CANNON'S PRECEDENTS

VOLUME VI

CANNON'S PRECEDENTS

OF THE

HOUSE OF REPRESENTATIVES

OF THE

UNITED STATES

INCLUDING REFERENCES TO PROVISIONS
OF THE CONSTITUTION, THE LAWS, AND DECISIONS
OF THE UNITED STATES SENATE

By
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VOLUME VI

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PREFACE TO SECOND EDITION

It is difficult to appraise too highly the benefits accruing to the House from the codification of its procedure by Mr. Hinds. The daily citation of the Precedents on the floor and the adherence to fundamental principles of procedure which they have enjoined have affected not only the technical routine of the House but also, in a larger way, its ideals of democracy in legislation, its conception of parliamentary equity, and, indirectly, its prestige as a branch of the Government.

The material value of the Precedents to the House is definitely measurable. Aside from other advantages naturally to be derived from a comprehensive digest of its practice, the saving of time alone which it has effected in the daily sessions has been invaluable. Beginning with the first Congress, one of the major problems of the House has been the restriction of debate on questions of procedure. Entire days have been dissipated in profitless, and frequently acrimonious, discussion of points of order. It was estimated shortly before the appearance of Mr. Hinds' work that a third of the time of the House was consumed in discussions of this character. Most of the questions under consideration on such occasions had been the subject of frequent and exhaustive debate in previous sessions and most of them had been authoritatively decided many times before. Any fairly accurate compendium would have disposed of them before they were submitted. But in the absence of such a digest former decisions were forgotten or disregarded and the same questions, again were permitted to consume time which otherwise would have been devoted to the public business. Not infrequently, before the publication of the Precedents, conflicting decisions on the same point of order, sometimes by the same presiding officer, and apparently of equal weight, were produced to divide the House and confuse the Chair. In such cases a digest of decisions establishing the validity of one and the fallacy of the other, and indicating the recognized practice of the House, would have anticipated the point of order and saved the House both the digression and the delay. As a matter of fact, the publication of the Precedents has largely decreased the number of points of order presented in an average session. Obviously, no Member desires to be placed in the attitude of obstructing the proceedings when reference to an index at the Speaker's elbow will disprove his contention as soon as stated. In this way unwarranted excursions of attention and diversions of time on such questions have been reduced to a minimum. It is only necessary to glance through the pages of the Congressional Record of former sessions and compare them with the Records of today, to realize the extent of this reform. In view of the constantly increasing pressure of the business of the House, this accomplishment stands out as one of the notable developments in the parliamentary history of the Congress. No one influence since the time of Jefferson has affected so profoundly the procedure of the House or has contributed so materially to the efficient

and harmonious disposition of the ever-growing volume of business pressing for legislative consideration.

But Mr. Hinds' compendium is more than a parliamentary text. Through the recognition of established parliamentary principles which it enjoined on Speakers and chairmen; through the stable and orderly processes which it instituted in the practice of the House, men came to look upon parliamentary probity as a matter of inherent right rather than a contingent privilege subject to political exigencies; to regard it as a science rather than an improvisation to be varied at the caprice of the Chair or the behest of partisan interests. In this respect it contributed inevitably to momentous readjustments in the law of the House.

The period covered most intimately by the Precedents had witnessed the rise of the speakership to a position of commanding influence. In the last years of the nineteenth century especially, when turbulent minorities welded their historic functions of criticism and protest into ruthless instruments of obstruction, the power of the Speaker, necessarily enhanced to meet the emergency, approached absolutism. Fostered by the arbitrary exercise of the power of recognition by Speaker Carlisle, supplemented by utilization of special orders under Speaker Crisp, the growing ascendancy of the speakership was further augmented under Speaker Reed and reached its flower under Speaker Cannon. Entrenched behind the power to appoint committees, with authority to extend or refuse control of the floor, sitting as chairman ex officio of the Committee on Rules, and exercising the right to count a quorum or declare a motion dilatory, the Speaker became an arbiter from whose decisions in chambers there was no appeal. So autocratic was the power of the speakership that contemporary historians characterized the office as "second in power only to the presidency," [1] or considered the Speaker of the House as "more powerful than the President of the United States." [2] Such was the situation at the opening of the Sixty-first Congress.

The reaction came with startling suddenness. Almost overnight the slowly accumulated prerogatives of the great office crumbled. Within three short years (1909–11) a bipartisan revolution swept away every vestige of extrajudicial authority. The power of recognition was circumscribed by the establishment of the Unanimous Consent Calendar, the Discharge Calendar, the provision for Calendar Wednesday, and by the restoration to the minority of the motion to recommit. The appointment of committees was lodged in the House, and the Speaker was made ineligible to membership on the Committee on Rules. Reference of bills

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[1] No one who looks beneath the surface of our national political system can fail to see that the Speaker is, next to the President, the most powerful man in the Nation, and that his influence increases. (Albert Bushnell Hart, Follett's The Speaker of the House of Representatives, p. xi.)

"The Speaker of the House of Representatives was the undoubted second officer of the Government. He towered at times above the President, with whom, in power, he was virtually co-equal." (George Rothwell Brown, The Leadership of Congress, p. 102.)

[2] This system in reality made him more powerful than the President of the United States. Without his consent and assistance, legislation was practically impossible. The President might recommend, but the Speaker dictated, legislation. He not only decided what legislation should be permitted but he even shaped the form of that legislation to conform to his own personal ideals." (Fuller, The Speakers of the House, p. 269.)

to committees was standardized by rigid enforcement of the rules of jurisdiction; recalcitrant committees and managers of conference were rendered subject to summary discharge; and the determination of legislative policies and programs was delegated to party caucuses and steering committees. The tidal wave of reform culminated with the adoption of the rules for the Sixty-second Congress and Speaker Clark succeeded to an office which, aside from the outstanding position he occupied in his party, was hardly more than that of moderator. The control of the House thus wrested from the Speaker has been more than maintained. Command has passed from the Chair to the floor, and the prerogatives of the Speaker have been jealously limited by the rules of each succeeding Congress. Administrative functions are vested in party caucuses and their all-powerful steering committees which meet as party boards of strategy and on occasion have been attended by the Speaker on invitation and not by right of membership.[3]

The restoration of the judicial character of the Speakership is reflected both in the decisions of the Chair and in their reception by the House and by the country at large. Supported by citation of clearly defined and long established principles of procedure as enunciated in the Precedents, the opinions of the Chair are no longer subject to the criticism of the press and the distrust of the minority which regularly featured sessions of Congress in former years. At liberty to disregard political considerations, and no longer under the onus of serving party interests, the decisions of the Speaker are judicial and academic rather than polemic and partisan, a change which has served to add distinction to the office and its incumbents.

At the same time the prestige of the House and its influence in legislation has been largely enhanced. Through the establishment of the budget system and the concentration of the power of appropriation in a single committee, the House has strengthened its grip on the national purse strings. Its insistence on the observance of recognized rules of conference and the maintenance of its privilege in revenue legislation have further contributed to its influence. In the reenactment of the Holman rule in 1911, and the adoption of the amendment of 1920, interdicting fiscal legislation in conference, it has affirmed its primacy in the formulation of the supply bills and emphasized its constitutional prerogatives.

To recapitulate, the quarter century which has elapsed since the publication of the Precedents has witnessed a more radical amendment of the rules and a more fundamental change in the unwritten law of the House than any similar period since its establishment. It has been a period of change, not only in House procedure but in world relations, economic standards, scientific formulas, and every phase of human progress. A world war with its attendant problems, the adoption of constitutional amendments of far-reaching effect, the enfranchisement of women, the authorization of new bases of Federal taxation, increased membership of the House, decisions of the Supreme Court affecting the Congress and its powers, extensions of the activities of the Federal Government into new channels, and vast national readjustments, have precipitated legislative proposals in such volume and of a character so unprecedented in the practice of the House as

[3] Speaker Gillett was not a member of his party's steering committee.

to render a revision of the Precedents incorporating the modern practice indispensable.

The appended supplement is in response to this requirement. In its preparation Mr. Hinds' original plan has been followed wherever adaptable. His entire work is here reprinted in unabridged form, and while much of it is no longer relevant, no chapter or section of a work of this character can become obsolete. With the lapse of time the original edition becomes increasingly valuable in supplying historical background and in the preservation of premises applicable by analogy to current problems.

In conclusion, the author, out of his long study of the Precedents during his service as parliamentarian of the House, as a Member of the Congress, and as compiler of the supplement, desires to give expression to an ever-increasing appreciation of the profound scholarship, the remarkable faculty of analysis, and the indefatigable industry of Asher Crosby Hinds. His work will stand for all time a landmark in the field of parliamentary jurisprudence unapproached by contemporary authors.

CLARENCE CANNON.

ELSBERRY, MO., *January 1, 1936.*

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Chapter CXLIX.[1]

THE MEETING OF CONGRESS.

1. Provisions of Constitution. Section 1.

1. The twentieth amendment to the Constitution provides for the annual meeting of Congress.

The term of a Congress begins on the 3d of January of the odd-numbered years, and extends through two years.

The twentieth amendment to the Constitution provides:

> The terms of the President and Vice President shall end at noon on the 20th day of January and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.
>
> The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 4, Article 1 of the Constitution, provided for the assembling of Congress on the first Monday in December of each year unless otherwise provided by law, and the term of a Congress began on the 4th of March of the odd numbered years and extended through two years. Under the twentieth amendment to the Constitution, proclaimed March 3, 1932, the term of Congress begins on the 3d of January of the odd-numbered years, and extends through two years.

In Section 3 of Article 11, the further provision is made that the President of the United States "may on extraordinary occasions, convene both Houses, or either of them."

[1] Supplementary to Chapter 1.

Chapter CL [1]

THE CLERK'S ROLL OF MEMBERS ELECT.

1. The statutes covering the making of the roll. Section 2.

2. A statute provides that the Clerk shall make a roll of the Representatives elect, placing thereon the names of those whose credentials show election in accordance with law.

An instance in which the Clerk in making the roll of Members elect recognized as the official credentials the certificate of the Governor of the State rather than the returns of the election judges.

On April 15, 1929,[1] during the call of the roll of Members elect to ascertain the presence of a quorum preliminary to the organization of the House, the name of Mr. Augustus McCloskey of Texas, was called.

The Clerk [2] interrupted the roll call and said:

The Clerk begs leave to state, in reference to the fourteenth congressional district of the State of Texas, that there were filed in his office copies of returns made by the county canvassing boards to the State canvassing board of Texas, which showed the election of Harry M. Wurzbach, and that there was also filed with the Clerk a certificate of election signed by the Governor and secretary of state of the State of Texas, authenticated by the seal of the State of Texas, showing that Augustus McCloskey "was duly elected as Representative in Congress from said district according to the face of said returns." This certificate also contains the following statement:

"I further certify that there has been filed with the State canvassing board, composed of the secretary of state, the governor of the State, and the attorney general of the State, a contest of the returns from Bexar County, alleging the same to be illegal and fraudulent, and a protest against the canvassing of said returns and the issuing of a certificate of said election to the said McCloskey; but the said canvassing board, after consideration of the briefs filed and arguments presented, has determined that under the Constitution and laws of the United States and of the State of Texas it had no jurisdiction to consider or determine said contest, and therefore has taken no action thereon.'

The law provides:

"Before the first meeting of each Congress the Clerk of the next preceding House of Representatives shall make a roll of the Representatives elect, and place thereon the names of those persons and of such persons only, whose credentials show that they were regularly elected in accordance with the laws of their States, respectively, or the laws of the United States." (U.S.C., title 2, par. 26.)

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[1] Supplementary to Chapter II.

[2] First session Seventy-first Congress, Record, p. 22.

[3] William Tyler Page, of Maryland, Clerk.

In conformity with this provision the Clerk considered it to be his duty to be governed by the certificate of the Governor of Texas rather than by returns of election judges, which certificate is in itself sufficient in form and substance and legal intendment to establish the prima facie title of Mr. McCloskey, and the Clerk therefore placed the name of Augustus McCloskey on the roll as the Representative elect from the fourteenth congressional district of the State of Texas.

It is proper to add that the Clerk has knowledge of the bringing of a contest to determine the ultimate right to the seat by Harry M. Wurzbach, contestant, against Augustus McCloskey, contestee, in the manner prescribed by law, as evidenced by the filing in the Clerk's office of copies of the notice of contest and of contestee's reply thereto.

Thereupon the Clerk continued the call of the roll.

Chapter CLI.[1]

PROCEDURE AND POWERS OF THE MEMBERS-ELECT IN ORGANIZATION.

1. Privilege of resolution affecting organization of the House. Section 3.
2. The seating of Members. Section 4.
3. As to when Congress is assembled. Section 5.

3. A resolution affecting the organization of the House is privileged, and takes precedence of a motion that the House resolve itself into the Committee of the Whole to consider a revenue bill.—On May 13, 1909,[2] Mr. Sereno E. Payne, of New York, moved that the House resolve itself into the Committee of the Whole House on the state of the Union for the consideration of the Philippine tariff bill.

Pending this motion, Mr. Finis J. Garrett, of Tennessee, offered as privileged the following resolution:

Resolved, That the Speaker be, and he is hereby, respectfully requested to appoint the Committee on Insular Affairs forthwith.

Thereupon Mr. Payne submitted the point that the resolution offered by Mr. Garrett was not privileged.

The Speaker[3] said:

This resolution, as well as the motion of the gentleman from New York, Mr. Payne, is privileged under the rules, yet it occurs to the Chair that the resolution of the gentleman from Tennessee, Mr. Garrett, affects the organization of the House and would take precedence of the privileged motion of the gentleman from New York.

4. Members are not assigned to particular seats in the House, and the seating of Members is no longer governed by rule.

Tables are provided for the use of members of the committee in charge of the business before the House.

Formerly individual desks were provided for the use of Members in the Hall of the House, and a rule[4] provided for the assignment of seats by lot at the commencement of each Congress. The last drawing of seats under the rule was held at the organization of the Sixty-second Congress.[5]

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[1] Supplementary to Chapter IV.

[2] First session Sixty-first Congress, Record, p. 1997.

[3] Joseph G. Cannon, of Illinois, Speaker.

[4] Sec. 119 of Vol. 1.

[5] First session Sixty-second Congress, Record, p. 8.

When the membership of the House was increased in 1913, the desks were removed and benches were substituted[1] in preparation for the first session of the Sixty-third Congress. The substitution of benches for desks was found to have rendered the assignment of seats impracticable and unnecessary, and the provision for assignment was specifically excepted in the resolution[2] adopting the rules of the Sixty-third Congress. Members are no longer assigned to particular seats and may choose any vacant seat, although it is customary for a Member to be seated in the section occupied by his party.

Tables for the use of members of the committee in charge of the business before the House are provided on either side, but in speaking at length Members usually take a position in front of the Speaker in the well of the House instead of speaking from the tables or from their seats as was the custom before the desks were removed.

On April 7, 1913,[3] Mr. A. Mitchell Palmer, of Pennsylvania, in conformity with long-established custom, submitted a request for unanimous consent that the party leaders be permitted to select their seats, but omitted the names of certain members of long service usually included in such requests.

In explanation he said:

> The plan in this Congress is to have all seats free, so that Members may sit where they wish. The only thing that is sought to be accomplished by this request is that the leaders of the three parties and the chairman and ranking members of the most important committees of the House, which have the most business before the House, may be certain of their seats when they come upon the floor.
>
> The tables provided for the use of committees and of Members having business before the House will give ample room for papers and documents which Members addressing the House may desire to have before them.
>
> Since there are to be no regularly assigned seats to every Member it did not seem necessary to extend the courtesy to those Members of the House who have been long in service.

Mr. James R. Mann, of Illinois, added:

> The commission which provided for the reseating of the Hall designed these tables primarily for committees that had charge of a bill on the floor of the House and those in opposition to the bill, so that the majority members of a committee in charge of a bill would have a table on that side of the House, and any gentlemen in opposition would have a right to have their papers on a table on this side of the House.

Thereupon, Mr. Palmer withdrew his request, and no proposition for an assignment of seats has since been received in the House.

However, by general acquiescence, the aisle seats at the center tables on either side of the chamber are reserved for the use of the majority and minority leaders, respectively.

5. The Congress is not assembled until both House and Senate are in session with a quorum present.—On December 1, 1913,[4] in the Senate, at the beginning of the second session, after the Senate had transmitted to the House the

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[1] Third session Sixty-second Congress, Journal, p. 110; Record, p. 1357.

[2] First session Sixty-third Congress, Journal, p. 8; Record, p. 69.

[3] First session Sixty-third Congress, Record, p. 68.

[4] Second session Sixty-third Congress, Record, p. 3.

usual message announcing the presence of a quorum and that the Senate was ready to proceed to business but before a similar message had been received from the House, Mr. John Sharp Williams, of Mississippi, demanded the regular order, which was the morning business.

Mr. Reed Smoot, of Utah, said:

It has always been the rule that the Senate has taken a recess to wait until they have received notice from the House of Representatives that it is in session and also a report from the committee appointed to wait upon the President. This is a session of Congress; it is not merely a session of the Senate; and by right we ought to know whether or not Congress is in session, and the only way to know that is to receive notification from the other House of its organization.

Mr. Williams replied:

Usually that course is necessary, and I understand that precedent is followed on the meeting of a new Congress; but in this instance both Houses have organized and everybody knows it. This is the second session of this Congress, and all we have to do is to go ahead with the regular order.

The Vice-President [1] held:

The Constitution of the United States requiring the Congress of the United States to assemble upon the first Monday in December of each year, the Chair rules that the Congress of the United States is not assembled until both the Senate and the House of Representatives are in session with a constitutional quorum present for the transaction of business, and that no legislative business can be transacted by the Senate of the United States until that time has arrived.

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[1] Thomas R. Marshall, of Indiana, Vice-President.

Chapter CLII.[1]

THE OATH.

6. While the oath has usually been administered to the Speaker by the Member of longest consecutive service, that practice is not always followed.—On May 19, 1919,[2] the oath of office was administered to Speaker Frederick H. Gillett, himself the "Father of the House," by Mr. Joseph G. Cannon, of Illinois, who, though the Member of longest service, was one of the younger Members of the House in consecutive service.

7. On April 4, 1911,[3] Mr. J. Fred C. Talbott, of Maryland, one of the older Members of the House, but not the oldest in consecutive service, administered the oath to Mr. Speaker Clark.

8. Previously it was the custom to administer the oath by State delegations, but beginning with the Seventy-first Congress Members elect have been sworn in en masse.—On April 15, 1929,[4] following the administration of the oath of office to the Speaker elect, the Speaker[5] after addressing the House announced:

> The Chair asks the attention of all the Members of the House for a moment. The Chair has decided to practice an innovation in the manner of administering the oath of office to Members. The Chair has observed that under our general practice, where groups are sworn separately, the remainder of the House is apt to be in disorder. The Chair does not think that contributes to the dignity of this most important ceremony. The Chair thinks that it will more comport with the dignity and solemnity of this ceremony if he administers the oath to all Members of the body at once. The Chair, therefore, asks the Members desiring to take the oath of office to raise their right hands.

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[1] Supplementary to Chapter V.

[2] First session Sixty-sixth Congress, Record, p. 8.

[3] First session Sixty-second Congress, Record, p. 7.

[4] First session Seventy-first Congress, Record, p. 25.

[5] Nicholas Longworth, of Ohio, Speaker.

Whereupon the Members elect arose in a body and the oath was administered to all simultaneously.

9. When the right of a Member-elect to take the oath is challenged the Speaker has requested the Member to stand aside temporarily.—On April 11, 1921,[1] at the organization of the House, the Speaker was administering the oath to Members and the State of Kansas had been called, when Mr. Henry D. Flood, of Virginia, objected to the swearing in of Mr. Richard E. Bird, of Kansas. The Speaker having requested Mr. Bird to stand aside temporarily, Mr. James R. Mann, of Illinois, raised the point of order that the Speaker was not empowered to require a Member with proper credentials to stand aside.

After debate the Speaker[2] said:

The Chair thinks that the precedents are that in such cases the Member stands to one side, not at all as any evidence of the accuracy of the charge, but simply so that those whose rights are uncontested may be sworn in, and that then his case may be taken up.

Mr. Bird stood aside and the administration of the oath for Members was resumed and completed. Mr. Flood then offered a resolution referring to a special committee the question of Mr. Bird's right to be sworn in. A substitute directing the administration of the oath having been offered and agreed to, Mr. Bird was sworn in.

10. On May 19, 1919[3] while the oath was being administered to Members by the Speaker at the organization of the House, Mr. Frederick W. Dallinger, of Massachusetts, when the State of Wisconsin was called, rose and objected to the swearing in of Victor Berger, of that State. Mr. Berger demanded to be heard on a question of privilege. The Speaker[2] declined to recognize him and the swearing in of Members continued. Later in the day Mr. Dallinger offered a resolution referring to a special committee the question of Mr. Berger's prima facie right to be sworn in. The resolution was agreed to, and, the proceedings so instituted subsequently resulting in a denial by the House of Mr. Berger's right, the oath was never administered.

11. On April 7, 1913,[4] at the organization of the House, when the State of Michigan was called, during the administration of the oath to Members by the Speaker, Mr. Wm. H. Hinebaugh, of Illinois, challenged the right of Mr. H. Olin Young, of Michigan, to be sworn in.

Mr. Charles L. Bartlett, of Georgia, protested:

I enter my protest, Mr. Speaker, and insist that the Speaker ought not to have the right to stand aside any Member from being sworn upon the mere suggestion of a Member who may or may not himself be sworn or whose own title to a seat may be at stake, in the face of the regular certificate of the governor of a sovereign State to the effect that that Member has been elected.

The Speaker[5] said:

There is no question but what under the precedents the Speaker has the right to ask a Member to stand aside where there is any controversy about his right to take the oath.

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[1] First session Sixty-seventh Congress, Record, p. 6.

[2] Frederick R. Gillett, of Massachusetts, Speaker.

[3] First session Sixty-sixth Congress, Record, p. 8.

[4] First session Sixty-third Congress, Record, p. 64.

[5] Champ Clark, of Missouri, Speaker.

Mr. Young stood aside and the administration of the oath to Members was resumed and concluded. Mr. Hinebaugh thereupon offered a resolution referring the question of Mr. Young's right to a seat in the House to a special committee. A substitute directing that the oath be administered forthwith was adopted, and Mr. Young was immediately sworn in.

12. Members without certificates but of whose election there was no question have been sworn in by unanimous consent pending the arrival of their credentials.—On May 19, 1919,[1] when at the organization of the House the Speaker[2] directed that Members be called to take the oath, Mr. Frank W. Mondell, of Wyoming, sent to the Clerk's desk a list of sixteen Members-elect whose certificates had not been received, but with regard to whose election there was no question, and asked unanimous consent that they be sworn in pending the arrival of their credentials.

There being no objection, those so listed were called when their respective States were reached, and came forward and took the oath with their respective State delegations.

13. It has been the custom to swear in Members whose credential have not arrived if the statement was made that there was no question of their election.—On December 3, 1917,[3] at the opening of the second session, after several Members presenting regular certificates of election had been sworn in, the request was made that the oath be administered to Mr. Earl H. Beshlin, of Pennsylvania. Mr. Beshlin held a certificate from the district canvassing board as provided by law, but the State Department had not yet issued a certificate.

Mr. Martin B. Madden, of Illinois, objected on the grounds that the administration of the oath under such circumstances might establish an undesirable precedent. Mr. John J. Fitzgerald, of New York, replied that for a number of years it had been the uniform practice of the House to swear in Members without certificates if the statement was made that there was no question of their election. Mr. Madden thereupon withdrew his objection and Mr. Beshlin was sworn in.

14. By authority of the House the oath may be administered to a Member away from the House and by another than the Speaker.

While the selection of a deputy to administer the oath is within the Speaker's discretion, he is constrained by custom to appoint a Member of the House and where that is inexpedient designates an official authorized to administer oaths.

Where the oath has been admmistered away from the House and by another than the Speaker, the House has by resolution received and accepted the oath.

Resolutions relating to the administration of the oath are of high privilege.

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[1] First session Sixty-sixth Congress, Record, p. 8.

[2] Frederick H. Gillett, of Massachusetts, Speaker.

[3] Second session Sixty-fifth Congress, Record, p. 4.

Forms of resolutions authorizing and accepting oaths administered away from the House.

On January 4, 1928,[1] Mr. Thomas S. Butler, of Pennsylvania, presented, as privileged, the following resolution:

Whereas George S. Graham, a Representative from the State of Pennsylvania from the second district thereof, has been unable from sickness to appear in person to be sworn as a Member of the House, and there being no contest or question as to his election: Therefore be it

Resolved, That the Speaker, or a deputy named by him, be, and he is hereby, authorized to administer the oath of office to said George S. Graham at Mount Sinal Hospital in New York, N.Y., and that the said oath when administered as herein authorized shall be accepted and received by the House as the oath of office of the said George S. Graham.

The resolution having been agreed to, the Speaker[2] in response to an inquiry from Mr. Finis J. Garrett, of Tennessee, said:

The resolution gives the Speaker a free hand in designating the person who may administer the oath, but the Speaker would feel bound by the precedents.

The Chair would, if possible, designate some Member of the House, but failing in that, he would have to designate some person who has the right to administer oaths.

On January 5,[3] under the authority conferred by the resolution the Speaker appointed to administer the oath to Mr. Graham, Mr. Royal H. Weller, a Member from New York, who on January 10,[4] reported:

Mr, Speaker, on January 5 I was appointed by the Speaker to administer the oath of office to my distinguished colleague, Mr. George S. Graham, of Pennsylvania. Mr. Graham was in the Mount Sinai Hospital in New York, and on January 9, pursuant to House Resolution 72, I swore Mr. Graham in as a Member of the House. The oath was administered in conformity with the rules of the House, and I offer the following privileged resolution and move its adoption.

The resolution was received as privileged and was agreed to as follows:

Whereas George S. Graham, a Representative for the State of Pennsylvania, from the second district thereof, has been unable from sickness to appear in person to be sworn as a Member of this House, but has sworn to and subscribed the oath of office before the Hon. Royal H. Weller, authorized by resolution of this House to administer the oath, and the said oath of office has been presented in his behalf to the House, and there being no contest or question as to his election: Therefore.

Resolved, That the said oath be accepted and received by the House as the oath of office of the said George S. Graham as a Member of this House.

15. On April 22, 1929,[5] Mr. William W. Hastings, of Oklahoma, proposed, as privileged, the following resolution, which was agreed to:

Whereas James V. McClintic, a Representative from the State of Oklahoma, from the seventh district thereof, has been unable from sickness to appear in person to be sworn as a Member of the House, and there being no contest or question as to his election: Therefore be it

Resolved, That the Speaker, or deputy named by him, be, and he is hereby, authorized to administer the oath of office to said James V. McClintic at Rochester, Minn., and that the said oath, when administered as herein authorized shall be accepted and received by the House as the oath of office of the said James V. McClintic.

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[1] First session Seventieth Congress, Record, p. 966.

[2] Nicholas Longworth, of Ohio, Speaker.

[3] Record, p. 1045.

[4] Record, p. 1256.

[5] First session Seventy-first Congress, Record, p. 279.

The Speaker[1] thereupon appointed as deputy to administer the oath, under the resolution, Vernon Gates, of Rochester, Minn., judge of the third judicial district.

On May 3[2] the Speaker laid before the House this communication, which was read by the Clerk.

ROCHESTER, MINN., *April 30, 1929.*

Hon. NICHOLAS LONGWORTH,

Speaker House of Representatives, Washington, D.C.

SIR: In accordance with your designation of me, pursuant to Resolution 27, adopted by the House of Representatives, to administer the oath of office to Representative-eleet James V. McClintic, of the seventh district of the State of Oklahoma, I have the honor to report that on the 30th day of April, 1929, at the city of Rochester, county of Olmsted, and State of Minnesota, I administered the oath of office to Mr. McClintic, form prescribed by section 1757 of the Revised Statutes of the United States, being the form of oath administered to Members of the House of Representatives, to which Mr. McClintic subscribed.

I have the honor to be, yours respectfully,

VERNON GATES.

The following privileged resolution, offered by Mr. Hastings, was then agreed to:

Whereas James V. McClintic, a Representative from the State of Oklahoma, from the seventh district thereof, has been unable from sickness to appear in person to be sworn as a Member of this House, but has sworn to and subscribed the oath of office before Judge Vernon Gates, authorized by resolution of this House to administer the oath, and the said oath of office has been presented in his behalf to the House, and there being no contest or question as to his election: Therefore

Resolved, That the said oath be accepted and received by the House as the oath of office of the said James V. McClintic as a Member of this House.

16. On May 1, 1929,[3] on motion of Mr. Guy E. Campbell, of Pennsylvania, the House agreed to this resolution:

Whereas John J. Casey, a Representative from the State of Pennsylvania from the twelfth district thereof, has been unable from sickness to appear in person to be sworn in as a Member of the House, and there being no contest or question as to his election: Therefore be it

Resolved, That the Speaker, or a deputy named by him, be, and he is hereby authorized to administer the oath of office to said John J. Casey at Ancon, Canal Zone, and that the said oath, when administered as herein authorized, shall be accepted and received by the House as the oath of office of the said John J. Casey.

The Speaker[1] thereupon designated Frank H. Wang, notary public at Ancon, Canal Zone, to administer the oath of office to Mr. Casey.

On May 6[4] the Speaker laid before the House the following communication:

THE PANAMA CANAL, WASHINGTON OFFICE,
Washington, May 3, 1929.

The SPEAKER OF THE HOUSE OF REPRESENTATIVES,

Washington, DC.

DEAR SIR: The following self-explanatory radiogram, dated the 2d instant, as received by this office to-day from the Governor of the Panama Canal, Balboa Heights, Canal Zone:

"Referring to cablegram 1st instant from Clerk House of Representatives to Frank H. Wang notary public, inform Speaker of House that oath of office was administered to-day by Wang to Representative John J. Casey and certification been mailed to Speaker."

Very respectfully.

A. L. FLINT, *Chief of Office.*

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[1] Nicholas Longworth, of Ohio, Speaker.

[2] Record, p. 845.

[3] First session Seventy-first Congress, Record, p. 738.

[4] Record, p. 912.

The House then adopted the usual resolution of acceptance, offered by Mr. Edgar R. Riess, of Pennsylvania.

17. Instance wherein the House authorized administration of affirmation of office.

Form of resolutions relating to the administration of affirmation.

On April 16, 1929,[1] Mr. George P. Darrow, of Pennsylvania, offered the following resolution as privileged and requested immediate consideration:

Whereas W. W. Griest, a Representative from the State of Pennsylvania, from the tenth district thereof, has been unable from sickness to appear in person to be affirmed as a Member of the House, and there being no contest or question as to this election: Therefore be it

Resolved, That the Speaker, or a deputy named by him, be, and he is hereby, authorized to administer the affirmation of office to said W. W. Griest at Lancaster, Pa., and that the said affirmation, when administered as herein authorized, shall be accepted and received by the House as the affirmation of office of the said W. W. Griest.

The resolution having been considered and agreed to, the Speaker[2] deputized Charles L Landis, judge of the county of Lancaster, Pa., to administer the affirmation of office.

Subsequently, on May 1, 1929,[3] the following communication was laid before the House by the Speaker:

LANCASTER, PA., *April 30, 1929.*

Hon. NICHOLAS LONGWORTH,

Speaker of the House of Representatives, Washington, D. C.:

I hereby certify that I have this day administered to Hon. W. W. Griest, Member of the House of Representatives from the tenth congressional district of Pennsylvania, the following affirmation of office:

"Do you solemnly affirm that you will support and defend the Constitution of the United States against all enemies, foreign and domestic; that you will bear due faith and allegiance to the same; that you take this obligation freely, without any mental reservation or purpose of evasion; and that you will well and faithfully discharge the duties of the office on which you are about to enter; so help you God?"

CHAS. I. LANDIS,

President Judge of the Second Judicial District of Pennsylvania.

A resolution of acceptance, offered by Mr. Darrow, was then agreed to as follows:

Whereas W. W. Griest, a Representative from the State of Pennsylvania, from the tenth district thereof, has been unable from sickness to appear in person to be affirmed as a Member of this House, but has affirmed to and subscribed the affirmation of office before Judge Charles I. Landis, authorized by resolution of this House to administer the affirmation, and the said affirmation of office has been presented in his behalf to the House, and there being no contest or question as to his election: Therefore

Resolved, That the said affirmation be accepted and received by the House as the affirmation of office of the said W. W. Griest as a Member of this House.

18. On March 11, 1933,[4] the House agreed to resolutions authorizing the Speaker to administer the oath of office without the Hall of the House to Mr. Andrew

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[1] First session Seventy-first Congress, Record, p. 46.

[2] Nicholas Longworth, of Ohio, Speaker.

[3] Record, p. 738.

[4] First session Seventy-third Congress, Record p. 239.

J. Montague, of Virginia, and Mr. Wilburn Cartwright, of Oklahoma, who on account of illness were unable to appear in person to be sworn.

On March 13,[1] following the approved of the Journal, the Speaker[2] said:

The Chair desires to inform the House that pursuant to the authority conferred upon him, he did, on Saturday, March 11, 1933, administer the oath of office to the Honorable Andrew J. Montague at Garfield Memorial Hospital and the Honorable Wilburn Cartwright at Walter Reed Hospital in the city of Washington, D. C.

Mr. Bertrand H. Snell, of New York, inquired as to the nature of the change affected in the status of a Member-elect by the administration of the oath.

The Speaker replied:

He then becomes a full-fledged Member of the House of Representatives, without question. As a Member-elect he enjoys many of the privileges, but in order to become a Member he must take the oath prescribed by law. He then has actually become a Member.

19. An exceptional instance wherein the Senate authorized the administration of the oath to a Senator elect by deputy and outside the Senate Chamber.—On May 3, 1929,[3] Mr. George W. Norris, of Nebraska, offered the following resolution:

Whereas Henrik Shipstead, a Senator elect from the State of Minnesota, has been unable from sickness to appear in person to be sworn as a Member of the Senate, and there being no contest or question as to his election: therefore be it

Resolved, That the President of the Senate, or deputy named by him, be, and he is hereby, authorized to admimster the oath of office to said Henrik Shipstead, and that the said oath, when administered as herein authorized, shall be accepted and received by the Senate as the oath of office of the said Henrik Shipstead.

The resolution having been considered by unanimous consent, and passed, the President[4] pro tempore designated John C. Crockett, Chief Clerk of the Senate, as deputy to administer the oath.

On May 6,[5] the Vice President[6] laid before the Senate the following report, which was read and filed:

WASHINGTON, D.C., *May 4, 1929.*

Hon. CHARLES CURTIS,

President of the Senate.

SIR: In accordance with your designation of me, under authority of Senate Resolution 52, agreed to on the calendar day of May 3, 1929, to administer the oath of office to Henrik Shipstead, Senator elect from the State of Minnesota, I have the honor to report that I this day administered to Mr. Shipstead the oath of office prescribed by section 1757 of the Revised Statutes of the United States, being the form of oath administered to Members of the Senate, to which Mr. Shipstead subscribed.

I have the honor to be, very respectfully,

JOHN C. CROCKETT,
Chief Clerk United States Senate.

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[1] Record p. 282.

[2] Henry T. Rainey, of Illinois, Speaker.

[3] First session Seventy-first Congress, Record, p. 833.

[4] George H. Moses, of New Hampshire, President pro tempore.

[5] Record, P. 869.

[6] Charles Curtis, Vice President.

20. Instance wherein the Speaker pro tempore administered the oath to a Member.—On March 20,1920,[1] Mr. Jacob L. Milligan, from the third Missouri district, Member-elect to the seat resigned by Joshua, W. Alexander, appeared and presented his credentials, and was sworn in by Speaker pro tempore Joseph Walsh, of Massachusetts, whose designation as Speaker pro tempore by the Speaker[2] had been formally approved[3] by the House.

21. Instance wherein the oath was administered in the absence of a quorum.

Adminstration of the oath before the reading of the Journal and while a point of no quorum was pending.

On April 29, 1910,[4] the House was called to order by the Speaker[5] and the Clerk proceeded to read the Journal, when Mr. Robert L. Henry, of Texas, made the point of order that no quorum was present.

Thereupon the Speaker, announcing that he would contribute to the presence of a quorum, laid before the House credentials showing the election of Mr. James S. Havens, Member-elect from New York to succeed Mr. James B. Perkins, deceased.

Mr. Havens then came forward and took the oath of office.

22. It has been held in order to administer the oath to a Member during a roll call, in the absence of a quorum, or on Calendar Wednesday.— On March 16, 1910,[6] this being Calendar Wednesday, Mr. Robert Turnbull, of Virginia, presented his credentials and was sworn in.

Subsequently Mr. John J. Fitzgerald, of New York, made the point of order that nothing was in order except the call of the committees under the Calendar Wednesday rule.

Mr. James R. Mann, of Illinois, inquired:

Would the gentleman contend that under the Calendar Wednesday rule the swearing in of a new member was out of order?

After debate the Speaker[5] said:

The oath could be administered even in the absence of a quorum, because, perchance, the presence of the Member might make a quorum, and the taking of the oath could interrupt a roll call; and yet any question touching the eligibility of a Member might arise which would consume all of Calendar Wednesday.

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[1] Second session Sixty-sixth Congress, Record, p. 4644.

[2] Frederick H. Gillett, of Massachusetts, Speaker.

[3] Second session Sixty-sixth Congress, Record, p. 4179.

[4] Second session Sixty-first Congress, Record, P. 5569.

[5] Joseph G. Cannon, of Illinois, Speaker.

[6] Second session Sixty-first Congress, Record, p. 3242.

Chapter CLIII.[1]

THE OFFICERS OF THE HOUSE AND THEIR ELECTION.

23. A majority vote is required for the election of officers of both Houses of Congress.—On May 11, 1911,[2] in the Senate, at the conclusion of a roll call for the election of President pro tempore of the Senate, the Presiding Officer announced that Mr. Augustus O. Bacon, of Georgia, had received 35 votes; Mr. Jacob H. Gallinger, of New Hampshire, 32 votes; Mr. Moses E. Clapp, of Minnesota, 4 votes, and three other Senators, 1 vote each; and there was no choice.

Mr. Charles A. Culberson, of Texas, submitted:

Mr. President, the Constitution of the United States contains no provision with reference to the vote by which a President pro tempore of the Senate may be elected.

The Presiding Officer[3] said:

The Chair is very clearly of opinion that under the Constitution of the United States, in the absence of any provision to the contrary, all officers of both Houses must be elected by a majority; and in the practice of the House, where there have been contests very frequently, a majority vote has been and is required. The Chair is aware that there is no provision in the Constitution of the United States in so many words requiring a majority vote for the election of a President pro tempore, neither is there a provision requiring it for a Speaker of the House. It makes the same provision for the officers of both Houses, and in the opinion of the Chair it is the contemplation of the Constitution that a majority should be required for the election of all officers.

24. The contest over the election of Speaker in 1923.

Memorandum of a program to be followed in the adoption of rules, agreed upon preliminary to the organization of the House.

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[1] Supplementary to Chapter V1.

[2] First session, Sixty-second Congress, Record, p. 1188.

[3] Henry Cabot Lodge, of Massachusetts, President pro tempore.

On December 3, 1923,[1] at the organization of the House, the first roll call for the election of Speaker resulted as follows:

For Frederick H. Gillett	197
For Finis J. Garrett	195
For Henry Allen Cooper	17
For Martin B. Madden	4
Answering present	4
Whole number of votes cast	414

Three additional ballots were taken without materially changing the result, when the House adjourned.

On December 4 four ballots were taken on the election of Speaker without any candidate receiving a majority of the votes cast, the last roll call showing:

For Finis J. Garrett	198
For Frederick H. Gillett	197
For Henry Allen Cooper	17
For Martin B. Madden	5
Answering present	3
Whole number of votes cast	417

On December 5,[2] immediately after the reading of the Journal, Mr. John M. Nelson, of Wisconsin, obtained consent to submit the following statement which was read by the Clerk.

A committee of the Progressive group of the House of Representatives, consisting of Messrs. Woodruff and LaGuardia and myself, met with Majority Leader Longworth last evening and discussed the proposed procedure for a revision of the rules of the House. At this meeting mutual assurances were given that the following program would be carried out:

1. That the rules of the Sixty-seventh Congress should be adopted as the rules of the Sixty-eighth Congress for 30 days only.

2. That during these 30 days amendments to the rules may be offered by any Member, to be referred to the Committee on Rules, which committee shall consider such amendments and make a report thereon to the House.

3. Within such 30 days the committee shall make a report of the rules and such amendments as they recommend. The rules and amendments as reported by the committee shall be subject to reasonable discussion, amendment, and record votes of the House.

4. When the committee shall have made its report any Member of the House shall, have opportunity to offer amendments to any rule of the House and may call for a record vote thereon, whether such rule has been included in the report of the committee or not.

5. One motion to recommit sha1l be in order.

Thereupon, the roll was called for the ninth time on the election of Speaker and was announced as follows:

For Frederick H. Gillett	215
For Finis J. Garrett	197
For Martin B. Madden	2
Answering present	4
Whole number of votes cast	414

[1] First session, Sixty-eighth Congress, Journal, p. 5; Record, p. 8.

[2] Record, p. 14.

Mr. Frederick H. Gillett, of Massachusetts, having received 215, a majority of the votes cast, was declared duly elected Speaker, and addressed the House.

25. In case of temporary absence or disability the Clerk designates a Clerk pro tempore.

Amending Rule III by the addition of a now clause to be known as clause 4.

On January 18, 1912,[1] the House adopted a resolution, reported from the Committee on Rules, adding to Rule III a new clause, to be clause 4, to read as follows:

He [the Clerk] shall, in case of temporary absence or disability, designate the Chief Clerk, or some other official in his office, to sign all papers that may require the official signature of the Clerk of the House, and to do all other acts, except such as are provided for by statute, that may be required under the rules and practice of the House to be done by the Clerk. Such official acts, when so done by the Chief Clerk or other official, shall be under the name of the Clerk of the House. The said designation shall be in writing, and shall be laid before the House and entered on the Journal.

This amendment formally authorized a long-established practice,[2] with the additional requirement that such designation be in writing and be laid before the House and entered on the Journal.

Under the rule the designation has been in the form of a letter addressed to the Speaker and by him laid before the House.[3]

26. Form of designation of a clerk pro tempore.—On May 3, 1933,[4] the Speaker laid before the House the following communication designating an official to subscribe the signature of the Clerk of the House to official papers in his absence:

WASHINGTON, D.C., *May 2, 1933.*

Hon. HENRY T. RAINEY,
Speaker of the House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: Desiring to be temporarily absent from my office, I hereby designate Mr. H. Newlin Megill, an official in my office, to sign any and all papers for me which he would be authorized to sign by virtue of this designation and of clause 4, rule III of the House.

Yours respectfully,

SOUTH TRIMBLE,
Clerk of the House of Representatives.

27. The Clerk is required to pay the officers and employees of the House on the first secular day of each month.

Amending section 3 of Rule M.

Section 3 of Rule III provides:

He [the Clerk] shall pay the officers and employees of the House of Representatives, on the first day of each month, the amount of their salaries that shall be due them; and when the first day of the month falls on Sunday he shall pay them on the day next preceding.

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[1] Second session Sixty-second Congress, Record, p. 1072.

[2] House Report No. 238.

[3] First session, Sixty-seventh Congress, Journal, p. 405; Record, p. 4658.

[4] First session Seventy-third Congress, Record, p. 2814.

Formerly [1] salaries were paid on the last day of the month, but in the revision of the rules adopted April 5, 1911,[2] the provision was altered, changing the time of payment from the last day of the month to the first day of the month.

28. The present seal of the House was provided in 1880.

On June 14, 1912,[3] Mr. John C. Floyd, of Arkansas, presented the following resolution, which was agreed to by the House:

Whereas the great seal of the House of Representatives having been in use continually since the year 1830 A. D., and having now become so worn as to make impressions taken therefrom almost illegible: Be it

Resolved, That the Clerk of the House of Representatives immediately procure a new seal for the use of the House of Representatives, which shall possess the same design and description as the present seal, but shall now have 48 stars, emblematic of the 48 States of the Union, instead of the 24 stars now upon the present seal, which represent the 24 States constituting the Union at the time of the adoption of the present seal.

The necessary expense of procuring the new seal to be paid out of the contingent fund of the House.

This resolution was never carried into effect, and the House continues to use the seal provided in 1830.

During consideration of the resolution Mr. Floyd announced that when the seal was obtained he would introduce a resolution similar to the one [4] then in force with reference to furnishing a copy of the impression to the State Department, but such resolution was not offered.

29. The Sergeant-at-Arms attends the sitting of the House, and under direction of the Speaker or Chairman maintains order.

Amending Section I of Rule IV:

Section 1 of Rule IV provides:

It shall be the duty of the Sergeant-at-Arms to attend the House during its sittings, to maintain order under the direction of the Speaker or Chairman, and, pending the election of a Speaker or Speaker pro tempore, under the direction of the Clerk; execute the commands of the House, and all processes issued by authority thereof, directed to him by the Speaker; keep the accounts for the pay and mileage of Members and Delegates, and pay them as provided by law.

This rule was adopted January 6, 1880,[5] and was retained until the revision of 1890,[6] when a clause was added providing for the attendance of the Sergeant-at-Arms upon the Committee of the Whole also. This clause was stricken out in the Fifty-second and Fifty-third Congresses, restored in the Fifty-fourth Congress, and continued as a part of the rule until finally eliminated in the revision of the rules adopted April 5, 1911.[2]

30. The Speaker does not assume to control the Sergeant-at-Arms in the discharge of certain official duties.

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[1] Vol. I, see. 251, of this work.

[2] First session Sixty-second Congress, Journal, p. 40; Record, p. 80.

[3] Second session Sixty-second Congress, Record, p. 8146.

[4] Vol. 1, see. 256, of this work.

[5] Second session Forty-sixth Congress, Record, p. 204.

[6] House Report No. 23, first session Fifty-first Congress.

The question as to whether an officer of the House is properly discharging the duties of his office is a legal proposition, and one which the Speaker is not called upon to decide.

The House has by resolution directed the enforcement of the statute [1] providing for deductions by the Sergeant-at-Arms from the pay of Members and Delegates absenting themselves without leave.

On August 25, 1914,[2] Mr. Oscar W. Underwood, of Alabama, submitted the following resolution, which was agreed to by the House:

Resolved, That all leaves of absence heretofore granted to Members an hereby revoked.

Resolved further, That the Sergeant-at-Arms is hereby directed to notify all absent Members of the House by wire that their presence in the House of Representatives is required, and that they must return without delay to Washington.

Resolved further, That the Sergeant-at-Arms is directed to enforce the law requiring him to deduct from the salary of the Members their daily compensation when they are absent for other cause than sickness of themselves and their families.

In compliance with this resolution the Sergeant-at-Arms addressed to each Member a request for a certification on blanks prepared for that purpose of the number of days he had been absent from the House and the occasion for such absence.

On October 3, 1914,[3] Mr. Ben Johnson, of Kentucky, rose to a question of privilege, reciting that he had been in attendance upon the House during the past month, but that the Sergeant-at-Arms, although personally aware of that fact, had withheld his salary because he declined to certify to his attendance upon the sessions of the House as required.

Mr. Johnson asked that the Speaker determine his rights as a Member to his salary, and instruct the Sergeant-at-Arms accordingly.

The Speaker [4] held the matter to be a legal proposition which the Chair was not authorized to pass upon, and in discussing the right of the Speaker to supervise the official duties of the Sergeant-at-Arms said:

It is the business of the Sergeant-at-Arms. The Speaker has no more authority over the Sergeant-at-Arms than the gentleman from Kentucky. Each one of these officers elected here is expected to attend to his own business. Of course, once in a while I have assumed the authority I have, in a friendly kind of way, of making suggestions to the various officers of the House, and communicate to them any complaints Members have made about what their helpers are doing; but beyond that the Speaker has no control over it.

The whole business resolves itself into this: The statutes require the Sergeant-at-Arms to do certain things.

That is a legal proposition which the Chair is not authorized to pass upon.

31. The election of a Chaplain emeritus.

The Chaplain takes the oath prescribed for the officers of the House.

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[1] U. S. Code, title 2, section 39.

[2] Second session Sixty-third Congress, Record, p. 14229; Journal, p. 881.

[3] Second session Sixty-third Congress, Record, p. 16119.

[4] Champ Clark, of Missouri, Speaker.

On January 6, 1921,[1] Mr. Clifford Ireland, from the Committee on Accounts, asked unanimous consent for the consideration of the following resolution:

Resolved, That immediately following his resignation as Chaplain of the House of Representatives, Henry N. Couden be, and he is hereby, appointed Chaplain emeritus of the House of Representatives, with salary at the rate of $1,500 per annum, payable monthly, to be paid out of the contingent fund of the House until otherwise provided by law.

The resolution was agreed to, and on January 13, 1921,[2] the Speaker laid before the House the following communication:

HOUSE OF REPRESENTATIVES,
CHAPLAIN'S OFFICE,
January 11, 1921.

To the SPEAKER OF THE HOUSE OF REPRESENTATIVES,

Washington, D. C.

MY DEAR MR. SPEAKER: It becomes my sad and painful duty to tender my resignation as Chaplain of the House of Representatives, to take effect when my successor shall have been chosen, my only reason being physical disability

Allow me to express my thanks to the Members of the House for their uniform courtesy and kindness through all these years.

Cordially and sincerely,

HENRY N. COUDEN.

No action was taken relating to the election of a successor, and on February 28, 1921,[3] the Speaker laid before the House a further communication as follows:

WASHINGTON, D. C., *February 28, 1921.*

Hon. FREDERICK H. GILLETT,
Speaker of the House of Representatives.

MR. DEAR MR. SPEAKER: I beg hereby to respectfully resign as Chaplain of the House of Representatives, and request that my resignation be accepted at once.

Sincerely,

HENRY N. COUDEN, *Chaplain.*

Thereupon,[4] on motion of Mr. Horace M. Towner, of Iowa, Rev. Dr. James Shera Montgomery was elected Chaplain, and appeared at the bar of the House and took the oath of office prescribed by law.

32. During the temporary disability of the Sergeant-at-Arms another was authorized to perform the duties of the office.

The death of the Sergeant-at-Arms being announced, the House passed appropriate resolutions and adjourned as a mark of respect.

Upon the death of the Sergeant-at-Arms, a Sergeant-at-Arms pro tempore was elected to serve until a successor was chosen.

The vacancy caused by the death of the Sergeant-at-Arms was, after some delay, filled by the House by election.

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[1] Third session Sixty-sixth Congress, Journal, p. 85; Record, p. 1056.

[2] Third session Sixty-sixth Congress, Record, p. 1392.

[3] Third session Sixty-sixth Congress, Record, p. 4075.

[4] Third session Sixty-sixth Congress, Journal, p. 275; Record, p. 4174.

On June 1, 1912,[1] Mr. Lincoln Dixon, of Indiana, offered by unanimous consent the following joint resolution:

Resolved, etc., That Charles F. Riddell, cashier in the office of the Sergeant-at-Arms of the House of Representatives, be, and he is hereby, authorized and directed to sign all necessary checks, requisitions, and papers in the place of U. S. Jackson, Sergeant-at-Arms of the House of Representatives, to secure the money appropriated for the salaries and mileage of the Members of the House of Representatives during the temporary disability of the said U. S. Jackson, Sergeant-at-Arms; and the Treasurer of the United States is hereby authorized to pay the said money to the said Riddell, cashier, in conformity to the provisions of this resolution, upon the approval by the Secretary of the Treasury of a bond in the sum of $50,000 of the said Riddell, payable to the United States of America.

The resolution was passed and transmitted to the Senate, where it was considered and passed June 3.[2]

On June 22,[3] on motion of Mr. Dixon, it was:

Resolved, That the House has heard with profound sorrow of the death of Hon. U. S. Jackson, Sergeant-at-Arms of the House.

Resolved, That as a mark of respect to his memory the House do now adjourn.

Subsequently[4] a message was received from the Senate[5] announcing the passage of the following:

Resolved, etc., That Charles F. Riddell, cashier in the office of Sergeant-at-Arms of the House of Representatives, be, and he is hereby, authorized and directed to draw checks, requisitions, and execute all papers necessary to obtain from the United States Treasury the money appropriated for salaries and mileage of Members, Delegates, and Resident Commissioners of the House of Representatives until a Sergeant-at-Arms of the House of Representatives has been duly elected and qualified; and the Treasurer of the United States is hereby authorized to pay the said money to the said Riddell, cashier, in conformity with the provisions of this resolution; and that the bond executed by said Riddell, as cashier in the office of Sergeant-at-Arms in the House of Representatives, in the penal sum of $50,000, payable to the United States of America, by authority of public resolution No. 34, approved June the 4th, 1912, be, and the same is hereby, with the consent of the sureties on said bond, extended in force and effect to cover the faithful discharge of the aforesaid cashier's duties, as herein authorized and directed, until a Sergeant-at-Arms of the House of Representatives has been elected and qualified.

The resolution was passed by the House, but the oath prescribed for officers of the House was not administered.

Mr. Riddell continued to discharge the duties of the office until July 18,[6] when, on motion of Mr. J. Thomas Heflin, of Alabama, he was elected Sergeant-at-Arms, and the oath of office was administered by the Speaker.

33. The House does not pass upon the acceptance of resignations from statutory positions, even when it is authorized to fill such offices.

Communications announcing resignations of employees of the House from statutory offices are read and ordered to be laid on the table.

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[1] Second session Sixty-second Congress, Journal, p. 752; Record, p. 7516.

[2] Second session Sixty-second Congress, Record, p. 7529.

[3] Second session Sixty-second Congress, Record, p. 8480.

[4] Second session Sixty-second Congress, Journal, p. 825; Record, p. 8487.

[5] During debate in the House it was explained that the joint resolution originated in the Senate at the request of Members of the House, as the Senate convened at 10 o'clock and would not be in session when the House met, and the emergency required immediate action.

[6] Second session Sixty-second Congress, Record, p. 9241.

On February 1, 1910,[1] the Speaker[2] laid before the House the following communication:

JANUARY 20, 1910.

Hon. JOSEPH G. CANNON,

Speaker House of Representatives, Washington, D. C.

SIR: I hereby resign my position as special messenger[3] of the House of Representatives, to take effect February 1, 1910.

Respectfully,

JOSIAH H. SHINN.

The question of the acceptance of the resignation was not considered, and the Speaker directed that the communication be laid on the table. Thereupon, the House proceeded to the election of a successor.

34. The Postmaster superintends the post office in the Capitol and House Office Building and is responsible for the prompt and safe delivery of mail.

Amendment of Rule VI.

Rule VI provides:

The Postmaster shall superintend the post office kept in the Capitol and House Office Building for the accommodation of Representatives, Delegates, and officers of the House, and be held responsible for the prompt and safe delivery of their mail.

The rule originally provided for the post office in the Capitol only.[4] The opening of the House Office Building in 1907 made necessary the establishment of a post office there, and in the revision of the rules adopted April 5, 1911,[5] an amendment to Rule VI was included providing for that office also. With this exception there has been no change in the rule since the revision of 1880.

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[1] Second session Sixty-first Congress, Journal, 241; Record, p. 1361.

[2] Joseph G. Cannon, of Illinois, Speaker.

[3] The position of special messenger was created in the legislative, executive, and judicial appropriation bill approved Mar. 4, 1909.

[4] Vol. I, sec. 270, of this work.

[5] First session Sixty-second Congress, Journal, p. 40; Record, p. 80.

Chapter CLIV.[1]

REMOVAL OF OFFICERS.

35. A proposition to remove an officer of the House presents a question of privilege.

Instance wherein the Speaker, following a vote upon an essential question indicating a change in the party control of the House, announced that under the circumstances it was incumbent upon the Speaker either to resign or to recognize for a motion declaring vacant the office of Speaker.

A resolution declaring vacant the office of Speaker is presented as a matter of high constitutional privilege.

On March 19, 1910,[2] the House having declined by a yes and nay vote to sustain a decision[3] by the Speaker from which appeal had been taken, the Speaker[4] made the following statement:

Gentlemen of the House of Representatives: Actions, not words, determine the conduct and the sincerity of men in the affairs of life. This is a Government by the people acting through the representatives of a majority of the people. Results cannot be had except by a majority, and in the House of Representatives a majority, being responsible, should have full power and should exercise that power; otherwise the majority is inefficient and does not perform its function. The office of the minority is to put the majority on its good behavior, advocating, in good faith, the policies which it professes, ever ready to take advantage of the mistakes of the majority party, and appeal to the country for its vindication.

From time to time heretofore the majority has become the minority, as in the present case, and from time to time hereafter the majority will become the minority. The country believes that the Republican Party has a majority of 44 in the House of Representatives at this time; yet such is not the case.

The present Speaker of the House has, to the best of his ability and judgment cooperated with the Republican Party, and so far in the history of this Congress the Republican Party in the House has been enabled by a very small majority, when the test came, to legislate in conformity with the policies and the platform of the Republican Party. Such action of course begot criticism—which the Speaker does not deprecate—on the part of the minority party.

The Speaker can not be unmindful of the fact, as evidenced by three previous elections to the Speakership, that in the past he has enjoyed the confidence of the Republican Party of the country and of the Republican Members of the House; but the assault upon the Speaker of the House by the

[1] Supplementary to Chapter VII.

[2] Second session Sixty-first Congress, Record, p. 3436.

[3] For proceedings relating to this decision which was subsequently overruled by the House, see sec. 889 of this work.

[4] Joseph G. Cannon, of Illinois, Speaker.

minority, supplemented by the efforts of the so-called insurgents, shows that the Democratic minority, aided by a number of so-called insurgents, constituting 15 per cent of the majority party in the House, is now in the majority, and that the Speaker of the House is not in harmony with the actual majority of the House, as evidenced by the vote just taken.

There are two courses open for the Speaker to pursue—one is to resign and permit the new combination of Democrats and insurgents to choose a Speaker in harmony with its aims and purposes. The other is for that combination to declare a vacancy in the office of Speaker and proceed to the election of a new Speaker. After consideration, at this stage of the session of the House, with much of important legislation pending involving the pledges of the Republican platform and their crystallization into law, believing that his resignation might consume weeks of time in the reorganization of the House, the Speaker, being in harmony with Republican policies and desirous of carrying them out, declines by his own motion to precipitate a contest upon the House in the election of a new Speaker, a contest that might greatly endanger the final passage of a legislation necessary to redeem Republican pledges and fulfill Republican promises. This is one reason why the Speaker does not resign at once; and another reason is this: In the judgment of the present Speaker, a resignation is in and of itself a confession of weakness or mistake or an apology for past actions. The Speaker is not conscious of having done any political wrong. The same rules are in force in this House that have been in force for two decades. The Speaker has construed the rules as he found them and as they have been construed by previous Speakers from Thomas B. Reed's incumbency down to the present time.

Heretofore the Speakers have been members of the Committee on Rules, covering a period of sixty years, and the present Speaker has neither sought new power nor has he unjustly used that already conferred upon him.

There has been much talk on the part of the minority and the insurgents of the "czarism" of the Speaker, culminating in the action taken to-day. The real truth is that there is no coherent Republican majority in the House of Representatives. Therefore, the real majority ought to have the courage of its convictions, and logically meet the situation that confronts it.

The Speaker does now believe, and always has believed, that this is a Government through parties, and that parties can act only through majorities. The Speaker has always believed in and bowed to the will of the majority in convention, in caucus, and in the legislative hall, and to-day profoundly believes that to act otherwise is to disorganize parties, is to prevent coherent action in any legislative body, is to make impossible the reflection of the wishes of the people in statutes and in laws.

The Speaker has always said that, under the Constitution, it is a question of the highest privilege for an actual majority of the House at any time to choose a new Speaker, and again notifies the House that the Speaker will at this moment, or at any other time while he remains Speaker, entertain, in conformity with the highest constitutional privilege, a motion by any Member to vacate the office of the Speakership and choose a new Speaker; and, under existing conditions would welcome such action upon the part of the actual majority of the House, so that power and responsibility may rest with the Democratic and insurgent Members who, by the last vote, evidently constitute a majority of this House. The Chair is now ready to entertain such motion.

Thereupon, Mr. Albert S. Burleson, of Texas, offered as privileged the following resolution:

Resolved, That the office of Speaker of the House of Representatives is hereby declared to be vacant, and the House of Representatives shall at once proceed to the election of a Speaker.

The Speaker said:

The Chair desires to say this is a question of high constitutional privilege.

36. While the House may by simple resolution establish or abolish offices in its service, a joint resolution is required for such action affecting offices in the joint service of the House and Senate.

The effect of the adoption of such Resolution is automatically to separate from the service of the House on the date adopted incumbents of the offices affected.

Salaries already appropriated for such offices are thereby in effect covered back into the Treasury.

It is within the power of the officers of the House to remove at will employees subject to appointment by them, and to refrain from appointing their successors.

One Congress may not, even by statute, provide officers or employees for the service of its successor. One House may continue the tenure of an officer after the Congress for which he was appointed has expired, but a subsequent House may remove such officer and appoint another in his stead.

On May 9, 1911,[1] Mr. John C. Floyd, of Arkamsas, from the Committee on Accounts, submitted a report[2] on a resolution declaring vacant on May 15, 1911, certain offices and employments in the service of the House. In the course of this report the committee includes the following discussion of the rights of the House in providing for its service:

[The] House of Representatives has constitutional power at will to dispense with offices in its own service and to create other offices it may deem necessary by simple resolution of the House regardless of what the House in a previous Congress may have provided for its own service either by statute or resolution. Therefore we recommend the adoption of a simple resolution declaring certain offices vacant on and after May 15, 1911, and another resolution substituting therefor certain new offices, fewer in number.

As to the effect of such resolutions upon incumbents of offices affected, the report holds:

The effect of the adoption of this resolution will be to separate on said date from the service of the House the present incumbents of the offices made vacant and to abolish such offices.

On the question of salaries in such cases, the report holds:

The salaries already appropriated for such offices for the balance of this fiscal year, ending June 30, 1911, and for the entire fiscal year ending June 30, 1912, will be covered back into the Treasury; in fact, they will not be withdrawn from the Treasury, for the Clerk of the House, in executing the resolution, will not make requisition on the Secretary of the Treasury, and consequently no warrant willissue. The Clerk's annualreport of expenditures will show unexpended balances for the remainder of the present and for the whole of the next fiscal year under the heading "Salaries, officers, and employees." Then, at the ensuing regular session, when the legislative appropriation bill is formulated for the fiscal year ending June 30, 1913, the salaries of the offices now made vacant will be, in accordance with the resolution, omitted altogether from the bill. This method your committee recommenda. It is direct, and admits of no delay in its execution. Then, if thought necessary or advisable, the House may follow up this action and leisurely pass a joint resolution repealing the provisions of the legislative, executive, and judicial appropriation acts of June 17, 1910, and March 4, 1911, making appropriations for the specific offices in question. This course was suggested instead of that we recommend as being the only legalmethod whereby the House may act in the matter. But we are convinced that it is perfectly competent for the House to follow the method first outlined. Moreover, concurrence of the Senate and the approval of the President is necessary for the passage of a joint resolution, and that body may not act at once, if it acts at all.

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[1] First session Sixty-second Congress, Record, p. 1148.

[2] House Report No. 25.

Relative to the power of the House to create and discontinue the services of its own officers, the report further says—

Is is inconceivable that the House can not independently of both the Senate and President regulate its internal affairs to the extent of abolishing and creating its own offices and employees. Because a former House chose to maintain and appropriate for certain offices in the service of the House is no good reason why this present House should be bound by that action, any more than that the rules of the last Congress are orshould be the rules of this Congress. Under the Constitution each House may determine the rules of its proceedings. (Art. I, see. 5, par.).

The Constitution (Art. 1, see. 2, par. 5) also declares: "The House of Representatives shall choose their Speaker and other officers."

The rule of the House (Rule II) provides that each officer elected by the House "shall appoint all of the employees of his department provided for by law." Judge William Lawrence, for many years Comptroller of the Treasury, and a Member of this House, whose legal learning and experience made him an authority on questions of constitutional and parliamentary law, in commenting on this rule (which has been the rule for many yews), said:

"It is well settled that when authority is granted to a designated officer to appoint any person in his discretion to an office, and the law does not give the incumbent a right to hold the same for any specified period, the power of removal and of filling the vacancy thereby made is incidental to the authority to appoint." (Judge Lawrence cited 2 Story Const., 4th ed., par. 1537. First Comptroller's Decisions, Vol. V, p. 4.)

We believe that according to this principle it would be entirely within their power for the Speaker, the Clerk, the Sergeant-at-Arms, and the Doorkeeper to remove from office the incumbents of the offices now in question, and to refrain from appointing their successors. The object sought could thus be accomplished in a very simple way. But we believe the transaction should be by order of the House and publicly recorded, as we propose.

Judge Lawrence, in the same decision, says:

"The Revised Statutes (sec. 53) have created certain officers of the House. But each House has power to appoint other officers of its own creation, and to remove, and even to refuse to employ those provided for by a statute of a previous Congress. The right to create appropriate offices, and to appoint officers, is given by the Constitution, and can not be taken away by a statute not assented to by the Congress affected thereby. A right or power given by the Constitution can not be taken away by a statute."

And further on in the same decision:

"* * * the House of the Forty-seventh had no power to provide a Speaker or any other officer of the House of the Forty-eighth Congress, because the Constitution gives to the House of each Congress the sole, uncontrolled, and independent power to choose and remove all its own officers at pleasure. Even a statute enacted by the Fortyseventh Congress could not take from the House of the Forty-eighth Congress its power to choose all its own officers. Such statute would be void. This appears so clearly by the words of the Constitution that no argument seems necessary to prove it. Neither the House of the Forty-seventh Congress, nor even a statute, could continue Grayson in office during any part of the Forty-eighth Congress against the choice or direction of the House of the latter Congress. If this could be done, a Speaker could equally, by the same forms, be imposed on the present House. The attempt to do so would be absurd."

The case under discussion at that time and decided by Judge Lawrence January 11, 1884 (1–48), was that of Davidson, appointed to succeed Grayson, whose employment by name was authorized by a resolution adopted by the House in the Forty-seventh Congress, known as "House appointees' case," and the question raised was as to "the authority of the House of Representatives of one Congress to remove a person holding his appointment under a statute enacted by or under color of a resolution of the House of a prior Congress." The syllabus, paragraphs 5 and 6, says:

"An act of Congress may continue the existence of such office or employment for either House of Congress, and may provide for the payment of the officer or employee so appointed, even after the Congress during which he was appointed has expired.

"But the House of Representatives of a subsequent Congress may remove any officer or employee so continued, and appoint another in his stead, or, by rule, authorize any proper officer to do so."

This decision has not been reversed by any succeeding comptroller.

It will be observed that Judge Lawrence throughout applies the term "officers" to other than those elected by the House, i.e., those commonly called "employees." In this he seems to have been fully justified and sustained.

Again, in Ordway's cam, Judge Lawrence, comptroller, says:

"The House resolution of June 18, 1878, does not per se give a continuing authority to select or employ a person to prepare an index. It could not give authority to a committee of a subsequent House." (First Comptroller's Decisions, Vol. IV, p. 529.)

Your committee adopts the view so clearly expressed by Judge Lawrence that each House has power to remove, and even refuse to employ, officers provided for by a statute of a previous Congress, and that each House has the sole, uncontrolled, and independent power to choose and remove all its own officers at pleasure, and therefore recommends that certain officers be declared vacant.

37. Instance wherein the Senate by resolution removed its Sergeant at Arms.

An officer of the Senate being charged with authorship of a magazine article prejudicial to the reputations of Members of Congress, was suspended pending an investigation

In response to charges made in open session, an officer of the Senate appeared voluntarily at the bar and being arraigned declined counsel.

In arraigning one of its officers the Senate declined to require that questions be reduced to writing, and elected to interrogate him orally.

The Senate having dismissed its Sergeant at Arms for cause, declined to take further punitive action.

On the removal of the Sergeant at Arms, the Deputy Sergeant at Arms succeeded to the duties of the office as Assistant Sergeant at Arms, without action by the Senate.

On February 3, 1933,[1] Mr. James E. Watson, of Indiana, rising in the Senate, called attention to an article appearing in the current number of a magazine under the title "Over the Hill to Demagoguery" and purporting to be written by David S. Barry, Sergeant at Arms of the Senate, from which he read the following excerpt:

Contrary, perhaps, to the popular belief, there are not many crooks in Congress, that is, out-and-out grafters or those who are willing to be such. There are not many Senators or Representatives who sell their vote for money, and it is pretty well known who those few are.

Mr. Watson alluded to the long service of the Sergeant at Arms in that capacity and his previous experience as a newspaper correspondent, and moved that he be brought before the Senate for the purpose of answering under oath such questions as might be asked him touching the article, and be afforded an opportunity of offering such explanation as he might desire to make in that connection.

The President pro tempore[2] entertained the motion, as privileged, and it was unanimously agreed to.

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[1] Second session, Seventy-second Congress, Record, p. 3269.

[2] George H. Moses, New Hampshire, President pro tempore.

Whereupon Mr. David A. Reed, of Pennsylvania, being recognized, said:

I observe that Mr. Barry is now in the Chamber. I move that the oath be now administered to him by the Presiding Officer.

The motion being put was decided in the affirmative, when the President pro tempore said:

This is a unique proceeding. The Senate is about to put on hearing one of its officers. The oath is about to be administered to that officer under a vote of the Senate. The manner of proceeding with the hearing is wholly unknown to the Senate. It has occurred to the Chair that at least the matter of procedure might be referred to the Committee on Rules, so that the Senate might establish a precedent in the event that hereafter some of its officers should possibly transgress the proprieties.

No action was taken on the suggestion of the President pro tempore relative to reference of the matter to the Committee on Rules, and following brief debate on procedure, the President pro tempore announced:

The Chair is about to administer the oath to the Sergeant at Arms.

Sergeant at Arms Barry rose and raised his right hand. The President pro tempore administered the oath:

You do solemnly swear, in reference to the cause now on hearing before the Senate, that you will tell the truth, the whole truth, and nothing but the truth, so help you God?

The President pro tempore then asked:

Does the Senate ask that any time be given Mr. Barry in which to consider his answer?

Mr. William E. Borah, of Idaho, responded:

Mr. President, I suggest that Mr. Barry state whether or not he desires to proceed at this time. If he desires time to consult counsel, the Senate ought to give it to him. After that we can determine how we will question him, if he does not desire time.

The President pro tempore rejoined:

Very well; the Senate will hear the Sergeant at Arms.

The Sergeant at Ams said:

I have no desire to have counsel. There is no real explanation to make. The article stands for what it says. Any further statement that is desired I will be glad to make about it, but I have no desire to make one.

Mr. Henry F. Ashurst, of Arizona, moved that all questions propounded to the Sergeant at Arms be submitted in writing.

The motion was rejected.

Whereupon, the President pro tempore announced:

The Chair assumes that the Senate for the minute has resolved itself into a court of inquiry, and, having rejected the motion of the Senator from Arizona that questions to the Sergeant at Arms be propounded in writing, the Chair holds that any Senator may rise and orally propound to the Sergeant at Arms any question which he has in mind.

Various Senators propounded questions, all of which were answered by the Sergeant at Arms. At the conclusion of the examination, Mr. Reed said:

Mr. President, it is perfectly clear that Mr. Barry has charged some of the Members of the Senate and some of the Memebers of the House with bribery. It is also clear that he says under

oath that that charge is unsupported by any evidence, and that he is unable to give the name of any Senator or any Member of the other House whom he knows or believes to be guilty of bribery. I move that the Sergeant at Arms be suspended from office until further action of the Senate; and that at 4 o'clock on February 7 the Senate proceed to final disposition of this matter.

Mr. George W. Norris, of Nebraska, proposed as a substitute:

That David S. Barry be, and he is hereby, removed from the office of Sergeant at Arms of the Senate.

The question being taken on the substitute, and the yeas and nays being ordered, the substitute was rejected—yeas 31, nays 40.

The President pro tempore submitted the pending question as follows:

The Chair understands the question before the Senate to be this: The Senator from Pennsylvania has moved that the Sergeant at Arms be suspended from office until further action of the Senate and that at 4 o'clock on Tuesday, February 7, the Senate proceed to the final disposition of the matter, in the meantime the whole subject to be referred to the Committee on the Judiciary.

The motion was agreed to.

Mr. Thomas J. Walsh, of Montana, sent to the desk the following resolution which, on his request, was received and referred to the Committee on the Judiciary:

Resolved, That the proceedings of the Senate this day had in the matter of the Sergeant at Arms be certified to the district attorney of the District of Columbia with a view to prosecution under section 38 of title 6 of the Code of the District of Columbia, as follows: "Whoever publishes a libel shall be punished by a fine not exceeding $1,000 or imprisonment for a term not exceeding five years, or both." And also to the district attorney for the southern district of New York for appropriate action by him.

No further action on the resolution appears.

On February 7,[3] Mr. Norris, rising to submit a privileged report from the Committee on the Judiciary, said:

The Committee on the Judiciary have had under consideration the matter which the Senate referred to them regarding what action, if any, should be taken upon the case of the Sergeant at Arms for the writing of an article published in the February issue of the New Outlook. After due consideration the committee have directed me to report to the Senate that we recommend to the Senate the adoption of the resolution which I send to the desk.

The Clerk read the resolution as follows:

Resolved, That David S. Barry be, and he is hereby, removed from the office of Sergeant at Arms, and Doorkeeper of the Senate.

After debate, Mr. Otis F. Glenn, of Illinois, offered this substitute:

Whereas David S. Barry, when Sergeant at Arms of the Senate, caused to be published in the New Outlook, a magazine of general circulation, an article which reflects upon the integrity of Members of both Houses of the Congress;

Whereas upon a hearing the said Barry admits he does not have in his possession any facts substantiating such statements made in said article;

Whereas the said article impugns the honor of the Members of Congress;

Resolved, That such conduct upon the part of an employee of the Senate be, and the same is hereby, condemned; and the fact that Mr. Barry has in the Senate and before the committee

[3] Record, p. 3511.

repeatedly disavowed any intention of reflecting upon the honor of the Congress makes any further punishment unnecessary.

Further resolved, That said David S. Barry be, and he is hereby, reinstated as Sergeant at Arms of the Senate.

The question being put, and the yeas and nays being ordered, the yeas were 15, the nays were 56, and the substitute was not agreed to.

Mr. L. J. Dickinson, of Iowa, moved as a substitute for the pending resolution:

That the pending resolution be referred to the Committee on Rules, with power to reconsider the complaint against Sergeant at Arms David S. Barry, to reinstate, reprimand, or dismiss said official of the Senate.

The question being taken, on a yea and nay vote, there were 10 yeas and 58 nays and the substitute was rejected.

The question recurring on the original resolution, and being taken by yeas and nays, there were yeas 53, nays 17, the resolution recommended by the Committee on the Judiciary was adopted, and the Sergeant at Arms was removed from office.

Thereupon, J. Mark Trice, the Deputy Sergeant at Arms, automatically succeeded to the duties of the office without action by the Senate and for the remainder of the session executed official papers as "Deputy Sergeant at Arms."

Chapter CLV.[1]

THE ELECTORS AND APPORTIONMENT.

38. The right of citizens of the United States to vote shall not be denied or abridged on account of sex.

The nineteenth amendment to the Constitution provides:

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

SEC. 2. Congress shall have power to enforce this article by appropriate legislation.

39. The Constitution provides that the enumeration to fix the basis of representation shall be made once in every ten years.

The distribution of representation under the several apportionments.

Section 2 of Article XIV of the Constitution provides—

Representatives shall be apportioned among the several States according to their respective numbers,[2] counting the whole number of persons[3] in each State, excluding Indians not taxed.

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[1] Supplementary to Chapter VIII.

[2] The various apportionments, including the first one made in the Constitution itself, have been as follows:

States.	1787	1790	1800	1810	1820	1830	1840	1850	1860	1870	1880	1890	1900	1910	1920	1930
Delaware	1	1	1	2	1	1	1	1	1	1	1	1	1	1	.....	1
Pennsylvania	8	13	18	23	26	28	24	25	24	27	28	30	32	36	.....	34
New Jersey	4	5	6	6	6	6	5	5	5	7	7	8	10	12	.....	14
Georgia	3	2	4	6	7	9	8	8	7	9	10	11	11	12	.....	10
Connecticut	5	7	7	7	6	6	4	4	4	4	4	5	5	5	.....	6
Massachusetts	8	14	17	20	13	12	10	11	10	11	12	13	14	16	.....	15
Maryland	6	8	9	9	9	8	6	6	5	6	6	6	6	6	.....	6
South Carolina	5	6	8	9	9	9	7	6	4	5	7	7	7	7	.....	6
New Hampshire	3	4	5	6	6	5	4	3	2	3	2	2	2	2	.....	2
Virginia	10	19	22	23	22	21	15	13	11	9	10	10	10	10	.....	9
New York	6	10	17	27	34	40	34	33	31	33	34	34	37	43	.....	45
North Carolina	5	10	12	13	13	13	9	8	7	8	9	9	10	10	.....	11
Rhode Island	1	2	2	2	2	2	2	2	2	2	2	2	2	3	.....	2
Vermont	.....	2	4	6	5	5	4	3	3	3	2	2	2	2	.....	1
Kentucky	.....	2	6	10	12	13	10	10	9	10	11	11	11	11	.....	9
Tennessee	.....	.....	3	6	9	13	11	10	8	10	10	10	10	10	.....	9
Ohio	.....	.....	.....	6	14	19	21	21	19	20	21	21	21	22	.....	24
Louisiana	.....	.....	.....	.....	3	3	4	4	5	6	6	6	7	8	.....	8
Indiana	.....	.....	.....	.....	3	7	10	11	11	13	13	13	13	13	.....	12
Mississippi	.....	.....	.....	.....	1	2	4	5	5	6	7	7	8	8	.....	7
Illinois	.....	.....	.....	.....	1	3	7	9	14	19	20	22	25	27	.....	27
Alabama	.....	.....	.....	.....	2	5	7	7	6	8	8	9	9	10	.....	9
Maine	.....	.....	.....	.....	7	8	7	6	5	5	4	4	4	4	.....	3
Missouri	.....	.....	.....	.....	1	2	5	7	9	13	14	15	16	16	.....	13

[3] The Constitution also provides for ascertaining this number of persons by a census every ten years.

But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

The last apportionment, which was the first under the act of 1929, was made on the basis of one Representative for 280,679 of population.

40. From March 3, 1913, the membership of the House was fixed at 435.

The law of August 8, 1911,[1] makes the following provisions as to the membership of the House:

That after the third day of March, nineteen hundred and thirteen, the House of Representatives shall be composed of four hundred and thirty-five members.

41. The apportionment of Representatives to the several States under the law of 1929.

Under the law of 1929 the President transmits to each fifth Congress a statement of population and apportionment of existing number of Representatives among the several States thereunder.

Methods of apportioning the existing number of Representatives among the several States in accordance with the census.

The act of June 18, 1929,[3] makes the following provisions as to apportionment:

SEC. 22. (a) On the first day, or within one week thereafter, of the second regular session of the Seventy-first Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the fifteenth and each subsequent decennial census of the popula-

[1] U. S. Code, title 2, sec. 2.

Footnote 2 continued from p. 31:

States.	1787	1790	1800	1810	1820	1830	1840	1850	1860	1870	1880	1890	1900	1910	1920	1930
Arkansas	.....	.....	.....	.....	.....	.....	1	2	3	4	5	6	7	7	.....	7
Michigan	.....	.....	.....	.....	.....	.....	3	4	6	9	11	12	12	13	.....	17
Florida	.....	.....	.....	.....	.....	.....	.....	1	1	2	2	2	3	4	.....	5
Iowa	.....	.....	.....	.....	.....	.....	.....	2	6	9	11	11	11	11	.....	9
Texas	.....	.....	.....	.....	.....	.....	.....	2	4	6	11	13	16	18	.....	21
Wisconsin	.....	.....	.....	.....	.....	.....	.....	3	6	8	9	10	11	11	.....	10
California	.....	.....	.....	.....	.....	.....	.....	2	3	4	6	7	8	11	.....	20
Minnesota	.....	.....	.....	.....	.....	.....	.....	.....	2	3	5	7	9	10	.....	9
Oregon	.....	.....	.....	.....	.....	.....	.....	.....	1	1	1	2	2	3	.....	3
Kansas	.....	.....	.....	.....	.....	.....	.....	.....	1	3	7	8	8	8	.....	7
West Virginia	.....	.....	.....	.....	.....	.....	.....	.....	3	3	4	4	5	6	.....	6
Nevada	.....	.....	.....	.....	.....	.....	.....	.....	1	1	1	1	1	1	.....	1
Nebraska	.....	.....	.....	.....	.....	.....	.....	.....	1	1	3	6	6	6	.....	5
Colorado	.....	.....	.....	.....	.....	.....	.....	.....	.....	1	1	2	3	4	.....	4
South Dakota	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	2	2	3	.....	2
North Dakota	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	1	2	3	.....	2
Montana	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	1	1	2	.....	2
Washington	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	2	3	5	.....	6
Idaho	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	1	1	2	.....	2
Wyoming	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	1	1	1	.....	1
Utah	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	1	1	2	.....	2
Oklahoma	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	5	8	.....	9
Arizona	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	1	.....	1
New Mexico	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	1	.....	1
Total	63	105	141	181	212	240	223	234	241	293	325	357	391	435	.....	435

[3] 46 Stat. L., p. 26.

tion, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives made in each of the following manners:

(1) By apportioning the then existing number of Representatives among the several States according to the respective numbers of the several States as ascertained under such census, by the method used in the last preceding apportionment, no State to receive less than one Member;

(2) By apportioning the then existing number of Representatives among the several States according to the respective numbers of the several States as ascertained under such census, by the method known as the method of major fractions, no State to receive less than one Member; and

(3) By apportioning the then existing number of Representatives among the several States according to the respective numbers of the several States as ascertained under such census, by the method known as the method of equal proportions, no State to receive less than one Member.

42. Statement of population and apportionment thereunder submitted to the Seventy-first Congress, and form of message transmitting it.—On December 5, 1930,[1] it being the first day of the second regular session of the Seventy-first Congress, the President transmitted to the Congress the following message:

To the Congress of the United States:

In compliance with the provisions of section 22 (a) of the act approved June 18, 1929, I transmit herewith a statement prepared by the Bureau of the Census, Department of Commerce, giving the whole number of persons in each State, exclusive of Indians not taxed, as ascertained under the Fifteenth Decennial Census of population, and the number of Representatives to which each State would be entitled under an apportionment of the existing number of Representatives by the method known as the method of major fractions, which was the method used in the last preceding apportionment, and also by the method known as the method of equal proportions.

HERBERT HOOVER.

The message was accompanied by the following statement:

Apportionment of 435 Representatives by the method of major fractions, which was used in the last preceding apportionment, and by the method of equal proportions with total population of the several States, number of Indians not taxed, and population basis of apportionment

State	Population as enumerated April 1, 1930	Indians not taxes	Population basis of apportionment	Apportionment of 435 Representatives by method of—	
				Major fractions used in last preceding apportionment	Equal proportions
Total	122,288,177	194,722	122,093,455	435	435
Alabama	2,646,248	6	2,646,242	9	9
Arizona	435,573	46,198	389,375	1	1
Arkansas	1,854,482	38	1,854,444	7	7
California	5,677,251	9,010	5,668,241	20	20
Colorado	1,035,791	942	1,034,849	4	4
Connecticut	1,606,903	6	1,606,897	6	6
Delaware	238,380	.....	238,380	1	1
Florida	1,468,211	20	1,468,191	5	5
Georgia	2,908,506	60	2,908,446	10	10

[1] Third session, Seventy-first Congress, House Document No. 664.

Apportionment of 435 Representatives by the method of major fractions, which was used in the last preceding apportionment, and by the method of equal proportions with total population of the several States, number of Indians not taxed, and population basis of apportionment—Continued

State	Population as enumerated April 1, 1930	Indians not taxes	Population basis of apportionment	Apportionment of 435 Representatives by method of—	
				Major fractions used in last preceding apportionment	Equal proportions
Idaho	445,032	3,496	441,536	2	2
Illinois	7,630,654	266	7,630,388	27	27
Indiana	3,238,503	23	3,238,480	12	12
Iowa	2,470,939	519	2,470,420	9	9
Kansas	1,880,999	1,501	1,879,498	7	7
Kentucky	2,614,589	14	2,614,575	9	9
Louisiana	2,101,593	.....	2,101,593	8	8
Maine	797,423	5	797,418	3	3
Maryland	1,631,526	4	1,631,522	6	6
Massachusetts	4,249,614	16	4,249,598	15	15
Michigan	4,842,325	273	4,842,052	17	17
Minnesota	2,563,953	12,370	2,551,583	9	9
Mississippi	2,009,821	1,667	2,008,154	7	7
Missouri	3,629,367	257	3,629,110	13	13
Montana	537,606	12,877	524,729	2	2
Nebraska	1,377,963	2,840	1,375,123	5	5
Nevada	91,058	4,668	86,390	1	1
New Hampshire	465,293	1	465,292	2	2
New Jersey	4,041,334	15	4,041,319	14	14
New Mexico	423,317	27,335	395,982	1	1
New York	12,588,066	99	12,587,967	45	45
North Carolina	3,170,276	3,002	3,167,274	11	11
North Dakota	680,845	7,505	673,340	2	2
Ohio	6,646,697	64	6,646,633	24	24
Oklahoma	2,396,040	13,818	2,382,222	9	9
Oregon	953,786	3,407	950,379	3	3
Pennsylvania	9,631,350	51	9,631,299	34	34
Rhode Island	687,497	.....	687,497	2	2
South Carolina	1,738,765	5	1,738,760	6	6
South Dakota	692,849	19,844	673,005	2	2
Tennessee	2,616,556	59	2,616,497	9	9
Texas	5,824,715	114	5,824,601	21	21
Utah	507,847	2,106	505,741	2	2
Vermont	359,611	.....	359,611	1	1
Virginia	2,421,851	22	2,421,829	9	9
Washington	1,563,396	10,973	1,552,423	6	6
West Virginia	1,729,205	6	1,729,199	6	6
Wisconsin	2,939,005	7,285	2,931,721	10	10
Wyoming	225,565	1,935	223,330	1	1

43. If Congress fails to apportion, each State shall be entitled to the number of Representatives shown in the President's statement under the method last used.

On failure of the Congress to apportion, the Clerk certifies to each State executive the number of Representatives to which the State is entitled under the law.

Form of the first certificate of notification under the law of 1929.

The act of June 18, 1929,[1] in providing for apportionment, has the following:

(b) If the Congress to which the statement required by subdivision (a) of this section is transmitted, fails to enact a law apportioning Representatives among the several States, then each State shall be entitled, in the second succeeding Congress and in each Congress thereafter until the taking effect of a reapportionment under this act or subsequent statute, to the number of Representatives shown in the statement based upon the method used in the last preceding apportionment. It shall be the duty of the Clerk of the last House of Representatives forthwith to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. In case of a vacancy in the office of Clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the officer who, under sections 32 and 33 of the Revised Statutes, is charged with the preparation of the roll of Representatives elect.

(c) This section shall have no force and effect in respect of the apportionment to be made under any decennial census unless the statement required by subdivision (a) of this section in respect of such census is transmitted to the Congress within the time prescribed in subdivision (a).

The Seventy-first Congress having failed to enact an apportionment law after receipt of the required statement of population and apportionment thereunder from the President, the Clerk dispatched to each State executive a certificate of notification in the following form:

I, Wm. Tyler Page, Clerk of the House of Representatives of the United States, hereby certify, pursuant to section 22, subdivision (B), of the act of the Congress of the United States of America entitled "An act to provide for the fifteenth and subsequent decennial censuses and to provide for apportionment of Representatives in Congress," approved June 18, 1929, that the State of ——— shall be entitled, in the Seventy-third Congress and in each Congress thereafter until the taking effect of a reapportionment under said act or subsequent Statute, to ——— Representatives in the House of Representatives of the Congress of the United States.

In witness whereof I hereto affix my name and the seal of the House of Representatives of the United States of America this fourth day of March, Anno Domini 1931, in the city of Washington, District of Columbia.

44. The law of 1911 provides that Representatives shall be elected in districts composed of contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants.

The districts in a State shall be equal to the number of its Representatives, no one district electing more than one Representative.

The act of August 8, 1911,[2] has the following:

That in each State entitled under this apportionment to more than one Representative, the Representatives to the Sixty-third and each subsequent Congress shall be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative.

45. The act of a State legislature redistricting the State in accordance with the law of 1911 requires the approval of the governor of such State or passage over his veto.

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[1] 46 Stat. L., p. 26, 27.

[2] U. S. Code, Title 2, sec. 3.

Where the number of Representatives to which a State is entitled pursuant to the act of 1929 is the same as the number under the last previous apportionment and the districts are unchanged, elections of Representatives may be conducted in the same manner as before the reapportionment.

Where the number of Representatives has been decreased by the new apportionment, all the Representatives must be elected by the State at large unless and until the new districts are created.

Where the number of Representatives for a State has been increased by the new apportionment, the additional Representatives, if no new districts are created, may be elected by the State at large.

Interpretation of the statutes providing for apportionment.

On April 11, 1932,[1] the Supreme Court held that the legislature of a State, in redistricting the State into congressional districts in accordance with the last previous census, pursuant to the act of 1929, is required to obtain the governor's approval or pass the act over his veto, where the constitution of the State so requires in the enactment of the laws.

The decision holds that a redistricting act or resolution of a legislature not approved by the governor, or passed over his veto as required by the State constitution, is void, and in such case the Representatives, if not increased in number, must be elected by the State at large, regardless of whether the act of 1911, fixing the requirements of districts, is still in effect.

The court further held that where the number of Representatives has been increased and the redistricting act is void, the Representatives to which the State was previously entitled are to be elected in the districts existing at the time of the attempted redistricting, and the additional Representatives by the State at large.

As to States where the number of Representatives is unchanged by reapportionment, the decision says:

> In States where the number of Representatives remains the same, and the districts are unchanged, no question is presented; there is nothing inconsistent with any of the requirements of the Congress in proceeding with the election of Representatives in such States in the same manner as heretofore.

As to States where the number is increased, the court held:

> In the absence of the creation of new districts, additional Representatives allotted to a State under the present reapportionment would appropriately be elected by the State at large.

As to States where the number is decreased, the court said:

> Where the number of Representatives has been decreased, there is a different situation as existing districts are not at all adapted to the new apportionment. It follows that in such a case, unless and until new districts are created, all Representatives allotted to the State must be elected by the State at large.

46. The law of 1911 provides for the election of Representatives in old districts and at large until the respective States shall have rearranged the districts.—The act of August 8, 1911,[2] has the following:

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[1] 285 U. S., pp. 355, 375.

[2] U. S. Code, title 2, sec. 4.

That in case of an increase in the number of Representatives in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts now prescribed by law until such State shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in section three of this act; and if there be no change in the number of Representatives from a State, the Representatives thereof shall be elected from the districts now prescribed by law until such State shall be redistricted as herein prescribed.

Provisions similar, but not identical are found in previous apportionment acts.

47. The law of 1911 provides that candidates for Representative to be elected at large shall be nominated in the same manner as candidates for governor, unless otherwise provided.—The apportionment act of August 8, 1911,[1] has the following:

That candidates for Representative or Representatives to be elected at large in any State shall be nominated in the same manner as candidates for governor, unless otherwise provided by the laws of such State.

This was the first instance in which an apportionment act made provision for the nomination of candidates.

48. While the House gives priority to the consideration of business made privileged by constitutional mandate, it determines by its rules the procedure of such consideration.

Dicta relating to the privilege accorded by the Constitution to the consideration of a measure returned with the President's veto.

Dicta relating to the Constitutional privilege of a question of impeachment.

Bills relating to the census or apportionment, though privileged, held subject to the rules of the House providing for the consideration of privileged questions.

The Chair in his ruling is constrained to follow precedent and to obey a well-established rule even if unreasonable, but one precedent alone when unsupported by others is not necessarily conclusive.

On May 6, 1921,[2] Mr. D. R. Anthony, jr., of Kansas, moved that the House resolve itself into the Committee of the Whole House on the state of the Union for the further consideration of the bill (H. R. 5010) making appropriations for the support of the Army for the fiscal year ending June 30, 1922. and for other purposes.

Pending this motion, Mr. George Holden Tinkham, of Massachusetts, offered, as privileged under the Constitution, the following resolution:

Whereas the fourteenth article, in addition to and amendment of the Constitution of the United States, section 2, provides:

"When the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof is denied to any of the male inhabitants of such State, being 21 years of age and citizens of the United States, or in any way abridged, except for

[1] U.S. Code, title 2, sec. 5.

[2] First session Sixty-seventh Congress, Record, p. 1129.

participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens 21 years of age in such State," and

Whereas it is generally and commonly alleged and is susceptible of proof that in many States of the United States the constitutions thereof and the laws enacted by their legislatures have, in effect, denied or abridged to large numbers of citizens qualified under the Constitution of the United States the right to vote in such States, and that such alleged nullification of the Constitution of the United States, whether direct or indirect, constitutes flagrant and persistent disregard and violation of the fundamental law of the land and is subversive wholly of law and of Liberty itself; and

Whereas no greater political discrimination could exist between the several States of the Union and of their citizens than the general conference upon each of the States alike of the power to prescribe qualifications for electors (subject alone to the inhibitions of the fifteenth and nineteenth amendments to the Constitution of the United States) upon a basis of population, and the coexistence of an extensive and evasive unconstitutional denial of the exercise of the franchise to some citizens by some States resulting in disproportionate political power, accentuated and enlarged by the recent enfranchisement of females; and

Whereas the House of Representatives is about to make a reapportionment off Representatives in Congress among the several States, based upon the census of population of 1920: Therefore be it

Resolved, That the Committee on the Census or any subcommittee thereof is hereby authorized and directed to proceed forthwith to make diligent inquiry respecting the extent to which the right to vote is denied or abridged to citizens of the United States in any State in violation of the Constitution of the United States; and said committee is authorized to send for persons and papers, to administer oaths to witnesses, to conduct such inquiry at such times and places as the committee may deem necessary, and to report its findings and recommendations to the House at the earliest possible moment, either separately or together with such report as said committee may submit in connection with proposed legislation providing for a reapportionment of Representatives in Congress, to the end that such reapportionment shall be constitutional in form and in fact.

Mr. Frank W. Mondell, of Wyoming, made the point of order that the resolution was not so privileged as to take precedence of the privileged motion to resolve into the Committee of the Whole House on the state of the Union for the consideration of a general appropriation bill.

Mr. Tinkham urged that his resolution was submitted in compliance with a mandatory provision of the Constitution and therefore took precedence over a proposition merely privileged under the rules of the House, predicating his argument upon a decision [1] rendered on a similar proposition by former Speaker Henderson.

The Speaker [2] in terms overruled specifically the decision cited and said:

The Chair thinks that if this question were brought up as an original question, and there were no precedents upon it, every Member of the House would at once say, "Why, of course this can not be admitted as privileged," because it would give the right to any Member of the House at any time to abring forward a resolution affecting some constitutional provision and to claim that his individual resolution can at once set aside all the regular business of the House, and must be considered by the House in preference to anything else. That puts it above the rules of the House and allows one man, and one after another if filibustering is desired, to bring before the House a question that he has in advance prepared, and insist that his individual will and preference shall change the regular order which the House itself has established just because a clause of the Constitution is affected. So the Chair thinks that if this were a matter of first impression, there would be no question about it. The Chair at any rate would have no question about it. But there is an exact precedent for this which has been followed by the gentleman from Massachusetts, and that has much embarrassed the Chair in coming to his decision. This whole question of a constitutional privilege being superior to the

[1] Vol. 1, sec. 305, of this work.

[2] Frederick H. Gillett, of Massachusetts, Speaker.

rules of the House is a subject which the Chair has for many years considered, and thought unreasonable. It seems to the Chair that where the Constitution orders the House to do a thing, the Constitution still gives the House the right to make its own rules and do it at such time and in such manner as it may choose, and it is a strained construction, it seems to the Chair, to say that because the Constitution gives a mandate that a thing shall be done, it therefore follows that any Member can insist that it shall be brought up at some particular time and in the particular way which he chooses.

If there is a constitutional mandate, the House ought by its rules to provide for the proper enforcement of that mandate, but it is still a question for the House how and when and under what procedure it shall be done, and a constitutional question, like any other, ought to be decided according to the rules that the House has adopted. But there have been a few constitutional questions—very few—which have been held by a series of decisions to be of themselves questions of privilege above the rules of the House. There is the question of the President's veto, and to the Chair that seems to be the only one in which there is any good reason to give a privileged status, because the Constitution says that when the President sends a veto to the House the House shall "proceed to" consider it; and that is apparently a definite order which can fairly be interpreted to mean that it shall be done at once, and that has been the practice of the House, and it has been held that without a rule in obedience to the Constitution a President's veto should be acted upon, not immediately but within a day or two.

Another subject which has been given constitutional privilege is impeachment. It has been held that when a Member rises in his place and impeaches an officer of the Government he can claim a constitutional privilege which allows him at any time to push aside the other privileged business of the House. To the Chair that does not seem rational. Although impeachment is a matter of constitutional privilege, yet there is no reason why it should not be introduced like any other matter, go into the basket, and be reported by a committee. But inasmuch as the long line of precedents has given it a privilege, the Chair would not think of overruling them; but the Chair can see no intrinsic reason for the privilege. It is simply a matter of precedent.

Then have come the two questions of the census and of apportionment. The Constitution provides that a census shall be taken every 10 years, and that after the census is taken there shall be an apportionment, and there is a line of decisions holding that because of that constitutional provision, although the rules of the House have not given the Committee on the Census a privileged status, they can come in ahead of other questions of privilege, although the House will remember that a few years ago the theory that a constitutional privilege was higher than the rules of the House received a damaging blow when it was attempted to bring up a census bill on Calendar Wednesday.

Speaker Cannon held that it was in order to do so, but the House overruled that decision and sustained the sanctity of Calendar Wednesday, and held that a census bill could not come up on that day, thereby deciding that the rule of the House which sets aside Calendar Wednesday is of higher authority than the constitutional privilege of the census bill.

But these questions of impeachment and others came up in the early days of the Congress, when the relative value of a privilege made little difference. In the first half century of our existence the House was not crowded with business. Anything that came before the House had ample opportunity to be heard and decided, and the question whether a subject was privileged or not was not of the same moment that it is to-day, when our calendars are crowded, when it is impossible to transact a tenth part of the business which is presented to the House, and when it is of vital importance to the House that it shall be able to determine an order of business and to consider those bills which it considers of the greatest importance. And apparently recognizing that, in 1880 the House for the first time adopted a rule defining questions of privilege. It was found necessary to check the tendency to claim the floor by alleging that a matter was privileged, and so Rule IX was adopted, which says:

"Questions of privilege shall be first, those affecting the rights of the House collectively, its safety, dignity, and the integrity of its proceedings; second, the rights, reputation, and conduct of Members individually in their representative capacity only; and shall have precedence of all other questions, except motions to adjourn."

It is fair to say that when that rule was adopted a motion was made that no other questions except those specified should be questions of privilege; and by that undoubtedly it was intended to shut out those questions of constitutional privilege which by long practice had become established. But that was voted down. The House obviously thought that it was not safe to say that there should be no questions of privilege except these described in Rule IX. That was in 1880, and the House had then recently, in the Hayes-Tilden contest, had a very vivid experience how important a question of privilege might be when Speaker Randall, in a turbulent House and in a great emergency, when an element in his own party was endeavoring to filibuster against the counting of the vote, held that the law of Congress and the necessity of determining the election was above the rules of the House, and insisted that there should be a vote. The Chair thinks it quite natural that Members who had had that recent experience should feel that it was not safe to decide that there should be no other questions of privilege than these described.

But this Rule IX was obviously adopted for the purpose of hindering the extension of constitutional or other privilege.

If the question of the census and the question of apportionment were new questions, the Chair would rule that they were not questions of constitutional privilege, because, while of course it is necessary to obey the mandate of the Constitution and take a census every 10 years and then make an apportionment, yet there is no reason why it should be done to-day instead of to-morrow. It seems to the Chair that no one Member ought to have the right to determine when it should come in in preference to the regular rules of the House, but that the rules of the House or the majority of the House should decide it. But these questions have been decided to be privileged by a series of decisions, and the Chair recognizes the importance of following precedents and obeying a well-established rule, even if it is unreasonable, that this may be a government of laws and not of men.

Now comes the decision by Speaker Henderson which stands alone on all fours with the present case. Shall it be followed? If you will notice the ruling of Speaker Henderson, you will see that it was not a carefully reasoned opinion. It seems to have been an impulsive, offhand opinion. He says:

"The Chair is unable to see why we should wander even among the precedents, which the Chair has looked over to some extent and which are all one way, when we have the plain language of the Constitution before us."

He does not consider it necessary to consider precedents, but relies on the plain language of the Constitution. But, as I have already indicated, I do not agree that the language of the Constitution gives any privilege superior to the rules of the House. The plain language of the Constitution simply provides for equal representation. But this resolution and the resolution upon which Speaker Henderson ruled did not provide that at all, it did not pretend to carry out the mandate of the Constitution. This resolution simply says the Committee on Census is directed to proceed forthwith to make diligent inquiry. An inquiry is all the resolution provides, and the Chair finds it difficult to see why on a new question Speaker Henderson ruled as he did if he had given the matter careful investigation. He himself said within a year of that time in passing on the question of the constitutional privilege of the census:

"If this were an original question, the Chair would be inclined to hold that if the House adopts rules of procedure and leaves out any committee from the list of committees whose reports are privileged, that that committee would be remitted to those rules of procedure adopted by the House for its guidance."

He agrees with the present occupant of the chair, that except for precedent, the Committee on the Census could not claim the constitutional privilege.

Therefore it seems to the Chair, there being this one precedent, and no others, and the claim of the gentleman from Massachusetts, Mr. Tinkham, being directly hostile to the control of the Home over its own business, it being an attempt to broaden the figment of constitutional privilege,

which in 1880 the House started to limit, and which it seems to the Chair for the orderly prosecution and control by the House of its business ought to be narrowed rather than broadened, the Chair sustains the point of order.

Mr. Tinkham appealed from the decision of the Chair, and the question being taken, "Shall the decision of the Chair stand as the judgment of the House?", there appeared yeas 285 and nays 47. So the decision of the Chair was sustained.

49. A bill relating to the taking of the census was formerly held to be privileged because of the constitutional requirement.

On March 17, 1910,[1] Mr. Edgar D. Crumpacker, of Indiana, proposed to call up, as privileged under the Constitution, the following joint resolution reported from the Committee on the Census:

Resolved, etc., That the schedules relating to population for the Thirteenth Decennial Census, in addition to the inquiries required by the act entitled "An act to amend section 8 of an act to provide for the Thirteenth and subsequent decennial censuses, approved July 2, 1909," approved February 25, 1910, shall provide inquiries respecting the nationality or mother tongue of all persons born in foreign countries.

Mr. Thomas S. Butler, of Pennsylvania, having made the point of order that the resolution was not privileged, the Speaker[2] submitted to the House the question:

Is the bill called up by the gentleman from Indiana in order as a question of constitutional privilege, the rule prescribing the order of business to the contrary notwithstanding?

On motion of Mr. Oscar W. Underwood, of Alabama, this question was amended to read:

Is the House joint resolution, called up by the gentleman from Indiana, in order now?

The question being taken, it was decided in the affirmative, 201 ayes to 72 nays, and the House proceeded to the consideration of the joint resolution.

50. On June 21, 1918[3] Mr. Harvey Helm, of Kentucky, as a privileged question, moved that the House proceed to the consideration of the bill (H. R. 11984) making provision for the Fourteenth and subsequent decennial censuses.

Mr. Frederick H. Gillett, of Massachusetts, made the point of order that the motion was not privileged and said:

The Speaker is, I know, perfectly familiar with the precedents and will remember, as I do, the argument and decision of Speaker Henderson on the subject. In making that decision Speaker Henderson indicated that if it was a new question without precedents he would be disposed to rule otherwise, and I think anybody would admit that the mere fact that the Constitution makes it the duty of Congress to provide for a census does not necessarily decide in what way the committee shall bring up that bill. It does not give the chairman of any one committee—the Committee on the Census or any other—the right to bring up any particular bill at any particular time. It really is a matter for Congress to decide by its rules how and in what way a bill should be brought up. The rules would naturally provide for it. It is simply our duty to pass a bill, but not any particular bill at any particular time.

It is the duty of Congress under the Constitution to paw appropriation bills for the expenses of the Government; but no one has ever contended that the Appropriation Committees derive their privilege from the Constitution, but it is derived from the rules of the House.

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[1] Second session Sixty-first Congress, Journal, p. 444. Record, p. 3290.

[2] Joseph G. Cannon, of Illinois, Speaker.

[3] Second session Sixty-fifth Congress, Record, p. 8130.

The Speaker[1] overruled the point of order on the ground that the bill was in compliance with a mandatory provision of the Constitution, and under the decisions of former Speakers of the House the privilege of such bills was too well established to be questioned.

51. A bill making an apportionment of Representatives presents a question of constitutional privilege.

A motion to go into Committee of the Whole to consider a bill being made, the House expresses its wish as to consideration by passing on this motion, and not by raising the question of consideration.

On October 14, 1921,[2] Mr. Isaac Siegel, of New York, as a privileged question, moved that the House resolve itself into the Committee of the Whole House on the state of the Union for the consideration of the bill (H. R. 7882) providing for reapportionment of Representatives in Congress.

Mr. Thomas L. Blanton, of Texas, and Mr. Otis Wingo, of Arkansas, made the point of order that the motion was not privileged.

The Speaker[3] overruled the point of order.

Thereupon Mr. Blanton demanded that the question of consideration be put.

The Speaker held that the motion to go into the Committee of the Whole raised the question of consideration and overruled the point of order.

52. A motion to go into the Committee of the Whole House on the state of the Union to consider an apportionment bill was formerly held to take precedence over the motion to go into the committee to consider a general appropriation bill.

The motion to resolve into Committee of the Whole to consider a privileged bill is not amendable.[4]

On February 9, 1911,[5] Mr. Charles F. Scott, of Kansas, moved that the House resolve itself into the Committee of the Whole House on the state of the Union for the consideration of the bill H. R. 31596, the agricultural appropriation bill.

Pending this motion, Mr. Edgar D. Crumpacker, of Indiana, moved that the House resolve itself into the Committee of the Whole House on the state of the Union to consider the bill (H. R. 30566) for the apportionment of Representatives in Congress among the several States under the Thirteenth Decennial Census.

The Speaker[6] said:

> The gentleman from Indian rose for the purpose of submitting a motion to the House that it do resolve itself into the Committee of the Whole House on the state of the Union for the purpose of considering the bill referred to—the apportionment bill—reported from the Committee on the Census. It seems to the Chair the gentleman calls up a matter which heretofore has been held, with one exception, uniformly to be a question of constitutional privilege, and the Chair will recognize the motion of the gentleman from Indiana.

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[1] Champ Clark, of Missouri, Speaker.

[2] First session Sixty-seventh Congress, Journal, p. 483; Record, p. 6307.

[3] Frederick H. Gillett, of Massachusetts, Speaker.

[4] However, see clause 5 of Rule XXIV.

[5] Third session Sixty-first Congress, Record, p. 2205.

[6] Joseph G. Cannon, of Illinois, Speaker.

Thereupon Mr. Scott, rising to a parliamentary inquiry, asked if it would be in order to offer his motion as an amendment to the motion of the gentleman from Indiana.

The Speaker replied:

Those motions under the rule in the practice of the House have not been considered as amendable, since no time would be saved and no purpose would be effected.

53. The Virginia election case of Parsons v. Saunders, in the Sixty-first Congress.

Instance wherein a State legislature twice redistricted the State between enumerations.

A reapportionment by a State legislature which rendered congressional districts of the State less compact and contiguous as to territory and more disproportionate as to population was not disturbed.

On June 21, 1910,[1] Mr. James M. Miller, of Kansas, from the Committee on Elections No. 2, submitted the report of the majority of the committee in the Virginia case of John M. Parsons *v.* Edward W. Saunders.

The apportionment of 1901 made no change in the number of Representatives allotted under the previous apportionment to the State of Virginia in the House of Representatives, and the congressional districts of the State established under the apportionment of 1891 remained unchanged until 1906, when a complete reapportionment was made. In 1908 the State again apportioned its congressional districts and among other changes transferred Floyd County from the fifth district to the sixth district.

Prior to the State apportionment of 1908 the population of the fifth and sixth districts was 175,597 and 181,571, respectively. As the unit of population under the act of 1901 was approximately 180,000, the fifth district was already below and the sixth district above the statutory unit, a disparity which the transfer of Floyd County further increased by reducing the population of the fifth district to 160,191 and increasing that of the sixth district to 196,959.

It is apparent from the testimony of both contestant and contestee that the transfer also tended to reduce the compactness and to some extent the contiguity of territory of both districts.

It was charged by the majority of the committee and tacitly conceded by the minority that the change in the two districts was dictated largely by political considerations.

As there were practically no disputed questions of fact involved, the case resolved itself largely into a question as to whether the State redistricting act of 1908 was violative of the Federal Constitution, the apportionment act of 1901, and the constitution of the State of Virginia.

The act of 1901 provides that the Members of the House to which each State is entitled shall be selected by—

districts composed of contiguous and compact territory, containing as nearly as practicable an equal number of inhabitants.

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[1] Second, session, Sixty-first Congress, Journal, p. 820; p. 3699; House Report No. 1095.

Article 5, section 55, constitution of Virginia, quotes the express language of the Federal statute as follows:

The general assembly shall by law apportion the State into districts corresponding with the number of Representatives to which it may be entitled in the House of Representatives of the Congress of the United States, which districts shall be composed of contiguous and compact territory containing, as nearly as practicable, an equal number of inhabitants.

The majority report points out:

Historically these provisions of the statute of the United States, as of the constitution of Virginia, were clearly intended to constitute restraints upon legislative discretion so as to prevent the well-known vicious political device of forming congressional or other legislative districts for mere partisan purposes

These restrictions upon the legislative power are:

1. Legislative districts must be composed of contiguous territory.
2. Legislative districts must be composed of compact territory.
3. Legislative districts must contain an equal number of inhabitants.
4. The only qualification to these requirements is the phrase "as nearly as practicable."

The rule is well established that the Constitution must be so construed that every word and phrase of the organic law shall be given meaning and purpose; also that constitutional provisions are mandatory.

As to contiguity, the majority say:

1. Contiguity: An inspection of the map of the district would seem to show that notwithstanding the taking of Floyd County out of the body of the district, thereby nearly severing it into two parts, there still remained an apparent strip of contiguity 10 miles in width measured in a straight line across. The evidence before the committee, however, shows conclusively that at this point, running from the boundary of Floyd County across to the state line, there is a mountain ridge which prevents public travel by road between the inhabitants of the one halt of the district with the inhabitants of the other half, except by going south into the adjoining State or north into the county of Floyd. This mountain barrier destroys in fact, if not in form, the apparently small strip of contiguity shown upon the map of the district.

To which the minority reply:

So far as Floyd was concerned, her natural interests and trade relations were with the sixth and not the fifth district. Her people are contiguous to the railroads in the sixth and trade with the towns on the lines of these roads. She has practically no trade relations with the fifth.

It is claimed in the majority report that the fifth Virginia district further offends against the Federal statute on the ground that it is not contiguous and compact territory. The objection on the score of contiguity is certainly not well taken, for the district is composed of a number of counties which touch each other in succession, as will be seen from the diagram and map filed. Contiguity means actual contact, nothing else, and the statute does not contemplate that each county in the district shall touch every other county, even if such a thing should be possible. It is stated in the report of the majority that as at present formed, a mountain ridge prevents public travel by road between the inhabitants of one portion of the district and the other, save by going through Floyd or North Carolina. The map to which the report refers shows that if the road from Patrick to Carroll goes through Floyd at all, it barely crosses, for the most insignificant distance, a sharp point which Floyd thrusts into Patrick. South of this road the map shows another road from Patrick into Carroll. The majority report further states that there is an apparent strip of contiguity 10 miles in width, measured in a straight line, across. This is intended to show that the counties are not contiguous save for this distance. But this is a mistake. The same map will show that, owing to the configuration of the two counties, they run together for as much as 30 miles, according to the map. The 10 miles is measured entirely in the county of Patrick. But granting, for the sake of argument, that the most convenient access from Patrick to Carroll would be through

a small part of Floyd, what would it prove? There are many districts in which the most convenient means of access from one portion of the district to another is through some other district.

On the question of compactness, the majority claim:

2. Compactness: An examination of the map of the fifth and sixth districts prior to this special apportionment of 1908 reveals the fact that the outline of the fifth district was fairly compact, but that the sixth district was abnormally elongated, with a tier of counties upon the other, extending in the form of a "shoestring" over the northern half or more of the fifth district. The removal of Floyd County under the apportionment act of 1908 from the body of the fifth district clearly destroyed its former compact form, and grossly aggravated the lack of compactness of the sixth district by attaching Floyd County to the extreme end of the excessively abnormal district.

In answer the minority assert:

But as in the matter of population, so in the respect of compactness the fifth Virginia district does not offend in any marked or striking degree; to such a degree, in comparison with other districts created in other States, that on this ground the act of the legislature of a State should be set aside, and the results of an admittedly honest election be nullified. For the purposes of comparison, the rasps of a number of districts, taken from the Congressional Directory for 1910, are submitted in this connection.

The majority conclude:

The phrase, "as nearly as practicable," indicates that these constitutional requirements do not seek to enforce perfection. Absolute contiguity, compactness, and equality of inhabitants are impossible of attainment. Mr. Webster discussed the general subject of apportionment in the Twenty-second Congress, first session, in an elaborate report, and with singular clearness and force laid down this rule:

"That which can not be done perfectly must be done in a manner as near perfection as can be. If exactness can not, from the nature of things, be attained, then the greatest practicable approach to exactness ought to be made."

Applying the Webster rule to this case, we can not find any approximation toward the exact truth, exact right, or exact justice; on the contrary, we find that the State legislature of Virginia turned its back on these constitutional requirements and deliberately moved away from them.

The basic idea underlying the word apportionment suggests an approximation to the truth, to the right, to equality, and to justice. The very purpose of an apportionment every 10 years is solely to approximate more closely a just and fair equality of representation by congressional districts. Can anyone say that this subsequent change of districts of the act of 1908 was an apportionment? On the contrary, it appears to us that it was a perversion of the term. It was a violation of the spirit and the meaning of an apportionment under the Constitution, and may be rightly declared no apportionment at all.

The majority report then cites in support of its conclusions the decisions of higher courts in a number of cases and continues:

After applying every reasonable and fair test suggested by common sense and judicial authority we have been impelled to this conclusion: This case presents as conclusive evidence of willful and deliberate legislative disregard of the fundamental constitutional requirements of contiguity, compactness, and equality of inhabitants as has come to the attention of the committee in reviewing the decisions of the courts of the various States of the Union that have declared similar enactments null and void. The only and the specific purpose of the act of 1908 in taking the county of Floyd out of the Fifth District and transferring it to the Sixth District, as appears from the evidence, was the political advantage that did result in making a close district barely safe for the dominant political party of the State.

This committee is a judicial tribunal. We have not the right to consider expediency or policy, politics, or personality. We have but to decide the case upon the broad lines of justice as determined

by the facts, the law, and the Constitution. But so far as we may go in considering the effect of our decision, we believe that it will shut the door of the House of Representatives to one of the most insiduous and dangerous political offenses that can menace democratic government.

Our conclusion is, therefore, that the redistricting act of 1908 of Virginia does not conform to nor comply with the Constitution of the United States, the United States apportionment act of the Twelfth Census. nor the constitution of the State of Virginia, and is null and void, and that Floyd County is still a part of the Fifth Congressional District.

The minority report also cites various judicial decisions, and deduces:

the question of whether a particular apportionment is fair or unfair, just or unjust, in the ordinary acceptation of the terms, ought not to enter into this determination at all. All apportionments are political and are generally regarded by the opposing party as unfair or unjust. There is practically no apportionment which is made by a political organization which could not be re-formed so as to make it fairer and more just to the opposing organization. The proper question for determination is whether this body has the right to interfere with the apportionments made by the States, or whether, if it possesses that power, the interests of the Republic would be forwarded by an attempt on its part to exercise the same in some universal fashion. If it is to be exercised at all, it should not be exercised capriciously or spasmodically, but universally, so as to compel every district in the United States to be so constructed that in conformity with the statute it will be contiguous and compact, containing, as nearly as practical, an equal number of inhabitants.

In contravention of the contentions of the majority relative to disparity in population, the minority list districts in various States showing even greater disparity and contend:

Many other disparities equally striking might be furnished, but these will suffice. Two things will be noted upon examination of these figures. First, the wide differences that the States have made in the relative populations of the districts which they have created; second, that if the fifth Virginia district is an unconstitutional formation by reason of the disparity of its population with that of the sixth, there are many other districts in the country at large offending in a much greater degree, and therefore calling for rectification. But it is submitted that the existence of these greater disparities in other districts, which make the districts in which they occur unconstitutional formations, in the view of the majority, merely tends to show from another standpoint that the States have not considered that their right to make these disparities was limited by any constitutional authority.

In conclusion the minority took the ground:

If gerrymandering is the outcome of the exercise of uncontrolled political power under certain familiar conditions, it is difficult to see how the disease will be cured by transferring the power to accomplish it from a number of diverse political bodies to one central body, which will be operated upon by the same considerations as the members of the smaller bodies. If Congress is to undertake the exercise of this authority, conceding that this body possesses it, then it ought to be done upon the theory that its assumption and exercise will be in the general public interests. What indication has been afforded that such has been the case, or would be the ease? The latest illustration of scientific arrangement was afforded in the ease of Oklahoma, when the enabling act of Congress created districts in that State with a population difference of 89,733, and scientifically grouped the democratic majorities in such fashion that one democratic district had a majority of about 25,000. The remedy offered for the disease does not commend itself. In lieu of a number of individual gerrymanders, effected by different political organizations, in different States, and working out some kind of equality, as pointed out by the report in Davison *v.* Gilbert, we win have one universal gerrymander, coextensive with the limits of the country. The effect of this new policy in unsettling tenure of seats will be intolerable. No Member would know when he would be secure from a contest, based on the grounds of disparity of population or irregularities in the physical make-up of the district. The opportunity to make a universal gerrymander would be a

stake well worth the scramble of the party organizations, since it might mean a tenure of power extending over an indefinite period of years.

The majority report recommended the following resolutions:

Resolved, That Edward W. Saunders was not elected to membership in the House of Representatives of the United States in the Sixty-first Congress and is not entitled to a seat therein.

Resolved, That John M. Parsons was elected to membership in the House of Representatives of the United States in the Sixty-first Congress from the Fifth District of Virginia and is entitled to a seat therein.

However, on January 24, 1911,[1] on motion of Mr. Miller, by unanimous consent, the report was recommitted to the committee, and was not again reported to the House, Mr. Saunders retaining his seat.

54. The Texas election case of E. W. Cole in the Sixty-eighth Congress.

The House denied the claim of a State to representation greater than the apportionment had given her when the reasons for such claim applied to many other States.

The Clerk declined to enroll a person bearing regular credentials, but claiming to be a Representative in addition to the number apportioned to his State.

Since the enfranchisement of women constitutional provisions relating to apportionment are to be read in connection with the nineteenth amendment.

The constitutional provision authorizing an apportionment act based upon each succeeding census is not mandatory, but such enactments are discretionary with Congress.

On December 3, 1923,[2] at the organization of the House, the Clerk announced that a concurrent resolution by the Legislature of the State of Texas had been received, reciting:

Under the constitutional provision providing for representation of the States in the House of Representatives on a basis of numerical population, and basing its action on the census of 1920, the State of Texas proceeded to elect a Representative at Large on the ground that the census of 1920 entitled the State of Texas to one more Representative than it now has in Congress, making the number 19 instead of 18.

In May, 1922, E. W. Cole, of Austin, Tex., had his name placed on the ballot to be voted on in the primary election in the selection of democratic nominees for various offices of the State as well as for Representative at Large in Congress. Mr. Cole secured recognition on the ballot through the Democratic State executive committee according to his brief filed with his claim. He further alleges that in July, 1922, at the primary election he received practically the unanimous vote of the Democratic Party of Texas for the nomination for the position of Representative at Large.

The Governor of the State of Texas at the proper time, it is alleged, issued his proclamation calling for the election of the various Members of Congress and the State officers in November, 1922, and among other provisions included in the proclamation was one for the election of a Representative at Large in Congress for the State of Texas.

A certificate of election issued by the Governor of the State of Texas accrediting E. W. Cole, as elected from the State at Large, had also been received by the Clerk.

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[1] Third session Sixty-first Congress, Journal, p. 206; Record, p. 1398; Moore's Digest, p. 43.

[2] First session Sixty-eighth Congress, Record, p. 7.

The claim was referred to the Committee on Elections No. 1 and on March 29, 1924, Mr. John M. Nelson, of Wisconsin, submitted the report of the committee, who were unanimous in holding that in view of the failure of Congress to amend the apportionment act of 1913 fixing the number of Representatives in the House from the State of Texas at 18, the claimant could not be admitted.

In its statement of the case the report [1] says:

Claimant alleges that his name was duly placed upon the democratic ballot as the candidate for that party in the general election held in November, 1922, and that the Republican Party of the State of Texas had placed upon its ballot as a candidate for the same office the name of Herbert Peairs.

Claimant alleges that in the election November, 1922, the said Herbert Peairs received 46,048 votes and that claimant received 265,317 votes.

Claimant further alleges that thereafter the election board of Texas canvassed the result of the said general election, and declared that E. W. Cole, the claimant, was duly elected as Representative at Large from the State of Texas, and that thereafter in due time and form the Hon. Pat. M. Neff, Governor of the State of Texas, issued, signed, and delivered a certificate of election to claimant as Representative at Large for the State of Texas, and that said certificate of election was duly filed with the Clerk of the House of Representatives of the Congress of the United States. Claimant further alleges that the Clerk of the House of Representatives received and is holding said certificate of election, but has refused to file the same or to recognize the claims of the claimant for a seat in the House of Representatives of Congress and has refused to recognize the appointment of a secretary and other privileges to which the said E. W. Cole would be entitled as a Representative in the House of Representatives in the Sixty-eighth Congress.

After citing section 11 of Article XIV of the Constitution relating to apportionment the report continues:

It may be observed that male citizens only are referred to in this section of the Constitution, but by the nineteenth amendment to the Federal Constitution women were enfranchised and now those constitutional provisions have to be read in connection with the nineteenth amendment.

As to claimant's contention that the reenactment of an apportionment act based upon each succeeding census is mandatory, the committee hold:

While it is true that some color may be given a claim that long-established custom has fixed that time for Congress to pass a reapportionment act the first session of Congress following the taking of the census, it still remains custom and not a constitutional provision nevertheless.

The committee indicate two obstacles to the seating of the claimant. The first is:

The number of Representatives fixed by an act of the Congress in 1913, based upon the official census of 1911, is 435. That act of Congress was passed by the House, then by the Senate, and was signed by the President of the United States. Your committee is of the opinion that the House of Representatives alone could not amend or modify an act of the whole Congress by increasing the membership of the House of Representatives to 436 without the act of the House being passed upon by the United States Senate and the President of the United States. Consonant with that view, then, your committee is of the opinion that if this claimant were to be seated he would have to be seated through an act of Congress to increase the membership of the House to 436.

The second is:

[1] House Report No. 398.

Even though the House might attempt by its own act and independently of the Senate and of the President of the United States to seat claimant, thereby increasing the membership of the House by one Member and increasing the representation of the State of Texas by one, there would be no fund with which to pay the salary, clerk hire, mileage, and other perquisites and expenses of claimant, because the appropriation from which salaries, clerk hire, mileage, and other expenses of Members of the House of Representatives is paid is an appropriation passed by an act of the whole Congress and approved by the President of the United States, and therefore, even though claimant were seated, his salary and perquisites would have to be paid by a special act of Congress.

The committee therefore conclude:

To attempt to settle questions of the nature involved in this case by seating the claimant would be to disorganize the House of Representatives. It would bring up other questions, such as the action to be taken in the cases of States which are now overrepresented, due to decrease in their population.

Your committee is of the opinion that in cases where States elect Representatives at large in the belief that such States are entitled to greater representation than they now have, the proper procedure is for such claimants to find their remedy through a bill presented to the Congress for action rather than through a report from an elections committee.

Accordingly the report recommended the following resolution:

Resolved, That E. W. Cole is not entitled to a seat in this House as a Representative from the State of Texas in the Sixty-eighth Congress.

The resolution was, on the 3d of June, 1924,[1] agreed to by the House without debate or division.

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[1] Journal, p. 636; Record, p. 10324.

Chapter CLVI.[1]

THE QUALIFICATIONS OF THE MEMBER.

1. Citizenship in the United States. Section 55.
2. Inhabitancy. Section 55.

55. The Indiana election case of Updike v. Ludlow, in the Seventy-first Congress.

Residence in the District of Columbia for years as a newspaper correspondent and maintenance there of church membership were not considered to outweigh payment of poll and income taxes, ownership of real estate, and a record for consistent voting in the district from which elected.

Excuse from jury duty in the District of Columbia on a plea of citizenship in the State from which elected and exercise of incidental rights of such citizenship, were accepted as evidence of inhabitancy.

Instance wherein the time specified by the rules within which the Election Committees of the House shall make final report on contested election cases was extended by resolution.

On December 12, 1929,[2] the contested-election case of Ralph E. Updike *v.* Louis L. Ludlow, from the seventh district of Indiana, was referred to the Committee on Elections No. 1, and on June 25, 1930,[3] Mr. Carroll L. Beedy, of Maine, from that committee, asked unanimous consent for consideration of the following resolution:

Resolved, That the Committee on Elections No. 1 shall have until January 20, 1931, in which to file a report on the contested-election case of Updike *v.* Ludlow, notwithstanding the provisions of clause 47 of Rule XI.

The resolution was considered and agreed to, and on December 20, 1930,[4] the committee submitted its report.

Mr. Ludlow was conceded to have received a majority of 6,380 votes, but his election was contested on two issues: First, on the ground that Mr. Ludlow was not an inhabitant of the State of Indiana within the meaning of the constitutional

[1] Supplementary to Chapter XIII.

[2] Second session Seventy-first Congress, Record, p. 573.

[3] Second session Seventy-first Congress, Record, p. 11701.

[4] Third session Seventy-first Congress, House Report No. 2139.

qualifications; and, second, upon the ground that his election was tainted by fraud and corruption.

In the course of the contest, the allegation of fraud and corruption was abandoned and the case finally turned on the issue of inhabitancy.

The report recounts that Mr. Ludlow was born in Indiana and resided there until 1901 when he came to Washington as a correspondent of an Indianapolis newspaper and remained in that capacity until his election in 1928.

It was shown that while his family resided in Washington except for visits back to Indiana, and he was a communiant and trustee of the Union Methodist Church in Washington, he engaged in the real estate business in Indianapolis during that time, owned unimproved land in Indiana, and expected eventually to return to that State.

It was also testified that Mr. Ludlow paid his poll tax and his income tax in Indiana and had voted regularly in Indianapolis during his entire residence in Washington.

The report thus distinguishes between legal and actual residence:

> It is the view of the committee that the term "inhabitant" as employed in section 2, Article I of the Constitution, embraces the idea of legal residence as contradistinguished from actual residence. In other words, it is the view of the committee that one's inhabitancy is where he maintains his ideal residence.
>
> It is commonly accepted that an actual resident may not be entitled to all the privileges or subject to all the duties of an inhabitant. This is clearly so when the individual goes to the trouble of paying his taxes and insisting upon his right to vote in the place of his birth which he claims as his legal residence. In such a case, one continues to be an inhabitant where he maintains his right to vote, irrespective of his actual residence. In other words, the inhabitancy of the individual is to be determined by his intention as evidenced by his acts in support thereof.

The committee referred to Mr. Ludlow's excuse from jury duty in the District of Columbia on the plea of his Indiana citizenship, and in closing their report concluded that his course of action for years was such as to indicate his intention to retain his inhabitancy in the State of Indiana.

The committee therefore unanimously recommended the adoption of a resolution confirming his right to his seat in the House.

The resolution was considered in the House on December 20, 1930,[5] and was agreed to without division.

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[5] Third session Seventy-first Congress, Record, p. 1313.

Chapter CLVII.[1]

THE OATH AS RELATED TO QUALIFICATIONS.

1. Provisions of the fourteenth amendment. Sections 56–59.

56. The case of Victor L. Berger, of Wisconsin, in the Sixty-sixth Congress.

For disloyalty to the United States, for giving aid and comfort to a public enemy, for publication of expressions hostile to the Government a Member-elect was denied a seat in the House.

The Committee on Elections declined to be governed by judgment and verdict of judge and jury of Federal court and proceeded to determine for itself the question of guilt or innocence of Member-elect charged with violation of Federal laws.

Nature and limitations of the constitutional power of expulsion discussed.

The constitutional power of expulsion is limited in its application to the conduct of Members of the House during their term of office.

On October 24, 1919,[2] Mr. Frederick W. Dallinger, of Massachusetts, from the Special Committee on Victor L. Berger Investigation, submitted the report of the majority of the committee.

On May 19, preceding,[3] at the organization of the House, when the State of Wisconsin was called, during the administration of the oath to Members, Mr. Dallinger challenged the right of Victor L. Berger, a Member-elect from that State, to be sworn in. By direction of the Speaker[4] the Member-elect stood aside and the administration of the oath to Members was concluded.

Thereupon Mr. Dallinger offered the following resolution which was agreed to:

Whereas it is charged that Victor L. Berger, a Representative-elect to the Sixty-sixth Congress from the State of Wisconsin, is ineligible to a seat in the House of Representatives; and

Whereas such charge is made through a Member of the House, and on his responsibility as such a Member, and on the basis, as he asserts, of public records and papers evidencing such an ineligibility:

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[1] Supplementary to Chapter XIV.

[2] First session Sixty-sixth Congress; House report 413; Record, p. 7475.

[3] Record, p. 8; Journal, p. 7.

[4] Frederick H. Gillett, of Massachusetts, Speaker.

Resolved, That the question of the prima facie right of Victor L. Berger to be sworn in as a Representative of the State of Wisconsin of the Sixty-sixth Congress, as well as of his final right to a seat therein as such Representative, be referred to a special committee of nine Members of the House, to be appointed by the Speaker; and until such committee shall report upon and the House decide such question and right, the said Victor L. Berger shall not be sworn in or be permitted to occupy a seat in this House; and said committee shall have power to send for persons and papers and examine witnesses on oath relative to the subject matter of this resolution,

The findings of fact by the committee appointed pursuant to this resolution are in part as follows:

Victor L. Berger was born in Austria in 1860 and came to this country in 1878, settling in Bridgeport, Conn.

In 1911 he started the Milwaukee Leader, which was at first a weekly and later became a daily paper, of which he has been the editor ever since. In 1910 he was elected as a Socialist to the Sixty-second Congress from the fifth district of the State of Wisconsin, taking the usual oath of a Member of Congress to support the Constitution of the United States, and serving from March 4, 1911, to March 4, 1913. At the election held on November 5, 1918, he was again elected as a Socialist to the Sixty-sixth Congress.

Diplomatic relations between the United States and Germany were broken off February 3, 1917, and in March, 1917, the President issued a proclamation calling a special session of Congress, which, on April 6, 1917, passed a joint resolution declaring the existence of a state of war between this country and the Imperial German Government.

On April 7, 1917, on the call of the executive committee, of which Victor L. Berger was one of the five members, there was convened in St. Louis an emergency national convention of the Socialist Party, at which a "Proclamation and War Program" was adopted, a copy of which will be found on page 117 of volume 2 of the printed hearings, and which ex-President Roosevelt characterized as "treason to the United States." This proclamation and war program was favorably reported to the convention by the committee on war and militarism, of which Victor L. Berger was a member, and his name was signed to the report.

On April 14, 1917, the Milwaukee Leader characterized the report as a "cool, scientific Marxian declaration," a copy of the entire editorial in which this characterization appears being reprinted on page 906, of volume 1 of the printed hearings; and on December 30, 1917, Berger published an editorial in the Milwaukee Leader entitled "The Party Will Stand No Wobbling," a copy of which will be found on page 907 of volume 1 of the printed hearings, which was plainly intended to intimidate D. W. Hoan, the Socialist mayor of Milwaukee, who had doubted whether he could subscribe to the Socialist war program without violating his oath of office.

This "Proclamation and War Program," which was signed by Victor L. Berger, was published in both the Milwaukee Leader and the American Socialist, and was printed and distributed in pamphlet form throughout the country, during the period from April to October, 1917, to the extent of over a million copies.

The St. Louis convention also adopted a platform making certain political demands, among them being "Resistance to compulsory military training and to the conscription of life and labor," and the "Repudiation of war debts."

On August 13, 1917, 300,000 copies of this platform were printed by order of Adolph Germer, the national secretary, and the platform was also published in the Milwaukee Leader September 8, 1917.

On July 18, 1917, at the time the Government was preparing to float a Liberty loan, the Milwaukee Leader referred to the repudiation of war debts plank in the Socialist platform as being s sentiment that would "gain rather wide popularity as time went on."

The American Socialist, of which J. Louis Engdahl was editor, Adolph Germer business manager, William F. Kruse and Irwin St. John Tucker frequent contributors, and the title to which was in the name of the national executive committee of the Socialist Party, of which Victor L. Berger was a member, contained a series of articles from the time of our entrance into the war

and throughout the year 1917, copies of which will be found in full in the Government exhibits of the printed hearings.

The article entitled "The Price We Pay," written by Irwin St. John Tucker, was afterwards printed as a pamphlet and widely circulated by Germer, the national secretary, during the summer of 1917. On June 9, 1917, the Milwaukee Leader in an editorial favorably commented upon this pamphlet and its sale was repeatedly advertised in its columns.

In the Milwaukee Leader, of which Victor L. Berger was the editor in chief, and for all articles in which, both at the Chicago trial and before your committee, he assumed full responsibility, there appeared during the period from June 18 to September 13, 1917, a series of editorials and articles, copies of which will be found on pages 514 to 530, inclusive, of volume 1 of the printed hearings. As a result of the publication of these articles, on October 3, 1917, the second-class mailing privilege of the Milwaukee Leader was revoked by the Postmaster General, on the ground that the matter there published evinced a purpose and intent to "willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, to promote the success of its enemies during the present war, and willfully cause and attempt to cause insubordination, disloyalty, mutiny, and refusal of duty in the military or naval forces of the United States, and to willfully obstruct the recruiting or enlistment service in the United States, to the injury of the service and of the United States," under the provisions of section 1 of Title 12 of the act of June 15, 1917, commonly known as the espionage act. The Court of Appeals of the District of Columbia, a copy of the decree of which will be found on page 504 of volume 1 of the printed hearings, in affirming the judgment of the lower court in dismissing a petition for a writ of mandamus, says in regard to these articles:

"No one can read them without becoming convinced that they were printed in a spirit of hostility to our own Government and in a spirit of sympathy for the Central Powers; that, through them, appellant sought to hinder and embarrass the Government in the prosecution of the war."

In this opinion your committee concurs.

On February 2, 1918, Victor L. Berger, Adolph Germer, J. Louis Engdahl, William F. Kruse, and Irwin St. John Tucker were indicted by the grand jury in the District Court of the United States for the Northern District of Illinois, eastern division, for the violation of the provisions of sections 3 and 4 of Title 1, of the act of June 15, 1917, known as the espionage act.

Their trial, which was a most exhaustive one, began in Chicago on December 9, 1918, before Judge Landis and a Federal jury, and on January 8, 1919, the defendants were found guilty as charged in the indictment, and on February 20, 1919, each was sentenced to 20 years' imprisonment in the United States Penitentiary at Fort Leavenworth, Kans. An appeal from this decision was taken by the defendants, which is still pending in the United States Circuit Court of Appeals for the Seventh District.

Your committee decided at the outset that it would not be governed by the action of the judge and jury at the Chicago trial, but would carefully consider all the evidence both at that trial and in the proceedings before the Court of Appeals of the District of Columbia, together with all the evidence introduced at the hearings before the committee, to determine for itself the question of whether or not Victor L. Berger was guilty of a violation of the espionage act, whether or not he did give aid or comfort to the enemies of the United States during the war with Germany, and whether or not he is ineligible to a seat in the House of Representatives.

After a careful consideration of all the evidence, in the opinion of your committee the admitted acts, writings, and declarations of Victor L. Berger and of the men with whom he was associated in the management and control of the Socialist Party from the time of the entrance of this country into the war until their indictment by a Federal grand jury, giving such acts and the language of the writings and declarations their ordinary everyday meaning and without considering any other evidence, clearly establishes a conscious, deliberate and continuing purpose and intent to obstruct, hinder, and embarrass the Government of the United States in the prosecution of the war and thus to give aid and comfort to the enemies of our country. The writings and activities of Mr. Berger and his associates could have had no other purpose. That Victor L. Berger was disloyal to the United States of America and did give aid and comfort to its enemies at a time when its existence as a free and independent Nation was at stake there can not be the slightest doubt.

The briefs submitted in the case contended that the House was without authority to expel a Member-elect. As to this contention the majority report says:

Inasmuch as some question has been raised as to the authority of the House of Representatives to exclude a Member elect, it may be well to review briefly the legal precedents involved in the present case.

Section 5, Article I, of the Constitution A the United States, provides:

"Each House shall be the judge of the elections, returns, and qualifications of its own Members."

Under this provision of the Constitution, the House of Representatives has always maintained its absolute right to exclude Members-elect and to prevent their taking the oath of office.

The report then discusses the right of the House to exclude, as maintained by decisions of the House, in the Kentucky Cases of 1867, the Whittemore case in the Forty-first Congress, the case of Cannon *v.* Campbell in the Fortyseventh Congress, and the Roberts case in the Fifty-sixth Congress. The report thus differentiates between the last two cases and the case at bar:

In the present case there is a fourth qualification prescribed by the Constitution, or rather a fourth prohibition, as the qualifications set forth in the Constitution are put in negative form, which applies to Representative elect Berger, and did not apply in the Cannon and Roberts cases. Section 3 of the fourteenth amendment to the Constitution of the United States provides as follows:

"No person shall be a Senator or Representative in Congress, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability."

In reference to this very plain prohibition of the Constitution, counsel for Representative elect Berger contends that the fourteenth amendment was adopted as a result of the Civil War and that section 3 has been entirely repealed by an act of Congress passed in 1898, which provided as follows:

"That the disability imposed by section three of the fourteenth amendment to the Constitution of the United States heretofore incurred is hereby removed.

"(U. S. Stats. L., vol. 30, ch. 389, p. 432.)"

It must be perfectly evident that Congress has no power whatever to repeal a provision of the Constitution by a mere statute, and that no portion of the Constitution can be repealed except in the manner prescribed by the Constitution itself. While under the provisions of section 3 of the fourteenth amendment Congress was given the power, by a two-thirds vote of each House, to remove disabilities incurred under this section, manifestly it could only remove disabilities incurred previously to the passage of the act, and Congress in the very nature of things would not have the power to remove any future disabilities. This was plainly recognized when the words "heretofore incurred" were placed in the act itself.

It was also seriously contended by counsel that section 3 of the fourteenth amendment was an outgrowth of the Civil War and that such a provision can not possibly apply to the present case. It is perfectly true that the entire fourteenth amendment was the child of the Civil War and that its main purpose was the security and protection of the political and civil rights of the African race. It is equally true, however, that its provisions are for all time, and are as the United States Supreme Court well said in the case of Yick Wo *v.* Hopkins, "universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, color, or of nationality." (Yick Wo *v.* Hopkins, 118 U.S., 369.) It is inconceivable that the House of Representatives, which without such an express provision in the Constitution repeatedly asserted its right to exclude Members-elect for disloyalty, should ignore this plain prohibition which has been contained in the fundamental law of the Nation for more than half a century.

57. The case of Victor L. Berger, of Wisconsin, continued.

As to the meaning of the words "aid or comfort" as used in the fourteenth amendment to the Constitution.

As to the meaning of the words "freedom of speech" as used in the first amendment to the Constitution.

A Member-elect, who had not taken the oath, was excluded from the House for disloyalty.

Interpretations of the words "aid and comfort" as used in the fourteenth amendment are reviewed:

On the question as to the meaning of the words "aid or comfort" as used in the fourteenth amendment, it was held in the case of McKee *v.* Young, in the Fortieth Congress, to which reference has already been made, that "aid and comfort may be given to an enemy, by words of encouragement, or the expression of an opinion from one occupying an influential position."

In the case of Smith *v.* Brown, in the same Congress, the only evidence relied upon to support the charge of disloyalty was a letter written by the contestee to a newspaper.

Interpretations of the meaning of the words "freedom of speech" as used in the first amendment are also reviewed:

It was argued at great length, both by Mr. Berger and his counsel, that his conviction at Chicago and any attempt to deprive him of his seat in Congress would be a violation of the freedom of speech and the press guaranteed by the first amendment to the Constitution of the United States.

In the case of Abraham L. Sugarman *v.* United States (249 U.S., 182) Mr. Justice Brandeis, in delivering the unanimous opinion of the court, said:

"But 'freedom of speech' does not mean that a man may say whatever he pleases without the possibility of being called to account for it."

In the case of Charles P. Schenck et al. *v.* United States (249 U.S., 47), which was a case of conspiracy in which the testimony was very similar and in some respects almost identical to that in the present case, Mr. Justice Holmes in delivering the unanimous opinion of the court said:

"But, it is said, suppose that that was the tendency of this circular, it is protected by the first amendment to the Constitution. Two of the strongest expressions are said to be quoted, respectively, from well-known public men."

* * * * * * * * *

"We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done."

* * * * * * * * *

"The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right."

* * * * * * * * *

"It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. The statute of 1917, in section 4, punishes conspiracies to obstruct as well as actual obstruction. If the act (speaking or circulating a paper), its tendency, and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime."

In the case of Eugene V. Debs *v.* The United States of America (249 U.S., 211), in which case the defendant Debs had been convicted and sentenced under the espionage act for a speech made by him at Canton, Ohio, on June 16, 1918, Mr. Justice Holmes in delivering the opinion of the court said:

"The main theme of the speech was socialism, its growth, and a prophecy of its ultimate success. With that we have nothing to do. * * *

"The defendant addressed the jury himself, and while contending that his speech did not warrant the charges, said: 'I have been accused of obstructing the war. I admit it. Gentlemen, I abhor war. I would oppose the war if I stood alone.' The statement was not necessary to warrant the jury in finding that one purpose of the speech, whether incidental or not does not matter, was to oppose not only war in general but this war, and that the opposition was so expressed that its natural and intended effect would be to obstruct recruiting. If that was intended and if, in all the circumstances, that would be its probable effect, it would not be protected by reason of its being part of a general program and expressions of a general and conscientious belief."

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"There was introduced also an 'antiwar proclamation and program,' adopted at St. Louis in April, 1917, coupled with testimony that about an hour before his speech the defendant had stated that he approved of that platform in spirit and in substance."

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"This document contained the usual suggestion that capitalism was the cause of the war and that our entrance into it 'was instigated by the predatory capitalists in the United States.' It alleged that the war of the United States against Germany could not 'be justified even on the plea that it is a war in defense of American rights or American honor.' It said, 'We brand the declaration of war by our Government as a crime against the people of the United States and against the nations of the world. In all modern history there has been no war more unjustifiable than the war in which we are about to engage.' Its first recommendation was 'continuous, active, and public opposition to the war, through demonstrations, mass petitions, and all other means within our power.' Evidence that the defendant accepted this view and this declaration of his duties at the time that he made his speech is evidence that if in that speech he used words tending to obstruct the recruiting service he meant that they should have that effect."

Summarizing the conclusion of the committee on the authority of the House in the exclusion of a Member-elect the majority report continues:

Counsel for Representative-elect Berger spent considerable time both at the outset of these proceedings and throughout the hearings in arguing the proposition that the House of Representatives has no constitutional right to exclude a member-elect, even if guilty of treason or other crime, if he presents himself to the House with a certificate from the Governor of his State, showing that he has been duly elected; and that the only course open to the House is to permit the member in question to be sworn in as a member of the House and then to expel him by a two-thirds vote. As has already been stated, counsel also contended that the prohibition contained in section 3 of the fourteenth amendment to the Constitution is no longer applicable.

As has already been shown in this report, both of these contentions are unsound and are not supported either by principle or by precedent. In the first place, the House of Representatives has always insisted upon its right to exclude members-elect and has also consistently refused to expel a member once he has been sworn in for any offense committed by him previous to his becoming a member, on the ground that the constitutional power of expulsion is limited in its application to the conduct of members of the House during their term of office. In the second place, as has already been pointed out, the contention that section 3 of the fourteenth amendment to the Constitution is no longer applicable, is not worthy of serious consideration.

In conclusion the majority report holds:

When the attention of counsel for Representative-elect Berger was called to those recent decisions of the Supreme Court of the United States, he criticized them as being contrary to all the fundamental principles of Anglo-Saxon liberty.

Your committee is convinced that the members of the House of Representatives are bound by their oaths to support the Constitution of the United States which declares that instrument and all acts of Congress passed in pursuance thereof to be the supreme law of the land. Inasmuch, therefore, as the espionage act has been declared by the Supreme Court of the United

States to be in pursuance of the Constitution, no question can now be raised by law-abiding citizens as to its full force and virtue. The essential purpose of this act was to prevent persons from obstructing and embarrassing the Government in the prosecution of the war and all the evidence in this case conclusively proves that Victor L. Berger from the time of the outbreak of the war until his indictment by the Federal grand jury continually did willfully hinder, obstruct, and embarrass the Government of the United States and thus gave aid and comfort to its enemies, and in the opinion of your committee is unfit and ineligible to sit as a member of our highest lawmaking body. That he should be permitted, after his treasonable conduct, to occupy a seat in the American House of Representatives, is inconceivable. While there has in the past been some opposition on the part of a small minority to the well established practice of the House of Representatives in excluding unfit persons from membership on the ground that the House has no right to add to the qualifications prescribed in the Constitution, in the present case it is perfectly plain that under the Constitution itself, if the House is satisfied that Representative-elect Berger did give aid or comfort to the enemies of the United States, he is ineligible to a seat in this House, and it is not only the right but the constitutional duty of the House to exclude him. Your committee, therefore, recommends the adoption of the following resolution:

"Resolved, That under the facts and circumstances of this case, Victor L. Berger is not entitled to take the oath of office as a Representative in this House from the fifth congressional district of the State of Wisconsin or to hold a seat therein as such Representative."

The report is concurred in by all members of the committee with the exception of Mr. William A. Rodenberg, of Illinois, who submits separate views in which, without taking issue with the committee as to the merits of the case, he advocates the suspension of action on the question involved until the court of appeals had passed upon the appeal at that time pending before it.

He did not, however, offer resolutions, and when the case came up in the House, November 10, 1919,[1] the resolution recommended by the majority of the committee was, after exhaustive debate, agreed to by the House, yeas 311, nays 1.

58. The Wisconsin election case of Carney v. Berger in the Sixty-sixth Congress.

A Member-elect found to have obstructed the Government in the prosecution of war, and to have given aid and comfort to its enemies, was declared ineligible to membership in the House.

The opinion of one Member of the Elections Committee, not necessarily approved by the House, is insufficient to establish a precedent.

In judging elections, qualifications, and returns of Representatives in Congress, the House does not consider itself bound by constructions placed upon State laws by the courts of the State.

Disqualification of the Member-elect does not authorize the seating of a contestant not found to be elected.

On October 24, 1919,[2] Mr. Frederick W. Dallinger, of Massachusetts, from the Committee on Elections No. 1, submitted the report of the committee in the Wisconsin case of Joseph P. Carney *v.* Victor L. Berger.

At this election Victor L. Berger, the contestee, received 17,920 votes; Joseph P. Carney, the contestant, received 12,450 votes; and William H. Stafford received 10,678 votes.

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[1] Journal, p. 571; Record, p. 8219.

[2] First session Sixty-sixth Congress; House report No. 414; Record, p. 7475.

No question was raised as to the regularity of the election or the correctness of the election returns. The only question involved was the eligibility of the Member-elect and the seating of the candidate receiving the next highest number of votes in event of his being declared ineligible.

The case was fully stated in the report of the special committee appointed to investigate the eligibility of Victor L. Berger to a seat in the House, and the committee concurs in the opinions expressed in that report as follows:

In regard to the first question, your committee concurs with the opinion of the special committee appointed under House resolution No. 6, that Victor L. Berger, the contestee, because of his disloyalty, is not entitled to the seat to which he was elected, but that in accordance with the unbroken precedents of the House, he should be excluded from membership; and further, that having previously taken an oath as a Member of Congress to support the Constitution of the United States, and having subsequently given aid and comfort to the enemies of the United States during the World War, he is absolutely ineligible to membership in the House of Representatives under section 3 of the fourteenth amendment to the Constitution of the United States.

This question having been disposed of, the only question remaining is whether the contestant, who received the next highest number of votes, is entitled to the seat.

The committee decide:

The only congressional precedent cited by counsel for the contentant is the case of Wallace *v.* Simpson in the Forty-first Congress. In this case neither the contestant nor the contestee were sworn in at the convening of the House of Representatives. The matter was referred to the Committee on Elections and a subcommittee of that committee unanimously reported in favor of the contestant. This report however was based on three grounds:

First. That the ineligibility of the contestee involved the election of the contestant.

Second. That the election was void in six of the nine counties and the contestant had a majority in those counties.

Third. That if no counties were rejected, enough voters were prevented from voting by violence and intimidation to have given the majority in the district to the contestant if they had voted.

The first proposition, which is the one on which counsel for the contestant in the present case relies, was agreed to only by Mr. Cassna, the chairman of the committee, who drew the report; Mr. Hale agreed to the second and third propositions; and Mr. Randall to the third only. Under a rule of the House at that time a subcommittee was authorized to report directly to the House, and in this case the subcommittee recommended that the contestant be seated and the House accepted the report. (Rowell's Digest of Contested Election Cases, 1790–1901, p. 245.)

It is plainly evident, however, that the proposition that the ineligibility of the contestee involved the election of the contestant was simply the opinion of one member of the committee and did not establish a precedent for the House of Representatives. (Rowell's Digest of Contested Election Cases, 1790–1901, p. 220.)

Various other cases cited in support of the contestant's contention are discussed by the committee and held not sufficiently germane to be considered as precedents.

In discussing the Wisconsin case of Bancroft *v.* Frear so cited, the committee further declare:

It is contended, however, by counsel for the contestant in the present case that Congress is bound by the laws of the States and inasmuch as the case of Bancroft *v.* Fear is now the law in the State of Wisconsin, that the House of Representatives is bound thereby, and that Joseph P. Carney, the, Democratic contestant, is therefore entitled to a seat in the House. Such, however, in the opinion of your committee, is *not* the law.

In summing up the case the committee conclude:

Your committee, upon all the law and the evidence, is of the opinion that, first, Victor L. Berger, the contestee, is not entitled to the seat to which he was elected; and, second, that Joseph P. Carney, the Democratic contestant, who received the next highest number of votes, is not entitled to the seat. Inasmuch as the special committee appointed under authority of House resolution No. 6 has already recommended to the House a resolution declaring the contestee ineligible, it is not necessary for your Committee on Elections No. 1 to make a similar recommendation. The committee, however, does recommend the adoption of the following resolutions:

"Resolved, That Joseph P. Carney, not having received a plurality of the votes cast for Representative in this House from the fifth congressional district of Wisconsin, is not entitled to a seat therein as such Representative.

"Resolved, That the Speaker be directed to notify the Governor of Wisconsin that a vacancy exists in the representation in this House from the fifth congressional district of Wisconsin."

The case was considered in the House on November 10, 1919,[1] immediately after the disposition of the case of Victor L. Berger. After brief debate the resolutions recommended by the committee were agreed to, and the seat was vacated.

59. The Wisconsin election case of Bodenstab v. Berger in the Sixty-sixth Congress.

Two committees of the House having adjudged a Member-elect to be ineligible to membership in the House of Representatives, and the House having twice refused to seat him, the committee a third time declared him to be ineligible, but did not consider it necessary to recommend a resolution to that effect.

The House, after declaring a Member-elect ineligible, refused to seat the candidate receiving the next highest number of votes.

The House declines to seat a candidate receiving less than a plurality of the votes cast in the district.

The English law under which a minority candidate succeeds to a vacancy resulting from the disqualification of the majority candidate is not applicable under the Constitution.

On February 5, 1921,[2] Mr. Frederick W. Dallinger, of Massachusetts, from the Committee on Elections No. 1, submitted the report of the majority of the committee in the Wisconsin case of Henry H. Bodenstab *v.* Victor L. Berger.

The contestee in this case was a candidate in a former election and received a majority of all the votes cast in the district in that election. When he appeared to take the oath, objection was made to his being sworn in and a special committee was appointed to investigate his eligibility to a seat in the House. The committee reported adversely, and on November 10, 1919, the House by a vote of 311 to 1 declared he was ineligible.

On the same day in the House, in deciding the case of Carney *v.* Berger, again declared him to be ineligible and vacated the seat.

Subsequently the Governor of Wisconsin called a special election to fill the vacancy thus created. At this election Victor L. Berger was again a candidate and received 24,350 votes, and Henry H. Bodenstab, the contestant, received 19,566.

[1] Journal, p. 571; Record, p. 8262.

[2] Third session Sixty-sixth Congress, House report 1300; Record, p. 2085.

votes. No question was raised as to the regularity of the election or the correctness of the election returns, but on January 10, 1920, when the contestee again appeared to take the oath of office, the House by a vote of 330 yeas to 6 nays agreed to the following resolution:

Whereas Victor L. Berger, at the special session of the Sixty-sixth Congress, presented his credentials as a Representative elect to said Congress from the fifth congressional district of the State of Wisconsin; and

Whereas on November 10, 1919, the House of Representatives, by a vote of 311 to 1, adopted a resolution declaring that "Victor L. Berger is not entitled to take the oath of office as a Representative in this House from the fifth congressional district of the State of Wisconsin or to hold a seat therein as such Representative," by reason of the fact that he had violated a law of the United States, and, having previously taken an oath as a Member of Congress to support the Constitution of the United States, had given aid and comfort to the enemies of the United States, and for other good and sufficient reasons; and

Whereas the said Victor L. Berger now presents his credentials to fill the vacancy caused by his own ineligibility; and

Whereas the same facts exist now which the House determined made the said Victor L. Berger ineligible to a seat in said House as a Representative from said district: Now, therefore, be it

"Resolved, That by reason of the facts herein stated, and by reason of the action of the House heretofore taken, the said Victor L. Berger is hereby declared not entitled to a seat in the Sixty-sixth Congress as a Representative from the said fifth district of the State of Wisconsin, and the House declines to permit him to take the oath and qualify as such Representative."

As the pleadings required by statute had not at that time been completed, no action was taken on the contest instituted by the contestant.

Subsequently when testimony and briefs had been submitted the committee reported:

Inasmuch as two committees of the House of Representatives have twice reported that Victor L. Berger, the contestee, is not eligible to membership in the House of Representatives, and inasmuch as the House of Representatives itself has twice, by an overwhelming vote, refused to seat the said Victor L. Berger, the contestee, on the ground that he is ineligible to membership therein, and inasmuch as there is no additional testimony in this case, your committee finds that Victor L. Berger, the contestee, is ineligible to membership in the House of Representatives, but recommends no resolution, for the reason that the House of Representatives has already finally determined that question so far as the present Congress is concerned.

This phase of the case having been disposed of the only question remaining to be considered was whether the contestant was entitled to the seat.

At the time of the regular election held November 5, 1918, the contestee, Victor L. Berger, had already been indicted for violation of the espionage act. At the time of the special election on December 19, 1919, he had been convicted of the crime for which indicted, and sentenced to imprisonment in the Federal penitentiary. Moreover, the House of Representatives had by resolution declared him ineligible to a seat in the House. It is evident, therefore, that those who voted for him at the special election must have had ample notice at the time of the fact that he had been adjudged ineligible.

For this reason the minority views, submitted by Mr. Clifford E. Randall, of Wisconsin, argue that the votes cast for contestee are void and that as the con-

testant received a majority of the votes cast for an eligible candidate, he is entitled to be seated.

In support of that doctrine he cites numerous cases, including that of Bancroft *v.* Frear decided by the Supreme Court of Wisconsin. (Vol. 144, p. 79, Wisconsin Reports.)

The majority, however, hold this position untenable, and say that while this is the prevailing doctrine in Great Britain, it has never been recognized by the United States House of Representatives.

The majority report continues:

> The committee found that precisely the same question was raised in the contested-election case of Maxwell *v.* Cannon in the Forty-third Congress; in the case of Campbell *v.* Cannon, in the Forty-seventh Congress; and in the case of Lowry *v.* White, in the Fiftieth Congress; in all of which the Committee on Elections of the House of Representatives rejected the doctrine that where the candidate who received the highest number of votes is ineligible, the candidate receiving the next highest number of votes is entitled to the office.
>
> In the previous case of Carney *v.* Berger, your committee also considered very carefully the general question of whether Congress is bound by the law of the State in which the contest arises.
>
> After an exhaustive examination of the authorities, your committee came to the unanimous conclusion that where the law of a State in a matter of this kind is contrary to the unbroken precedents of the House of Representatives in election cases the congressional precedent must prevail, anything in the laws of the State or decisions of its supreme court to the contrary notwithstanding.
>
> While it is true that in the present case the voters of the fifth congressional district of Wisconsin can fairly be said to have had constructive notice of the fact that Victor L. Berger, the contestee, was ineligible to membership in the House of Representatives, which circumstances was lacking in the case of Carney *v.* Berger, nevertheless this additional fact offers no reason why you committee and the House of Representatives should allow a decision of the Supreme Court of Wisconsin or of any other State to override an unbroken line of congressional precedents and establish a new rule in determining contested-election cases in the Congress of the United States.

The majority then discuss the case of McKee *v.* Young, cited as a precedent for the seating of the contestant, failing to find any parallel between that case and the present case, and quoting at length from the statement of the Committee on Elections in its report on the case of Smith *v.* Brown in the Fortieth Congress in opposition to the English rule.

In summing up the law and the evidence the majority of the committee conclude that while Victor L. Berger is not entitled to the seat and has been so adjudged by resolution of the House, neither is Henry H. Bodenstab entitled to it, and accordingly recommend the following resolution:

> *Resolved,* That Henry H. Bodenstab, not having received a plurality of the votes cast for Representative in this House from the fifth congressional district of Wisconsin, is not entitled to a seat therein as such Representative.

The minority concur in the findings of fact as stated by the majority report, but differ sharply in their views as to the law applicable to the case.

The English rule, under which the candidate having the next highest number of votes is seated when the majority candidate is disqualified, is stressed, and the following distinction drawn between cases relied upon by the majority and the case under discussion:

The precise question involved in this case has never been before the House of Representatives. The majority opinion refers to, relies upon, and quotes with approval several House decisions in election cases which are supposed to be inconsistent with the principles of law hereinbefore stated. Examination of these cases demonstrates clearly that in none of them was it established that the electors had knowledge of the ineligibility of the candidate voted for.

Each case is discussed separately and the lack of knowledge of the candidate's ineligibility on the part of the voters at the time of the election is pointed out.

The minority conclude with the recommendation of a resolution declaring Henry H. Bodenstab elected and entitled to a seat in the House of Representatives.

The report was briefly debated in the House on February 25, 1921,[1] and the resolution of the minority declaring the contestant elected was disagreed to. The resolution recommended by the majority was then agreed to, and the seat remained vacant.

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[1] Journal, p. 248; Record, p. 3883.

Chapter CLVIII.[1]

INCOMPATIBLE OFFICES.

60. The examination of 1916 as to incompatibility of commissions in the Army with Membership in the House.

Conclusion of the Judiciary Committee that acceptance of commission in the National Guard by a Member vacates his seat.

Action on part of the House not essential to relinquishment of seat through acceptance of incompatible office, but deemed necessary as a matter of public convenience.

Discussion as to what constitutes "public office."

On June 7, 1916,[2] Mr. James R. Mann, of Illinois, offered the following resolution, which was agreed to by the House:

Resolved, That in order to determine the status of certain Members of this House, with reference to whether there is any disqualification of such Members by reason of such Members holding commission in the National Guard of the various States, the Judiciary Committee is hereby directed to investigate such question and to report its conclusion thereon at such early date as may be convenient to such committee.

In explaining the purpose of the resolution, Mr. Mann said:

There are several Members of the House who hold commissions in the National Guard of the various States. There was no question in reference to that before the enactment of the recent Army reorganization bill. Under that act, there is pay that goes to the officers, and several Members have asked me in reference to their status, whether they could still remain members of the National Guard and of the House. I have a resolution asking the Committee on the Judiciary to make an investigation of the subject so that they may have their standing known.

On June 29 Mr. Edwin Yates Webb, of North Carolina, from that committee, submitted a report[3] in accordance with the resolution of instructions.

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[1] Supplementary to Chapter XVI.

[2] First session Sixty-fourth Congress, Record, p. 9324; Journal, p. 773.

[3] House Report No. 885.

After quoting section 6, Article I, of the Constitution, and referring to the act of June 3, 1916, making provision for the national defense, the report thus analyzes the question submitted:

The practical question submitted to the committee by the resolution, therefore, is, Does a Representative in Congress cease to be such a Representative upon his acceptance of a commission in the National Guard under the provisions of the act of Congress mentioned?

As to whether a commission in the National Guard may be considered to be an "office" within the meaning of the Constitution, the report says:

In United States *v.* Hartwell (6 Wall., 385), the Supreme Court of the United States said that the term "public office" embodies the ideas of tenure, duration, emoluments, and duties, and that the duties are continuing and permanent, not occasional and temporary.

Accepting this as a correct definition, we must, then, look to the act of Congress above referred to and determine whether a commissioned officer in the National Guard, under the provisions of the said act, is an officer of the United States.

Section 58 of the act mentioned provides that—

"The National Guard shall consist of the regularly enlisted militia between the ages of eighteen and forty-five years, organized, armed, and equipped as hereinafter provided, and of commissioned officers between the ages of twenty-one and sixty-four years."

Section 60 provides that the organization of the National Guard shall be the same as that which shall be prescribed for the Regular Army, subject in time of peace to such general exceptions as may be authorized by the Secretary of War, and authorizes the President to prescribe the particular unit or units, as to branch or arm of service, to be maintained in each State, Territory, or the District of Columbia, in order to secure a force which, when combined, shall form complete higher tactical units.

Section 64 authorizes the President to assign the National Guard of the several States and Territories to divisions, brigades, and other tactical units, and to detail officers either from the National Guard or the Regular Army to command such units.

Section 65 provides that—

"The President may detail one officer of the Regular Army as Chief of Staff, and one officer of the Regular Army or of the National Guard as assistant to the Chief of Staff of any division of the National Guard in the service of the United States as a National Guard organization."

Section 67 provides as follows:

"A sum of money shall hereafter be appropriated annually, to be paid out of any money in the Treasury not otherwise appropriated, for the support of the National Guard, including the expense of providing arms, ordnance stores, quartermaster stores and camp equipage, and all other military supplies for issue to the National Guard, and such other expenses pertaining to said guard as are now or may hereafter be authorized by law."

Section 69 provides that enlistment contracts shall be for a period of six years.

Section 70 provides that enlisted men in the National Guard shall enter into enlistment contracts, such contracts to contain an obligation to defend the Constitution of the United States, and to take an oath to the same effect.

Section 72 provides that enlisted men may be discharged from service in the National Guard in such form as shall be prescribed for the Regular Army, and in time of peace discharges may be given prior to the expiration of terms of enlistment under such regulations as the President may prescribe.

Section 74 provides that persons hereafter commissioned as officers in the National Guard shall not be recognized as such unless they shall have taken and subscribed to the oath of office prescribed by the act.

Section 75 provides that—

"The provisions of this act shall not apply to any person hereafter appointed an officer of the National Guard unless he first shall have successfully passed such tests as to his physical, moral, and professional fitness as the President shall prescribe. The examination to determine such

qualifications for commission shall be conducted by a board of three commissioned officers appointed by the Secretary of War from the Regular Army or the National Guard, or both."

Section 76 provides a method of filling vacancies in commissioned officers in the National Guard, and that the same shall be filled by the President as far as practicable by the appointment of persons similarly taken from said guard and in the manner prescribed by law for filling similar vacancies occurring in the volunteer forces.

Section 92 further provides that each company, troop, battery, and detachment in the National Guard shall assemble for drill and instruction, including indoor target practice, not less than 48 times each year, and in addition thereto shall participate in encampments, maneuvers, or other exercises, including outdoor target practice, at least 15 days in training each year, including target practice, unless such company, troop, battery, or detachment shall have been excused from participation in any part thereof by the Secretary of War.

Section 93 gives the Secretary of War the right to have the National Guard inspected, both the enlisted men and the commissioned officers, with a view to ascertaining both the equipment and qualifications.

Section 94 provides that the President of the United States shall authorize the Secretary of War to call out for drill, target practice, and military exercises all or any part of the National Guard of any of the States, Territories, or the District of Columbia. If further provides that officers and enlisted men of the National Guard while so engaged shall be entitled to the same pay, subsistence, and traveling expenses as that of officers and enlisted men of the United States Army.

Section 103 gives to the President of the United States the power to order a court-martial of any enlisted man or commissioned officer in time of peace, and without previously having said organization called to the regular service of the United States.

Sections 109 and 110 provide that commissioned officers of the National Guard shall receive certain compensations under regulations prescribed by the Secretary of War, and further provide as follows, in section 110:

"All amounts appropriated for the purpose of this and the last preceding section shall be disbursed and accounted for by the officers and agents of the Quartermaster Corps of the Army, and all disbursements under the foregoing provisions of this section shall be made as soon as practicable after the thirty-first day of December, and the thirtieth day of June of each year upon pay rolls prepared and authenticated in the manner to be prescribed by the Secretary of War."

Considering the accepted definition of the term "public offices" in connection with these provisions of the national defense act, the report decides:

From the foregoing provisions it is apparent that a commissioned officer in the National Guard clearly meets the definition in United States *v.* Hartwell of an officer of the United States; that is, that his office embraces the idea of tenure, duration, emoluments, and duties, and that his duties are continuing and permanent, not occasional and temporary. As such commissioned officer serves under an act of Congress, he takes an oath that he will obey the orders of the President of the United States (see sec. 73, act June 3, 1916), and will act under such rules and regulations as may be prescribed by the President and Secretary of War, perform the duties prescribed by the President and Secretary of War, and will be entitled to receive such compensation from the Federal Government for his services as may be prescribed and appropriated by Congress.

Having thus determined the status of an office in the National Guard, the committee then take up the question as to the incompatibility of such office with that of a seat in the House.

The report states the question as follows:

The only question, then, to be considered is, whether as an officer he is disqualified to fill a seat in the House of Representatives of the Congress of the United States.

From the earliest time it has been recognized as a plain principle of public policy that "where two offices are incompatible they can not be held by the same person." Incompatibility exists where the nature and duties of the two offices are such as to render it improper, from consideration

of the public policy, for one incumbent to fill both, the rule being that the acceptance of the second office vacates the first. From the further discussion of the duties and requirements of the two offices under consideration it will clearly appear that they are incompatible. The question here presented, however, is not to be determined by any general rule of public policy as promulgated by the courts and dependent upon a finding of incompatibility; but rests upon the plain prohibition contained in the clause of the Constitution already quoted.

The report then goes on to cite the cases of John P. Van Ness, in the Seventh Congress; Edward D. Baker, in the Twenty-ninth Congress; Frank P. Blair, in the Thirty-eighth Congress; and quotes at length the report of the Committee on the Judiciary on the subject in the Fifty-fifth Congress.

Applying the principles discussed in these cases, the committee conclude:

No line can be drawn between the large and the small office. The Constitution prohibits a Member of Congress from holding "any office under the United States while a Member of either House." If a Member should hold any office under the United States, the prohibition of the Constitution at once intervenes and declares that he shall not "be a Member of either House."

It follows that the seats of those Members of the House of Representatives who shall accept commissions in the National Guard of the various States under the act of Congress of June 3, 1916, will at once become vacant. The only action necessary would be to declare such vacancy by resolution as a matter of convenience and to aid the Speaker and others in discharging their public duties. It would not change the legal effect of accepting such an office in the National Guard.

The committee, therefore, reports in answer to the resolution that any Member of the House holding a commission in the National Guard under the provisions of the act of Congress of June 3, 1916, would at once be disqualified from acting as a Member of the House.

61. The examination of 1916 as to incompatibility of commissions in the Army with Membership in the House, continued.

Instance wherein appropriations were made for salaries of Members withheld during absence in military service.

Passage by the House of resolution authorizing payments of salaries of Members accepting commissions in the Army.

The report of the committee was not acted on by the House, but on February 28, 1919,[1] during consideration of the deficiency appropriation bill, Mr. Mann offered an amendment providing for payment of salary and clerk hire of Members who had accepted such commissions in the military service.

The amendment was agreed to, and Mr. Finis J. Garrett, of Tennessee, said:

The amendment proposed by the gentleman from Illinois has been agreed to. As a matter of fact, those gentlemen who left the House of Representatives and accepted commissions in the Army, under all the holdings of the past as reported by the Committee on the Judiciary following an investigation of precedents made in order by a resolution offered by the gentleman from Illinois calling upon them for a report, forfeited their seats as Members of the House of Representatives. I say those who accepted commissions. Those who went as privates, of course, occupied a different status.

Now, there is not any doubt about that. There is not any doubt in the mind of any gentleman here. Here, unfortunately, is what, because of our unwillingness to engage in an ungracious act, we are doing: We are providing an entirely different plane for men who left the House of Representatives and went into the Army from those who left other departments of the Government and went into the Army. I have no doubt, so far as I am personally concerned, of the

[1] Third session Sixty-fifth Congress, Record, p. 4623.

correctness of the report made by the Committee on the Judiciary. I have no doubt that they were correct under the precedents; I have no doubt they were right under the reasoning. I did not make the point of order. It would have been an ungracious thing to do; it would have been an exceedingly objectionable thing to do to the membership of the House, and yet this opportunity having arisen to express myself, I wish to take advantage of it to say that I did not approve of the amendment.

Mr. Richard Wayne Parker, of New Jersey, added:

The House ought to understand the last decision that was had with reference to this matter of Army service of Members of Congress and their pay.

The Constitution of the United States provides that no person holding any office under the United States shall be a Member of either House during the continuance of that office. During the Spanish-American War several Members of this House went into the war, which was a very temporary affair, as officers of volunteers, and a resolution was offered, which went before the Committee on the Judiciary, inquiring whether they had forfeited their seats. There had been a good deal of contradictory practice in the House of Representatives before that time, during the Civil War, and no one had ever actually been turned out of the House. The provision of the Constitution is different from that of the statute in England. In England, if any member of Parliament accepts any office under the Crown, the statute declares his seat vacant and forfeited, and that a writ of election shall immediately issue. Our Constitution does not say that the seat is forfeited forever. It simply says that no one holding office under the United States shall be a Member of either House during the continuance of his office. When this matter came before the Committee on the Judiciary, then presided over by Mr. Henderson, a resolution was reported by the majority of the committee that each of these Members, of whom Gen. Wheeler was one, had forfeited his seat. I filed a minority report, to protect these officers, suggesting that the Constitution recognized the necessity sometimes of using Members of Congress for temporary employment. The United States had sent Senators over as commissioners to Europe in order to negotiate peace and had sent Mr. Dingley to Canada as commissioner to negotiate a treaty. And while I acknowledged and believed that during the continuance of such office under the United States, such temporary office, the man was not in Congress and could not draw his pay or emoluments here, yet I insisted that if no notice was taken by Congress or by the States of the fact that the vacancy existed, the membership was only suspended and the Member could come back to his seat again.

This matter never came to decision on the merits. When the resolution was moved in the House, a veteran of the Civil War, Mr. Lacey, of Iowa, raised the question of consideration, and the House refused to consider the fact that these Members had left for this temporary service. At the same time it was ruled by the Speaker, Mr. Reed then being Speaker, that he would sign no warrants for pay while they were away as officers of the Army, and while their offices continued they received Army pay, but no payment was made to any Member of Congress who went into the Army of his salary as Member during his absence. Those who returned retook their seats after discharge from the Army, and went on with their duties and received their salary as Members here, as some of the present Members already have done.

Subsequently,[1] Mr. Mann moved to suspend the rules and pass the following:

Resolved, That the Sergeant at Arms and Clerk of the House of Representatives are hereby authorized and directed to immediately pay all arrears of salary and clerk allowance to Members of the House of Representatives of the Sixty-fifth Congress who have not received their monthly salary and allowance owing to their absence from the House while in the military service of the United States during the war: *Provided,* That there shall be deducted from such amounts for salary, respectively, any money received by any of the above-named as compensation for service in the Army during the present emergency, and the affidavits of the above-named persons shall be accepted as proof as to whether or not any such payment has been received by them.

The motion was agreed to.

[1] Journal, p. ———; Record, p. 5077.

62. Resolution to investigate compatibility of office of Representative with other offices held by Member, is privileged.

In 1921 the House questioned the constitutional right of a Member to accept a commission in the United States Army.

A committee receiving instructions from the House to make an investigation, made no report thereon.

On August 2, 1921,[1] Mr. Simeon D. Fess, of Ohio, asked unanimous consent that leave of absence be granted Mr. R. G. Fitzgerald, of Ohio, holding a commission in the Reserve Corps of the United States Army, in order to permit him to comply with orders to report for camp duty.

The request being submitted to the House, Mr. Thomas L. Blanton, of Texas, objected.

Thereupon Mr. Finis J. Garrett, of Texas, proposed to offer a pertinent resolution, when on motion of Mr. Frank W. Mondell, of Wyoming, the House adjourned.

On August 4,[2] Mr. Garrett presented, as privileged, the following resolution, which was unanimously agreed to:

Resolved, That the Committee on the Judiciary be instructed to ascertain and report to the House whether any Member of the House is at present holding a commission as an officer in the service of the Army of the United States; and if so, whether the holding of such commission vacates the seat of the Member holding the same.

The Committee on the Judiciary made no report thereon.

63. A member of either House is eligible to appointment to any office not forbidden him by law, the duties of which are not incompatible with those of a Member.

The question as to whether a Member may be appointed to the Board of Managers of the Soldiers' Home and become local manager of one of the Homes, is a matter for the decision of Congress itself.

There is no constitutional objection to the election of a Member to the Board of Managers of the Soldiers' Home, although in the opinion of the Attorney General such election appears contrary to public policy.

Under other circumstances than those involving the control of the Congress over a position established and filled by itself, the holding of a visitorial and an administrative office by the same person would be regarded as legally incompatible.

On November 15, 1907,[3] (26:457), in response to a letter of inquiry addressed to the President by Mr. Nathan W. Hale, of Tennessee the Attorney General[4] rendered the following opinion:

The questions presented by Representative Hale are as follows:

Whether or not, under the law and under the construction of the law, a man who is a Member of Congress or a United States Senator is eligible to be appointed to any other Federal office at the

[1] First session Sixty-seventh Congress, Record, p. 4563.

[2] Record, p. 4657; Journal, p. 405.

[3] 26 Opinions of Attorneys General, p. 457.

[4] Attorney General Charles J. Bonaparte.

same time? If so, to what kind of office can he be appointed? For instance, can be a man be a Member of Congress and be appointed at the same time as a member of the Board of Managers of the Soldiers' Home, and become local manager of one of the Homes?

The first question may be answered in the affirmative. A member of either House of Congress may be appointed to any other office not forbidden to him by law, and the duties of which are not incompatible with those of a Member of Congress. It would not be advisable to state any particular office which a Member of Congress might fill, and this does not seem to be necessary, as Representative Hale mentions a specific office, namely that of a member of the Board of Managers of the Soldiers' Homes, who should be the local manager of one of the Homes.

The law providing the method of selection of the Managers of the National Home for Disabled Volunteers, which title includes the several institutions in the various parts of the United States known as "National Soldiers' Homes" is contained in section 4826 of the Revised Statutes and provides that they shall be elected from time to time, as vacancies occur, by joint resolution of Congress." The selection of these officers being thus entirely vested in the Congress, the determination whether a member of Congress may be elected is wholly a matter for the decision of the Congress itself, unless there should appear to be some constitutional provision bearing upon the subject. As the members of the Board of Managers receive no compensation as such and as the positions were created by act of March 21, 1866, it does not appear that the matter comes within the second clause of the sixth section of article 1 of the Constitution.

Nor are such managers "Federal officers" who are prohibited by the Constitution from being members of Congress. Moreover, the intent of the Congress is shown by the fact that the act of March 21, 1866, creating this office, which contained the provision that the nine elective managers should "not be members of Congress," was amended by the act of March 12, 1867 (15 Stat., 1), striking out the restriction above quoted.

While, as has been said, the question is held to be one for Congressional determination, it may be pointed out that the institution in question is a creature of the Congress, so that a member elected a manager of the National Home for Disabled Volunteers would become, as a member of the governing body, an officer (in his capacity of manager, as aforesaid) by his own appointment, subject to removal by himself, whose powers are conferred and whose duties are prescribed by himself, and who himself supervises his own management. He, in one capacity, determines the amount which, in another capacity, he may expend, and he supervises his own expenditures; so that he would be in the incompatible position of both visitor and an officer whose acts are the subject of inquiry; but however incompatible, it is clearly within the province of the Congress to make the appointment, to continue or to discontinue it and I therefore answer that there is no constitutional obstacle to the election of a Member of Congress as a member of the Board of Managers of the National Home for Disabled Volunteers, although such an election would seem to be contrary to the principles of sound public policy and, under other circumstances than those which thus involve the entire control of the Congress over a position established and filled by itself, the holding of a visitorial and an administrative office by the same person would be regarded as legally incompatible.

64. Discussion of eligibility of Members of the Senate to civil offices created during their terms of office.

Discussion of incompatibility of office within the meaning of the Constitution.

In 1922 the Senate questioned the constitutional right of a Member to sit upon a commission created during the period of his Membership.

Service upon a commission the members of which receive no compensation and the function of which is limited as to time and restricted to a single object is not incompatible with service in the Senate.

Instance wherein the Senate disregarded the recommendation of the committee in confirming presidential appointments.

On February 24, 1922,[1] the Senate agreed to the following resolution submitted by Mr. Thomas J. Walsh, of Montana:

Resolved, That the Committee on the Judiciary be, and it hereby is, directed to inquire into and report to the Senate, not later than Tuesday next (Feb. 28, 1922), touching the eligibility of Hon. Reed Smoot and Hon. Theodore E. Burton to membership on the commission created by the act of Congress approved February 9, 1922, entitled "An act to create a commission authorized to refund or convert obligations of foreign Governments held by the United States of America, and for other purposes," reference being made to section 6 of Article I of the Constitution of the United States, as follows:

"No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created or the emoluments whereof shall have been increased during such time."

During debate on the resolution, Mr. Walsh said:[2]

On July 13,1898, President McKinley appointed Senator Cullom, Senator Morgan, Representative Hitt, and Messrs. Dole and Frear as commissioners to recommend legislation concerning the Hawaiian Islands under the joint resolution of July 7, 1898. The matter of the eligibility of Senators Cullom and Morgan and Representative Hitt to serve upon this commission was, by resolution of the Senate, referred for consideration to the Judiciary Committee of the Senate. In that situation of affairs the House also took note of the question, and a report of Mr. Henderson was submitted to the House in support of his contention that there was no constitutional objection to the appointment of Members of Congress upon that commission.

No report was made from the Judiciary Committee of the Senate. It is recorded, however, that Senator Hoar, upon whose motion the reference was made, made a very able and exhaustive speech contending that the gentlemen named, being Members of one or the other House of Congress, were ineligible. The speech evidently made a very deep impression upon his colleagues. The Senate refused to confirm these nominations, and the inference is irresistible that they were persuaded by the discussion which took place. Speaker Henderson, however, took the other view; and the discussion to which I now direct the attention of the Senate is, I take it, as strong an argument as could be made upon the other side. The Speaker here points out that inasmuch as the members of this commission had no duties to perform except to investigate and report to the Congress, without any power to carry out any law or to enact any law or to construe any law, they were not officers within the meaning of the Constitution.

The majority report of the Committee on the Judiciary, submitted on April 11, 1922,[3] reached the conclusion that Mr. Smoot and Mr. Burton were ineligible to appointment on the commission.

The following statement of fact is given in the report:

On February 9, 1922, the President approved the bill, theretofore passed by Congress, providing for the appointment of a commission authorized, subject to the approval of the President, to refund, convert, and extend the obligations due to the United States from foreign governments, arising out of loans made to them during the war and other transactions incident thereto, amounting to approximately $11,000,000,000. By the terms of the act, a copy of which is appended hereto, the commission is to consist of five members, including the Secretary of the Treasury, the other four of whom are to be nominated by the President and confirmed by the Senate. Pursuant to that law, the President, on February 21, 1922, transmitted to the Senate a communication advising it that he had nominated as members of the commission Hon. Charles E. Hughes, Hon. Herbert C. Hoover, Hon. Reed Smoot, and Hon. Theodore E. Burton. At the time of the passage of the act Mr. Smoot was a Member of the Senate and Mr. Burton a Member of the House of Representatives.

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[1] Second session Sixty-seventh Congress, Record, p. 2996.

[2] Record, p. 2990.

[3] Senate Report No. 563, Record, p. 5257

Pending action on those nominations by the Senate, it directed the Committee on the Judiciary to inquire into the eligibility of the gentlemen last named for the positions for which they were thus nominated.

The purpose of the constitutional provision involved is thus discussed by the majority:

There was a dual purpose in the provision under review, first, to remove the temptation from Members to multiply offices to which they might be appointed, either to their honor or their profit, and, second, and perhaps more important, as viewed by the fathers, to deprive the Executive, with whom was to rest the power of appointment, of the opportunity to constrain Members of Congress to conform to his desires concerning legislation by holding out to them the hope of appointment to offices which they were to create or render more attractive by an increase of salary. In other words, to remove, in part at least, the corrupting power of the patronage of the Executive. However fanciful such a danger may seem to us, it was notorious in their day that the King of Great Britain, or at least his ministers, often secured from Parliament legislation favored by them by a liberal distribution of offices, pensions, peerages, and even of cold cash.

As to whether the positions on the commission in question come within the inhibitions of the Constitution, the majority say:

Ignoring the adjudications of the courts as to what is or what is not technically an "office," many of them irreconcilable and hinging upon particular statutes, let us try to solve the question before us by the application of fundamental rules. Is the term "office," as ordinarily used, broad enough to include the positions in question; and if it is, are they such positions as the framers of the Constitution intended should fall under the ban of the language they used?

Undeniably a member of the Funding Commission holds an office under the dictionary definition, but if there were any doubt about it, or if the term is sometimes used in a more narrow sense, and it is essential to inquire whether in the case before us it is to be given the narrower significance, attention may, yea, by a rule both ancient and universal, must be paid to the mischief which the law was to guard against and the purpose which was to be subserved in its enactment and such a construction must be given to the language assumed to be of doubtful import as will effectuate and not defeat the purpose of the authors of the statute.

The positions under consideration being easily within the meaning of the word "office" as it is popularly understood and being undeniably of the character the framers of the Constitution intended should not be open to Members of Congress in the creation of which they participated, however faultily they may have expressed that intention, it must be held that such Members are ineligible under the Constitution.

In support of this position the majority further point out:

The conclusion that the positions in question fall under the operation of section 6 of Article I of the Constitution is enforced by a consideration of other provisions of the Constitution in which the words "office" and "officer" are used. The President is by it to nominate and by and with the advice and consent of the Senate to "appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for and which shall be established by law." Obviously Congress was of the opinion in enacting the law in question that the members of the commission are officers of the United States, for it is therein expressly provided that they should be nominated by the President and confirmed by the Senate, a circumstance which affords cogent proof of the fact that, as the term is popularly understood the members of the commission hold "office."

The majority also find authority for this interpretation in other provisions of the Constitution as follows:

By another provision of the Constitution no "person holding an office of trust or profit under the United States shall be appointed an elector" of President and Vice President. It was

this clause that was under consideration in In re Corliss, in which the Supreme Court of Rhode Island held that a member of the Centennial Exposition Commission holds an office under the United States. This provision likewise had its origin in a widespread apprehension that under the system being devised the Executive, in whom was reposed an enormous patronage, would use it to further his own purpose and ambitions. The electors it was assumed would be at liberty to exercise some independent judgment, and it was feared that an appointee of the President, eligible for reelection, would or might be constrained by a sense of interest or of gratitude to vote for him or at his direction or in conformity with his desires.

Let any Senator inquire of himself whether the framers of the Constitution intended that a citizen appointed to the high place occupied by members of the Funding Commission should, notwithstanding the ties which bind him to the Executive, be eligible as an elector of President and Vice President.

Still another provision of the Constitution is to the effect that "all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors." Are the members of the commission exempt from impeachment for bribery or other dereliction in connection with the discharge of their duties? If so, how can they be removed? The President may, of course, remove them, having the power to appoint. But is Congress powerless in the premises? Is it true that the Constitution makers reserved to Congress the right to remove by impeachment every petty officer of the United States, but surrendered it in the case of these high functionaries?

It is required by Article VI of the Constitution that all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support the Constitution. Is it conceivable that the authors of our fundamental law prescribed that a town constable or a poundmaster should take the oath, but that such important public servants as those under consideration should be exempt from that requirement?

Another particularly pertinent provision of the Constitution deserves notice, namely, that which prescribes that "No title of nobility shall be granted by the United States; and no persons holding any office of profit or trust under them shall, without the consent of Congress, accept of any present, emolument, office, or title of any kind whatever from any king, prince, or foreign State." Comment is unnecessary.

In conclusion the majority declare:

The places for which Senator Smoot and Representative Burton have been nominated are offices within the meaning of section 6 of Article I, and they are ineligible thereto.

Minority views submitted by Mr. Knute Nelson, of Minnesota, thus state the question under consideration:

The committee is required to answer a pure question of constitutional law, namely: Are Senator Reed Smooth and Representative Theodore E. Burton, eligible under the Constitution, to receive appointments as members of the World War Foreign Debt Commission, a commission created by the act of February 9, 1922; the act having been passed while these nominees of the President were Members of Congress, and during the time for which they were respectively elected?

The minority dissent from the interpretation of the majority in the following words:

Unquestionaly it is not only our right but our duty carefully to consider the known object which the makers of our Constitution had in view when particular provisions were debated and adopted; but respect for our fundamental law will not long survive if, in order to reach what may now be regarded as a desirable end and one which we may believe that the framers of the Constitution would have desired to reach had they been able to conceive the present development of organized society, we refuse to accept the true meaning of the words and phrases actually employed.

The minority has referred to this phase of the subject because it is earnestly and ably contended that to appoint a Senator or a Representative to any position of honor, distinction, or profit would be attended by the same evils that were anticipated and provided against by our forefathers when

they forbade the appointment of a Member of either House to a civil office under the authority of the United States created during the time for which he was elected.

The fundamental difference between the majority and the minority of the committee relates to the rule of construction which should be adopted. We may not differ upon literal definitions, but, nevertheless, lying deeper than the words which we may use to describe the guides which we follow, there is a radical divergence in thought.

The majority of the committee, while they would not admit the suggestion, are in fact, applying the rule which a distinguished President of the United States once stated in this very plain, blunt way—we are not attempting to quote him literally, but the substance of his declaration was that the Constitution at any given time means what the needs of the people at that time require that it shall mean. There are a great many statesmen of high degree and lawyers of great attainments who if they are not willing to avow this canon of construction act in accordance with its standards.

It is not difficult to understand the attitude of men who feel that it would promote the public interest if Members of Congress were ineligible for appointment to any office, position, place, or employment which they helped to create; first, because in rare instance the possibility of appointment might present a temptation that would influence their votes or, second, because the opportunity for such an appointment might give to the Executive an undue influence respecting the legislative act.

The minority of the committee do not deny that there is a possibility of such a result, but they can not accept the conclusion that because there is such a possibility we are justified in rewriting this clause of our Constitution, ignoring the distinction between the words "office," "position," "place," and "employment," and having so rewritten it, in testing the eligibility of Senator Smoot and Representative Burton, not by anything that those who have adopted the Constitution declared but by words and phrases not found in that instrument, but which according to the view of the majority ought to have been incorporated in it. The minority are strongly in favor of a literal construction of the Constitution, but they can not concur in the obvious effort to amend that instrument through interpretation.

In summing up the proposition, the minority are of the opinion that—

Senator Reed Smooth and Representative Theodore E. Burton are eligible for appointment as members of the World War Foreign Debt Commission.

In response to a request from the Senate, the President transmitted to the Senate the following opinion of the Attorney General:

WASHINGTON, D. C., *March 8, 1922.*

MY DEAR MR. PRESIDENT: I have the honor to acknowledge your request for my opinion as to whether the appointment of Senator Smooth and Representative Burton to the World War Foreign Debt Commission is invalid under Article I, section 6, of the Constitution.

Were this a case of first impression, I should have serious doubt as to what reply I should make. The language of the Constitution is so broad and comprehensive that it can not be denied that the commissioners in question, in a general sense, hold a "civil office under the authority of the United States," and as this commission was created by the Congress at a time when the two commissioners were Members of that body, the application of the section of the Constitution does present a serious and debatable question.

This department has already expressed an opinion on the subject, for, in an opinion rendered by my predecessor, Attorney General Griggs (Op. Atty. Gen., vol. 22, p. 183), specific reference is made to the fact that Senator Morgan was, with the approval of the Executive, appointed a member of the fur seal arbitration, although, while a Senator, he aided in creating that "civil office."

I have failed to find any judicial interpretation of the section of the Constitution now under consideration, and, in the absence of such finally authoritative interpretation, great weight must be attached to the practical construction put upon the Constitution from the beginning of the Government. In such practical construction a distinction has always been made between special employment on the one hand and offices on the other, and between offices—using that term in a

general sense—which serve only a temporary purpose, and those which have duration and permanency. From the very beginning of the Government Members of the Senate and the House have, from time to time, been asked to render services for the Government upon commissions of various kinds, and it has never been decided that such temporary employment for a special purpose and to serve an immediate exigency constituted a "civil office" within the meaning of the constitutional provision above referred to.

The opinion then cites various court decisions defining the word "office" and continues:

Applying this distinction between an "office" and a temporary trust to the act of Congress, which created the World War Foreign Debt Commission, I would say that for several reasons it excludes the application of the word "office" as above defined.

The commissioners receive no compensation.

Their tenure of office is limited in time and is restricted to a single object.

Therefore the opinion finds the positions not incompatible:

Having in mind the debates in the Constitutional Convention, it seems clear that the purpose of Article I, section 6, was to prevent Members of Congress from creating offices which thereupon they would seek to fill by resigning their positions in Congress. Thus the fundamental idea was the incompatibility of the new offices thus created with their existing office as Members of Congress. This reason is plainly inapplicable to the present legislation, for, when Senator Smooth and Representative Burton act on this debt commission, they are not exercising duties which are in compatible with their duties as Members of Congress, but, on the contrary, their duties as commissioners are, in a sense, an auxiliary to their work as Congressmen, and moreover an auxiliary to all the Members of Congress in any further consideration that that body may feel obliged to give to this matter of adjusting these foreign obligations.

The opinion accordingly concludes:

An impracticable and unreasonable construction of any clause of the Constitution ought to be avoided, and, as no judicial authority can be cited which forbids the views herein expressed, and as the practical construction by the Government from its very beginning and long acquiesced in has given some sanction to the views above expressed, I have less hesitation in advising you that in my judgment the appointment of Senator Smoot and Representative Burton does not offend Article I, section 6, of the Constitution.

Respectfully,

H. M. DAUGHERTY, *Attorney General.*

The PRESIDENT,
The White House, Washington, D. C.

On the same day on which the report was received the Senate, in executive session, confirmed the appointment of Mr. Smoot and Mr. Burton, yeas 47, nays 25.

65. Acceptance of an office the duties of which are incompatible with those of a Member of the House of Representatives automatically vacates the seat in the House.

While the Constitution does not prohibit a Member from holding any State office, the duties of a Member of the House and of the governor of a State are absolutely inconsistent and may not be simultaneously discharged by the same person.

The resignation of a Member, whether presented to the governor of the State or to the Speaker of the House, becomes immediately effective and may not be withdrawn.

Acceptance of the resignation of a Member of the House is unnecessary and the refusal of a governor to accept a resignation can not operate to continue membership in the House.

A Member having been inaugurated governor of his State was declared to have vacated his seat in the House coincident with his taking the oath as governor.

On January 15, 1909,[1] Mr. John W. Gaines, of Tennessee, rose to a question of the privilege of the House and offered the following resolution:

Whereas George L. Lilley, a citizen of the State of Connecticut, was duly elected and qualified a Member of the House of Representatives, Sixtieth Congress, from said State; and

Whereas the said George L. Lilley was thereafter, in November, nineteen hundred and eight, elected, and on January sixth, nineteen hundred and nine, duly qualified and entered upon his duties as governor of the said State: Therefore be it

Resolved, That his name be stricken from the roll and his seat in this House be, and is hereby, declared vacant.

Mr. Sereno E. Payne, of New York, moved that the resolution be referred to the Committee on the Judiciary, and asked, as a parliamentary inquiry, if the motion to refer was debatable.

The Speaker[2] said:

Such a motion is debatable, in narrow limits, as shown in the precedents that have been made from time to time.

Under the narrow limits of the language of the precedents, debate would not include any discussion of the merits of the proposition, but a discussion of the desirability of referring the resolution.

Thereupon, Mr. Champ Clark, of Missouri, raised the point of order that Mr. Gaines, having submitted a resolution, was entitled to the floor and Mr. Payne had not been recognized to make a motion.

The Speaker held:

The precedents are substantially uniform, where a Member arises in his place and presents a resolution; after the resolution is presented the gentleman must have a second recognition, and between the two recognitions, a motion having intervened after the introduction of the resolution, the gentleman making the motion pending should be entitled to recognition.

The question being taken, the motion was agreed to and the resolution was referred to the Committee on the Judiciary.

The report of the special committee, submitted by Mr. John J. Jenkins, of Wisconsin, January 20, 1909,[3] gives the following statement of facts:

The committee finds as facts that George L. Lilley was elected a Member of this House from the State of Connecticut to the Sixtieth Congress.

That the name of George L. Lilley was placed on the roll of Members-elect of the Sixtieth Congress.

That George L. Lilley performed more or less duties as a Member of this House during the first session of the Sixtieth Congress.

That George L. Lilley has not been in attendance at any time during the second session of the Sixtieth Congress.

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[1] Second session Sixtieth Congress, Record, p. 951.

[2] Joseph G. Cannon, of Illinois, Speaker.

[3] House Report No. 1882.

That on the 11th day of December, 1908, George L. Lilley tendered his resignation as Member of this House to Rollin S. Woodruff, governor of the State of Connecticut, to take effect January 5, 1909, and that Governor Woodruff declined to accept the resignation.

That George L. Lilley did not withdraw his resignation as a Member of this House.

That George L. Lilley was elected governor of the State of Connecticut and took the oath of office as governor of that State on January 6, 1909; and that ever since he took the oath of office he has been performing the duties of the office of governor of the State of Connecticut and has remained at the executive office at Hartford, Conn.

That on December 22, 1908, he drew his check for his stationery in full.

That on the 1st day of January, 1909, he drew his clerk hire in full for the month of December.

That George L. Lilley drew his salary as a Member of the House of Representatives up to and including the 4th day of December, 1908.

That on the 22d day of December, 1908, George L. Lilley made application by letter for a remittance of the mileage for the second session of the Sixtieth Congress.

The report also quotes the following letter explaining Mr. Lilley's position:

STATE OF CONNECTICUT, EXECUTIVE DEPARTMENT,
Hartford, January 18, 1909.

MY DEAR SIR: I have the honor to acknowledge receipt of your favor of January 15, with inclosed copy of resolution introduced by John W. Gaines.

Replying to your letter, I beg to say that on December 11, 1908, I tendered my resignation as Congressman to Governor Rollin S. Woodruff. The matter was referred by Governor Woodruff to the attorney-general, whose opinion it was that the statute was mandatory, and that if the resignation was accepted a special election to fill the vacancy must be held. It seemed to the governor and to the attorney-general that the large expense entailed was a conclusive reason why my resignation should not be accepted. The governor, therefore, declined to accept my resignation.

I felt that the precedent laid down by my predecessor was obligatory upon me as govenor, particularly in view of the fact that after deducting the time necessary for a special election there would be but about one month for a new Member to serve. I inclose a copy of Governor Woodruff's letter. My belief is that the people of Connecticut uphold Governor Woodruff's decision.

With sincere regards, I am, very truly, yours,

GEO. L. LILLEY.

Hon. JOHN J. JENKINS,
House of Representatives, Washington, D. C.

As to methods of resigning from the House the report says:

The Constitution is silent as to how a Member can dissever his membership. The Constitution anticipates that a vacancy may occur:

"When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies. (Clause 4, sec. 2, art 1.)"

The Constitution does not prohibit a Member from holding any state office.

The Constitution does provide—

That no person holding any office under the United States shall be a member of either House during his continuance in office. (Part of clause 2, sec. 6, art. 1.)

"Each House shall be the judge of the elections, returns, and qualifications of its own members. (Part of sec. 5, art. 1.)

"Each House may * * * punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member. (Subdivision 2, sec. 5, art 1.)"

In voluntary withdrawals from membership in the House of Representatives, the practice has not been uniform:

The retiring Member has resigned on the floor of the House. The retiring Member has notified the Speaker in writing and in turn the Speaker of the House has notified the governor of the State. Then again the retiring Member has resigned to his governor and the governor in turn has notified the Speaker, and then again the House was not informed of the vacancy until the new Member appeared with his credentials, but in all cases the act of the retiring Member has been positive to the extent of showing that he had ceased to be a Member of the House of Representatives as far as he was concerned.

By the statute of the State of Connecticut the governor may accept the resignation of any officer whose successor, in case of a vacancy in office, he has power to nominate or appoint; but there is no statute in the State of Connecticut authorizing the governor of that State to accept the resignation of a Member of Congress.

On the question as to whether a resignation is revocable the report decides:

There is no question but what if a Member of the House of Representatives tenders his resignation, no matter whether it be to the governor of the State or to the Speaker of the House, he becomes ipso facto no longer a Member, and therefore it is impossible for a Member having tendered his resignation to withdraw same.

Unless the House of Representatives exercises its power and expels a Member, it rests entirely with the Member as to whether or not he continues his membership. After he has declared in no uncertain terms to the governor of his State or to the Speaker of the House that he has resigned, there is nothing that can be done by the Member or by the officer to whom the resignation was tendered that will tend to continue the membership. The presentation of the resignation is all sufficient. It is self-acting. No formal acceptance is necessary to make it effective. The refusal of a governor to accept a resignation of a Member of Congress can not possibly continue the membership and certainly it is within the power of the House to declare what effect the presentation of the resignation had upon the membership.

The incompatibility of offices is thus commented upon:

It is a universally recognized principle of the common law that the same person should not undertake to perform inconsistent and incompatible duties, and that when a person while occupying one position accepts another incompatible with the first he, ipso facto, absolutely vacates the first office and his title thereto is terminated without any further act or proceeding. This incompatibility operating to vacate the first office exists where the nature and duties of the second office are such as to render it improper, from considerations of public policy, for one person to retain both. There is an absolute inconsistency in the functions of the two offices, Member of Congress and governor of the State of Connecticut.

Accordingly, the report concludes:

There can be but little question but what George L. Lilley resigned his membership in this House and that it became effective on the 5th day of January, 1909, and that being true, it logically follows that he ceased to be a Member at that time; but inasmuch as it seems so clear that George L. Lilley ceased to be a Member of the House of Representatives upon his acceptance of the office of governor of the State of Connecticut, and the question of time is so very brief, that it may be well to hold that his seat was vacant January 6, 1909.

The committee is of the opinion that if said George L. Lilley had not resigned on the 5th day of January, 1909, by entering upon the duties of the office of governor of the State of Connecticut, he ceased to be a Member of the House of Representatives of the United States on the 6th day of January, 1909.

The committee therefore recommended as a substitute for the House resolution the following resolution:

"Resolved, That the seat in this House of George L. Lilley as a Representative from the State of Connecticut was vacated on the 6th day of January, 1909.

"That the Clerk of this House be, and he is hereby, directed to remove the name of George L. Lilley from the roll of Members of this House."

Mr. Richard Wayne Parker, of New Jersey, and Mr. John A. Sterling, of Illinois, while concurring in the resolution recommended by the committee, submitted separate views holding that the House was authorized to decide when a resignation should take effect and it was therefore unnecessary to determine whether the office of governor is incompatible with that of Representative in Congress.

The substitute resolution recommended by the committee was agreed to [1] without debate or division.

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[1] Record, p. 1164, Journal, p. 184.

Chapter CLIX.[1]

TIME, PLACES, AND MANNER OF ELECTION.

66. A Federal law fixes the time of election of United States Senators.

The act of June 4, 1914.[2] makes the following provision as to time of election of Senators:

At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said State shall be elected by the people thereof for the term commencing on the fourth day of March next thereafter.

67. A Federal law requires sworn statements by candidates for Congress of contributions received, amounts expended, and promises made for the purpose of influencing the result of elections.

The amount of money which may be expended by a candidate for Congress in his campaign for election is limited by law.

No Member of Congress or candidate for Congress may solicit or receive political contributions from Government employees.

The act of February 28, 1925,[3] known as the Federal corrupt practices act, 1925, provides:

Every candidate for Senator shall file with the Secretary and every candidate for Representative, Delegate, or Resident Commissioner shall file with the Clerk not less than ten nor more than fifteen days before, and also within thirty days after, the date on which an election is to be held, a statement containing, complete as of the day next preceding the date of filing—

(1) A correct and itemized account of each contribution received by him or by any person for him with his knowledge or consent, from any source, in aid or support of his candidacy for election, or for the purpose of influencing the result of the election, together with the name of the person who has made such contribution;

(2) A correct and itemized account of each expenditure made by him or by any person for him with his knowledge or consent, in aid or support of his candidacy for election, or for the purpose of influencing the result of the election, together with the name of the person to whom such expenditure was made; except that only the total sum of expenditures for items specified in subdivision (c) of section 309 need be stated;

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[1] Supplementary to Chapter XVII.

[2] 2 U. S. C. 1.

[3] 2 U. S. C. 2 et seq.

(3) A statement of every promise or pledge made by him or by any person for him with his consent, prior to the closing of the polls on the day of the election, relative to the appointment or recommendation for appointment of any person to any public or private position or employment for the purpose of procuring support in his candidacy, and the name, address, and occupation of every person to whom any such promise or pledge has been made, together with the description of any such position. If no such promise or pledge has been made, that fact shall be specifically stated.

The Federal corrupt practices act, 1925, also limits the amount of campaign expenditures which may be made, as follows:

Unless the laws of his State prescribe a less amount as the maximum limit of campaign expenditures, a candidate may make expenditures up to—

(1) The sum of $10,000 if a candidate for Senator, or the sum of $2,500 if a candidate for Representative, Delegate, or Resident Commissioner; or

(2) An amount equal to the amount obtained by multiplying three cents by the total number of votes cast at the last general election for all candidates for the office which the candidate seeks, but in no event exceeding $25,000 if a candidate for Senator or $5,000 if a candidate for Representative, Delegate, or Resident Commissioner.

Money expended by a candidate to meet and discharge any assessment, fee, or charge made or levied upon candidates by the laws of the State in which he resides, or expended for his necessary personal, traveling, or subsistence expense, or for stationery, postage, writing, or printing (other than for use on bill boards or in newspapers), for distributing letters, circulars, or posters, or for telegraph or telephone service, shall not be included in determining whether his expenditures have exceeded the sum fixed by paragraph (1) or (2) as the limit of campaign expenses of a candidate.

It is unlawful for any candidate to directly or indirectly promise or pledge the appointment, or the use of his influence or support for the appointment of any person to any public or private position or employment, for the purpose of procuring support in his candidacy.

The act further provides:

It is unlawful for any Senator or Representative in, or Delegate or Resident Commissioner to, Congress, or any candidate for, or individual elected, as Senator, Representative, Delegate, or Resident Commissioner, or any officer or employee of the United States, or any person receiving any salary or compensation for services from money derived from the Treasury of the United States, to directly or indirectly solicit, receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any other such officer, employee, or person.

68. Decision of the Supreme Court that the corrupt practices act prohibiting Members of Congress from accepting certain contributions from Federal employees is constitutional.

The phrase "any political purpose" in the Federal corrupt practices act is construed to include a primary election.

On February 24, 1930,[1] the Supreme Court of the United States handed down an opinion in the case of the United States *v.* Wurzbach. Mr. Justice Oliver Wendell Holmes delivered the opinion of the court, in which all justices concurred.

Mr. Harry M. Wurzbach, a Representative in Congress from the fourteenth congressional district of the State of Texas, was charged with accepting contributions from Federal officeholders during his primary campaign. Mr. Wurzbach defended the suit on the ground that the contributions were voluntarily made and that the Supreme Court in the case of the United States *v.* Newberry,[2] had ruled that Congress could not regulate the conduct of primaries.

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[1] Vol. 280 U. S., P. 396.

[2] See sec. 7400 of this work.

The opinion is as follows:

The respondent was indicted under the Federal corrupt practices act, 1925; act of February 28, 1925, chapter 368, section 312; 43 Stat. 1053, 1073 (U. S. Code, title 18, sec. 208); on charges that being a Representative in Congress he received and was concerned in receiving specified sums of money from named officers and employees of the United States for the political purpose of promoting his nomination as Republican candidate for Representative at certain Republican primaries. Upon motion of the defendant the district court quashed the indictment on the ground that the statute should not be construed to include the political purpose alleged, and, construed to include it, probably would be unconstitutional. The United States appealed.

The section of the statute is as follows:

"It is unlawful for any Senator or Representative in, or Delegate or Resident Commissioner to, Congress, or any candidate for, or individual elected as, Senator, Representative, Delegate, or Resident Commissioner, or any officer or employee of the United States, or any person receiving any salary or compensation for services from money derived from the Treasury of the United States, to directly or indirectly solicit, receive, or be in any manner concerned, in soliciting or receiving any assessment, subscription, or contribution for any political purpose whatever, from any other such officer, employee, or person."

This language is perfectly intelligible and clearly embraces the acts charged. Therefore, there is no warrant for seeking refined arguments to show that the statute does not mean what it says unless there is some reasonable doubt whether so construed it would be constitutional—the doubt that was felt by the court below.

The court construes the statute to extend to State primaries and to include party elections. The opinion continues:

The doubt of the district court seems to have come from the assumption that the source of power is to be found in Article I, section 4, of the Constitution concerning the time, place, and manner of holding elections, etc.; and from the decision that the control of party primaries is purely a State affair. (Newberry *v.* United States, 256 U. S. 232). But the power of Congress over the conduct of officers and employees of the Government no more depends upon authority over the ultimate purposes of that conduct than its power to punish a use of the mails for a fraudulent purpose is limited by its inability to punish the intended fraud. (Badders *v.* United States, 240 U. S. 391.)

It hardly needs argument to show that Congress may provide that its officers and employees neither shall exercise nor be subjected to pressure for money for political purposes, upon or by others of their kind, while they retain their office or employment. If argument and illustration are needed they will be found in Ex parte Curtis (106 U. S. 371, s. c. 12 Fed. 824). See United States *v.* Thayer (209 U. S. 39, 42). Neither the Constitution nor the nature of the abuse to be checked requires us to confine the all-embracing words of the act to political purposes within the control of the United States.

It is argued at some length that the statute, if extended beyond the political purposes under the control of Congress, is too vague to be valid. The objection to uncertainty concerning the persons embraced need not trouble us now. There is no doubt that the words include Representatives, and if there is any difficulty, which we are far from intimating, it will be time enough to consider it when raised by some one whom it concerns.

As to the interpretation of the phrase "political purposes" the court further holds:

The other objection is to the meaning of "political purpose." This would be open even if we accepted the limitations that would make the law satisfactory to the respondent's counsel. But we imagine that no one not in search of trouble would feel any. Wherever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does

so it is familiar to the criminal law to make him take the risk. (Nash *v.* United States, 229 U. S. 373.)

It is said to be uncertain which of several sections imposes the penalty, and therefore uncertain what the punishment is. That question can be raised when a punishment is to be applied. The elaborate argument against the constitutionality of the act if interpreted as we read it, in accordance with its obvious meaning, does not need an elaborate answer. The validity of the act seems to us free from doubt.

Judgment reversed.

69. The Supreme Court invalidated, as unconstitutional, a Federal statute requiring sworn statements of receipts and expenditures and limiting the amount of money which might be used in procuring nomination as candidate for Representative or Senator.

The law of June 25, 1910, as amended by the act of August 19, 1911,[1] and commonly known as the corrupt practices act, provided:

No candidate for Representative in Congress or for Senator of the United States shall give, contribute, expend, use, or promise, or cause to be given, contributed, expended, used, or promised, in procuring his nomination and election, any sum, in the aggregate, in excess of the amount which he may lawfully give, contribute, expend, or promise under the laws of the State in which he resides: *Provided,* That no candidate for Representative in Congress shall give, contribute, expend, use, or promise any sum, in the aggregate, exceeding five thousand dollars in any campaign for his nomination and election; and no candidate for Senator of the United States shall give, contribute, expend, use, or promise any sum, in the aggregate exceeding ten thousand dollars in any campaign for his nomination and election:

Provided further, That money expended by any such candidate to meet and discharge any assessment, fee, or charge made or levied upon candidates by the laws of the State in which he resides, or for his necessary personal expenses, incurred for himself alone, for travel and subsistence, stationery and postage, writing or printing (other than in newspapers), and distributing letters, circulars, and posters, and for telegraph and telephone service, shall not be regarded as an expenditure within the meaning of this section, and shall not be considered any part of the sum herein fixed as the limit of expenses and need not be shown in the statements herein required to be filed.

The act further required sworn statements by candidates of expenditures incurred both in primary and in general elections as follows:

Every person who shall be a candidate for nomination at any primary election or nominating convention, or for election at any general or special election, as Representative in the Congress of the United States, shall, not less than ten nor more than fifteen days before the day for holding such primary election or nominating convention, and not less than ten nor more than fifteen days before the day of the general or special election at which candidates for Representatives are to be elected, file with the Clerk of the House of Representatives at Washington, District of Columbia, a full, correct, and itemized statement of all moneys and things of value received by him or by anyone for him with his knowledge and consent, from any source, in aid or support of his candidacy, together with the names of all those who have furnished the same in whole or in part; and such statement shall contain a true and itemized account of all moneys and things of value given, contributed, expended, used, or promised by such candidate, or by his agent, representative, or other person for and in his behalf with his knowledge and consent, together with the names of all those to whom any and all such gifts, contributions, payments, or promises were made, for the purpose of procuring his nomination or election.

Similar statements are also required after the election.

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[1] 2 U. S. C. 241 et seq.

In passing upon the constitutionality of this act, the Supreme Court of the United States, in an opinion rendered May 2, 1921,[1] in the case of Newberry[2] *v.* The United States, held:

We can not conclude that authority to control party primaries or conventions for designating candidates was bestowed on Congress by the grant of power to regulate the manner of holding elections. The fair intendment of the words does not extend so far; the framers of the Constitution did not ascribe to them any such meaning. Nor is this control necessary in order to effectuate the power expressly granted. On the other hand, its exercise would interfere with purely domestic affairs of the State and infringe upon liberties reserved to the people.

On February 24, 1923,[3] in the House of Representatives Mr. C. W. Ramseyer, of Iowa, in discussing this decision, quoted the following:

The law committee of the national Republican congressional committee had submitted to it the following question: "Under existing Federal law is a candidate for Representative in Congress at a primary election required to file sworn statements of his primary campaign expenditures with the Clerk of the House of Representatives?"

The Federal corrupt practices act[4] limits the amount of money that may be given, contributed, expended, used, or promised, or caused to be given, contributed, expended, used, or promised by a candidate for Representative in Congress or for Senator of the United States in procuring his nomination and election to a sum not in excess of the amount he may lawfully give, contribute, expend, or promise under the laws of the State of his residence, with a proviso that in the case of a candidate for Representative the amount shall not exceed $5,000, and in the case of a candidate for Senator, shall not exceed $10,000 in any campaign for nomination and election. The Federal corrupt practices act, as amended, further requires the filing of sworn statements by a candidate for Representative in Congress or for Senator of the United States of expenditures incurred both in the primary election and in the general election.

If Congress has the power to enact such legislation, it is based on the following constitutional provisions:

"ARTICLE I. SECTION 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

"SECTION 2. The House of Representatives shall be composed of Members chosen every second year by the people of the several States, and the electors of each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature. * * *"

"Section 3 is superseded by the seventeenth amendment, which provides. * * *"

"ARTICLE XVII. The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, * * * The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the state legislature. * * *"

"SECTION 4. The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators. * * *"

"SECTION 5. Each House shall be the judge of the election, returns and qualifications of its own Members. * * *"

The power of Congress to enact legislation regulating primary elections was never decided by the Supreme Court until in the case of Truman H. Newberry et al., plaintiffs in error, *v.* the United States of America. This case was decided by the Supreme Court May 2, 1921.

In the Newberry case the plaintiffs in error were found guilty of conspiracy to violate section 8 of the act of June 25, 1910, as amended by the act of August 19, 1911, in the Federal district court of Michigan.

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[1] 256 U. S. 232.

[2] See sections 7396–7400 of this work.

[3] Fourth session Sixty-seventh Congress, Record, p. 4567.

[4] Act of June 25, 1910, Stat. 822 as amended by act of August 19, 1911, 37 Stat. 25, 28.

This case was reversed by the Supreme Court of the United States on the 2d day of May, 1921, On the ground that the grant of power on Congress to regulate the "manner of holding elections" under Article I, section 4, of the Constitution did not bestow on Congress the authority to control party primaries or conventions for designating candidates. That is, the majority of the court seem to bold that the power to regulate the "manner of holding elections" is limited to general elections and that there is no power to regulate the manner of holding primary elections or party conventions.

If there were nothing to consider in this case, except the conclusion of the majority of the court, we would have no hesitancy in answering in the negative the question submitted to us. This is a five-to-four decision. Mr. Justice McReynolds wrote the opinion of the majority. In this opinion Mr. Justice McKenna concurred with a reservation as follows: "Mr. Justice McKenna concurs in this opinion as applied to the statute under consideration, which was enacted prior to the seventeenth amendment; but he reserves the question of the power of Congress under that amendment."

What would have been Mr. Justice McKenna's conclusion if the seventeenth amendment bad been adopted prior to the enactment of the corrupt practices act and amendments thereto? Furthermore, the plaintiff in error—Newberry—was a candidate for the Senate and the seventeenth amendment applies only to Senators, and Mr. Justice McKenna "concurs in this opinion as applied to the statute under consideration, which was enacted prior to the seventeenth amendment."

As the seventeenth amendment applies to the Senate, so Article. I, section 2, of the Constitution applies to the House of Representatives. Article I, section 2, was a part of the Constitution prior to the enactment of the corrupt practices act in question. If the plaintiff in error had been a candidate for the House of Representatives there would have been no excuse for Mr. Justice McKenna's qualified concurrence and reservation; and then, instead of having a court divided five to four against the constitutionality of the act, the result might have been five to four in favor of the constitutionality of the act. The qualified concurrence and reservation of Mr. Justice McKenna make this decision of the Supreme Court at best a fifty-fifty proposition when applied to a candidate for Representative in Congress at a primary election.

Therefore, we conclude, and wisdom and prudence dictate, that a candidate for Representative in Congress at a primary election should file sworn statements of his campaign expenditures with the Clerk of the House of Representatives as required by the act of June 25, 1910, as ended by the act of August 19, 1911.

Respectfully submitted this 21st day of March, 1922.

C. W. RAMSEYER,
WM. WILLIAMSON,
E. O. LEATHERWOOD,

Law Committee.

In conformity with this theory, candidates for Congress continued to file such statements until the repeal[1] by the Federal corrupt practices act, 1925, of the act of June 25, 1910 and enactment amendatory thereto.

70. The application of provisions of the corrupt practices act to party primaries.

The power of Congress to enact legislation relative to campaign receipts and expenditures in primary and general elections affirmed.

On February 24, 1930,[2] the Supreme Court rendered a decision sustaining provisions of the corrupt practices act involving the power of Congress to enact legislation relative to the collection and disbursement of money for political purposes, and holding that neither the Constitution nor the nature of the abuse to be checked re

[1] 43 Stat. L., p. 1070.

[2] U. S. *v.* Wurzbach, 280 U.S. 306.

quire that the words of the act be confined to political purposes within the control of the United States.

In this case, the respondent was indicted under the Federal corrupt practices act of 1925, on charges that being a Representative in Congress he received, and was concerned in receiving, specified sum of money from named officers and employees of the United States for the political purpose of promoting his nomination as candidate for Representative. Upon motion of the defendant the District Court quashed the indictment on the ground that the statute should not be construed to include the political purpose alleged. The Supreme Court held that a Representative in Congress who receives or is concerned in receiving money from officers and employees of the United States for the political purpose of promoting his nomination at a party primary, as a candidate for reelection, is guilty of the offense as defined by the Federal corrupt practices act.[1]

71. The law requiring statements by candidates of expenses incidental to election to House or Senate does not provide for their publication.

On April 17, 1913,[2] when the Speaker laid before the House the reports of various officers of the House, Mr. Victor Murdock, of Kansas, moved that the Clerk of the House be directed to include in his printed report statements by Members and national political committees relating to campaign contributions and expenditures.

Thereupon Mr. Thomas W. Hardwick, of Georgia made a question of order against the motion.

The Speaker[3] sustained the point of order.

72. The Senate election case of Ford v. Newberry, from Michigan, in the Sixty-seventh Congress.

Instance of a contest inaugurated in the Senate by petition, and form of petition.

Investigation of the right to a seat in the Senate can only be made by the Senate to which the person whose title is attacked has been elected.

On December 14, 1918,[4] in the Senate, Mr. Charles E. Townsend, of Michigan, presented the credentials of Truman H. Newberry as Senator from Michigan for the term of six years commencing March 4, 1919.

Mr. Atlee Pomerene, of Ohio, moved that the credentials be referred to the Committee on Privileges and Elections, when Mr. Henry Cabot Lodge, of Massachusetts, submitted that the presentation was for filing only as it related to a seat in the next Senate, and the Senate was at that time without jurisdiction to take action thereon.

Thereupon Mr. Townsend, by unanimous consent, withdrew the credentials.

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[1] U. S. Code, title 18, sections 211, 212.

[2] First session Sixty-third Congress, Record, p. 222.

[3] Champ Clark, of Missouri, Speaker.

[4] Third session Sixty-fifth Congress, Record, p. 437.

At the beginning of the next Congress Mr. Newberry was sworn in, and on May 20, 1919,[1] the following petition was presented to the Senate and referred to the Committee on Privileges and Elections:

To the Senate of the United States of America of the Sixty-sixth Congress:

I, Henry Ford, of Dearborn, Michigan, the petitioner, do hereby give notice of my intention to contest and do hereby enter and file a contest of the election of Mr. Truman H. Newberry as Senator from Michigan to succeed the Honorable William Alden Smith; and I request and petition for a recount of the ballots cast at the election held in Michigan November 5, 1918, and an investigation of the unlawful uses by said Truman H. Newberry, and in his behalf by his agents and representatives, of large sums of money to influence the primary and election, and also of cases of undue influence and intimidation of voters at the election.

I beg to represent to your honorable body:

(1) That an election was held by the voters of Michigan on the 5th day of November, 1918 to elect a United States Senator from Michigan for the term beginning March 4, 1919. That Truman H. Newberry was the candidate on the Republican ticket, Henry Ford on the Democratic ticket, Edward O. Foss on the Socialist ticket, and William J. Faull on the Prohibition ticket.

(2) That the official canvass made by the State canvassing board showed 220,054 votes cast for said Newberry, 212,487 votes east for said Henry Ford, 4,763 votes cast for said Foss, and 1,133 votes cast for said Faull, and that in pursuance of such canvass said board announced the result of the election to be that the above-mentioned number of votes were cast for each of the said candidates as stated above.

(3) That a certificate of election as such Senator has heretofore been issued to said Truman H. Newberry and he claims to have been duly elected such Senator, and he has heretofore caused his credentials as such to be offered to the United States Senate, namely, on or about the 14th day of December, 1918.

(4) That the primary election to select candidates by the respective parties for the office of such United States Senator was held on August 27, 1918; that in the primaries Mr. Truman H. Newberry was a candidate for the Republican nomination, your petitioner was candidate for the Republican nomination, also for the Democratic nomination, and he was nominated on the Democratic ticket, and said Truman H. Newberry was nominated on the Republican ticket. That large sums of money were unlawfully used and expended by and on behalf of said Newberry at said primary election and previous thereto to effect such election and to bring about his nomination and to purchase and procure the support and efforts of divers large numbers of persons and newspapers and periodicals. It was admitted by the committee, composed of a large number of men who acted in behalf of the nomination of Mr. Newberry, that said committee expended $176,568.08 and a sworn report to that effect was made under the State law by Mr. Frank W. Blair, the treasurer of said committee, and said report was filed with the county clerk of Wayne County, Michigan, where said Blair resided. And petitioner states upon information and belief that it can and will be proved that said Truman H. Newberry procured the appointment and selection of said committee and its members and was directly responsible for all its acts and that he was in constant communication with said committee and its members and knew of and approved its large expenditures of moneys and participated in its work. Upon information and belief petitioner says that large sums of money, aggregating many thousands of dollars, were expended by or on behalf of said Newberry's nomination, entirely outside of said $176,568.08 above mentioned as having been admitted, in the hiring of workers and other legitimate expenses and contrary to the laws of the United States and the State of Michigan in that behalf. That a memorial with respect to the above matters was filed with the Senate Committee on Privileges and Elections in the month of November last by Mr. Elbert H. Fowler, a lawyer and reputable citizen of the city of Detroit, Michigan, who had acted as secretary of the nonpartisan Ford-for-Senator Club, in connection with the election, a copy of which memorial or statement is hereto attached and made a part hereof, and upon information and belief petitioner avers the statements thereof to be true.

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[1] First session Sixty-sixth Congress, Record, p. 33.

(5) He further shows that the large sums of money expended by and in behalf of the nomination of Mr. Truman H. Newberry as hereinbefore stated, unlawfully enlisted the aid and support of large numbers of persons, papers, and periodicals throughout the State, and the results and influence of which extended down to and affected the election materially in favor of the said Truman H. Newberry, and that said great sums of money were expended in violation of the statutes of the United States and of the State of Michigan in such cases provided.

(6) The petitioner shows on information and belief that said Truman H. Newberry was not truly or lawfully elected to said office of the United States Senator and is not entitled to said office, and that your petitioner was elected and is entitled to said seat, and he specifies:

(a) That there are about 2,200 election precincts or districts in Michigan, and that nearly all of the election boards were composed wholly of Republicans, and great numbers of them were wholly composed of intense partisans of Mr. Newberry, and that only in a comparatively few of them were there at the said election any challengers or others acting in behalf of the Democratic candidates, and that every opportunity existed for election officials who were so inclined to miscount the ballots in favor of Mr. Newberry.

(b) That a large number of ballots were unlawfully counted for said Newberry, which, in fact in truth, were cast for Henry Ford, namely, at least ten thousand.

(c) That large numbers of ballots lawfully cast for petitioner were not counted for him, but were unlawfully rejected by the various precinct election boards when making the counts, and they were not returned for petitioner as in truth they ought to have been, namely, at least ten thousand.

(d) That in many election precincts or districts the count by the election officers and boards was illegal, in favor of Newberry, false and fraudulent, and in violation of the election laws governing the count.

(e) Many of the ballots marked and cast for petitioner were counted and returned for the said Truman H. Newberry.

(f) In many precincts (particularly in the Upper Peninsula of Michigan) the provisions of law enacted to protect the sanctity and secrecy of the ballots and to promote a true and honest vote and count were flagrantly violated and many important and vital irregularities and departures from such provision occurred, thus vitiating: under the law the vote of such precincts. As, for instance, the marking of ballots for voters by unauthorized third person, the exposure of ballots by the voters, the overseeing of the voting by mine bosses and superintendents and the like; all of which were conducted in the interests of said Truman H. Newberry, and the votes of such precincts should be rejected and thrown out.

(g) That many ballots in many precincts duly marked and cast for petitioner were rejected by the respective election boards and not counted at all.

(h) That many ballots bearing unlawful distinguishing marks were illegally and unlawfully counted for the said Truman H. Newberry.

(i) Many ballots duly marked and cast for your petitioner were wholly rejected and thrown out by many election boards on the unlawful and fraudulent pretext that they were not duly and properly marked for the petitioner, whereas in fact they were so marked and cast.

(j) Many ballots duly and properly marked and cast for the petitioner were rejected and thrown out by many election boards on the unlawful and fraudulent pretext that they bore distinguishing marks, whereas in fact they did not bear any unlawful distinguishing marks and ought to have been counted for your petitioner.

(k) Many ballots duly and lawfully marked and cast for petitioner were erroneously thrown out and not counted for petitioner by many of the said election boards under erroneous interpretations of their duties.

(l) Many ballots for said Truman H. Newberry were corruptly and unlawfully procured to be cast and counted for him by the unlawful use of money on his behalf.

(m) Large sums of money were unlawfully expended by and in behalf of said Truman H. Newberry to influence said election and cause votes to be cast for him that otherwise would not have been so cast.

(n) Large numbers of lawful voters were intimidated and prevented from voting at the said election by partisans and supports of said Newberry who otherwise would have voted at the election and cast their votes for the petitioner, to wit, five thousand of such votes.

(o) Large numbers of lawful voters, employees of certain large corporations, were intimidated and unlawfully coerced by employers and their representatives into voting for said Newberry against their wills and preferences who otherwise would have cast their ballots for the petitioner.

(p) In a number of the counties the respective boards of county canvassers made and reported their canvasses without having or examining the poll books and tally sheets nor in any way verifying the number of original votes as cast or the number of voters voting at the respective precincts.

(q) That careful investigation by petitioner's directions has been made by reliable men since the election to ascertain as far as may be the detailed facts pertaining to the above statements and as to the conduct of counting in said election and from such investigations and from other information reaching the petitioner and his representatives he avers the foregoing statements to be true and he particularly specifies the following counties and election districts therein as the counties and districts where such irregularities, miscounting, and frauds were more flagrantly committed, namely: Kent, Bay, Kalamazoo, Wayne, Saginaw, Allegan, Antrim, Baraga, Barry Benzie, Berrien, Calhoun, Cass, Charlevoix, Chippewa, Clare, Dickingson, Eaton, Emmet, Genesse, Gladwin, Gogebic, Gratiot, Hillsdale, Houghton, Huron, Ingham, Ionia, Iosco, Iron, Isabella, Jackson, Kalkaska, Keweenaw, Lapeer, Lenawee, Macomb, Marquette, Mason, Mecosta, Midland, Monroe, Montcalm, Montmorency, Muskegon, Newaygo, Oakland, Oceana, Osceola, Ottawa, Sanilac, St. Clair, St. Joseph, Tuscola, Van Buren, Washtenaw, Wexford; and that such irregularities and miscounts occurred in a more modified degree in nearly all the other counties of the State and that mistakes unfavorable to petitioner and in favor of the said Truman H. Newberry occurred in all of the counties.

(r) That upon a fair and lawful recount of the ballots cast at said election your petitioner would be decided to be duly and lawfully elected Senator from Michigan.

(s) That upon such a fair and lawful recount, and due allowances being made for such frauds, intimidations, and prevention of votes, petitioner would be decided and declared by your honorable body to have been duly and lawfully elected Senator from Michigan.

(7) Your petitioner shows that the ballots cast for the said office of United States Senator at said election have generally been preserved intact, with the exception of those cast in the cities of Saginaw, Marquette, and possibly one or two smaller localities, together with the poll books and tally sheets relating thereto, under the provisions of the several orders of court in that behalf in the two suits in equity brought by your petitioner for that purpose in the United States district court for each the eastern and western districts of Michigan, comprising the whole of said State, that as your petitioner is advised the ballots, poll books, and tally sheets, with the exceptions mentioned, are now generally held in the custody and possession of the officers designated by the law of the State of Michigan for such purposes awaiting action hereon by this Senate.

(8) And the petitioner further shows that he is advised that under the laws of Michigan there is no body or tribunal which has control of a recount except the United States Senate, and that his only adequate relief to preserve and recount the ballots lies in suitable action to that end by your honorable body.

(9) That petitioner has caused notice of his intention to contest the alleged election of said Truman H. Newberry to the United States Senate to be duly served upon the said Truman H. Newberry, viz, on the 2d day of January, 1919, and May 17, 1919.

(10) The petitioner hereby prays and requests the Senate to entertain his said contest; to provide for a recount of the said ballots and the due preservation of said ballots for the purpose of the recount and of evidence in the contest; and for a prompt investigation of said election and primary and of the matters hereinbefore set forth, and that said Truman H. Newberry be declared not elected, and also disqualified and not entitled to a seat because of the aforesaid violations of law; and that petitioner may be declared elected and entitled to said seat, and that he may have such further action of the Senate and its duly appointed committees and agents and such other relief as shall be conformable to justice, and as the premises shall warrant; and he will ever petition, etc.

HENRY FORD.

While this petition was pending in the Senate, Mr. Newberry with others was indicted and convicted in the Federal court of the United States at Grand Rapids, Mich., on a charge of violation of the Federal corrupt-practices act.[1]

On appeal to the Supreme Court of the United States the conviction was set aside and the case reversed on the ground that Congress had no authority to control party primaries and the act was to that extent unconstitutional.

Following the filing of the petition, the Senate agreed to the following resolution:

Whereas charges and countercharges of excessive and illegal expenditures of money and of unlawful practices have been made in connection with the primary nomination and election of a Senator from the State of Michigan, which election was held on the 5th day of November, 1918: Therefore be it

Resolved, That the Committee on Privileges and Elections, or any subcommittee thereof, be, and it is hereby, authorized and directed to investigate the said charges and countercharges of excessive and illegal expenditures of money and of unlawful practices in connection with the said election of a Senator from the State of Michigan, including the proceedings for the nomination of candidates at the primary theretofore held, and to take possession of the ballots, poll books, tally sheets, and all other documents and records relating to the said primary nomination and election; and the Sergeant at Arms of the Senate, and his deputies and assistants, be, and they are hereby, instructed to carry out the directions of the said Committee on Privileges and Elections, or any subcommittee thereof, in that behalf; and that the said Committee on Privileges and Elections, or any subcommittee thereof, be, and it is hereby, directed to proceed with all convenient speed to take all necessary steps for the preservation of the said ballots, poll books, tally sheets, and other documents, and to recount the said ballots, and to take and preserve all evidence as to the various matters alleged in the said charges and countercharges and any answers hereafter filed, and of any alleged fraud, irregularity, and excessive or illegal expenditures of money, and of any unlawful practices in the said election and primary, and as to the intimidation of voters, or other facts affecting the result of said election.

Resolved further, That the Committee on Privileges and Elections, or any subcommittee thereof, be authorized to sit during the sessions of the Senate and during any recess of the Senate, or of the Congress, and to hold its sessions at such place or places as it shall deemed most convenient for the purposes of the investigation; and to have full power to subpoena parties and witnesses, and to require the production of all papers, books, and documents, and other evidence relating to the said investigation; and to employ clerks and other necessary assistants, and stenographers, at a cost not to exceed $1 per printed page, to take and make a record of all evidence taken and received by the committee; and to keep a record of its proceedings; and to have such evidence, records, and other matter required by the committee printed.

Resolved further, That the Sergeant at Arms of the Senate and his deputies and assistants are hereby required to attend the said Committee on Privileges and Elections, or any subcommittee thereof, and to execute its directions; that the chairman or any member of the committee be, and is hereby, empowered to administer oaths; that each of the parties to the said contest be entitled to representatives and attorneys at the recount and the taking of evidence; that all disputed ballots and records be preserved so that final action may be had thereon by the full committee and the Senate; that the committee may appoint subcommittees of one or more members to represent the committee at the various places in the making of the recount and the taking of evidence, and the committee may appoint such supervisors of the recount as it may deem best; and that the committee may adopt and enforce such rules and regulations for the conduct of the recount and the taking of evidence as it may deem wise, not inconsistent with this resolution; and that the committee shall report to the Senate as early as may be, and from time to time, if it deems best, submit all the testimony and the result of the recount and of the investigation.

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[1] U. S. Code, title 2, section 244 et seq.

Resolved further, That the expenses incurred in the carrying out of these resolutions shall be paid from the contingent fund of the Senate upon vouchers ordered by the committee, or any subcommittee thereof, and approved by the chairman of the committee.

73. The Senate election case of Ford v. Newberry, continued.

On a recount of ballots the official returns in precincts where the ballots had been destroyed were accepted as correct by agreement of counsel.

Expenditure of large sums of money in the primary condemned, but where not shown to have been illegal or improper, held not to affect the title of the sitting Member to his seat.

Expenditures for newspaper advertisement and the circulation of form letters held not to constitute improper use of money.

Solicitation or disbursement of excessive sums in primary and general elections not to be considered when made without candidate's knowledge or consent.

On the legislative day of September 26, 1921 [1] (calendar day of September 29), Mr. Selden P. Spencer, of Missouri, presented the report of the majority of the committee, reciting that in compliance with the resolution of the Senate the committee had—

caused the ballots cast at the said general election (with the exception of a few precincts where the ballots had been destroyed, in all of which cases by agreement of counsel the State official count was accepted as correct) to be gathered together and brought to Washington where they were recounted in accordance with the rules agreed upon by counsel.

The official returns gave the contestant 212,487 votes and the contestee 220,054, a plurality for the latter of 7,567 votes. The recount under the direction of the committee gave the contestant 212,751 votes and the contestee 217,085 votes, a plurality of 4,334 votes for the sitting Member.

The majority therefore find:

The result of the recount shows conclusively that Truman H. Newberry was legally elected United States Senator, and there is no evidence to sustain any of the charges of the contestant with regard to the general election, as hereinbefore set out.

As to charges of corruption in the primary, the majority say:

The amount of money spent at the primary was large—too large—but there was no concealment whatever with regard to it, and it was spent entirely for legal and proper purposes. On September 6, and within the time prescribed by the laws of the State of Michigan, a full report, so far as it was then known, of the contributions and expenditures was filed and made public. It showed contributions of $178,856, and expenditures, $176,568.08.

Later on some bills, which had been delayed in presentation, mainly for advertising, amounting to between ten and fifteen thousand dollars, were presented and were paid by the Newberry campaign committee, but the fact that approximately $195,000 was used in the primary was frankly and freely admitted and nothing in the testimony has materially changed this admission.

Whether the amount was approximately $195,000, as was fully reported or openly acknowledged, or whether there were some few thousand dollars in excess of that amount, as contestant alleges, is immaterial. It is, in either event, a larger sum than ought to have been expended.

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[1] First session Sixty-seventh Congress, Senate Report No. 277, Record, p. 5866.

Mr. Newberry in his statement [1] on the floor of the Senate referred to this phase of the case as follows:

I knew, as a matter of fact, that a campaign of publicity was being extensively carried on, and I realized that such a campaign must necessarily cost a considerable sum of money; but I did not have the faintest idea as to the amount of money that actually was expended until after the report was made public. The cost of the campaign was about $195,000, according to the report, and when I learned of this amount I was at once filled with amazement and regret.

I have no criticism to make of those who managed the campaign which resulted in my election to the United States Senate. Whatever may happen, it is a gratification for me to remember that in the examination before the grand jury in New York City, in the diligent and detailed examinations which were made by numerous agents of the Department of Justice from Washington in all that was brought out, in the minute investigation of every step in the campaign in Michigan, in all that was presented to the grand jury at Grand Rapids, and before the petit jury who tried the Grand Rapids case, there was not the slightest evidence which involved moral turpitude in the remotest degree, nor was there any evidence, so far as I have been able to learn, of a single dollar that was spent dishonestly for corruption or bribery. The amount expended was large, more than I had any idea was being expended, and more than ought to be necessary to expend in any ordinary campaign. But this was not an ordinary campaign.

I shall not dwell upon the reasons which the committee thought imperatively demanded a campaign of newspaper publicity involving this expenditure of money. I can only say that I regret exceedingly the fact that so large an amount of money was necessarily expended. I can further say that in the acquisition of that money, in the solicitation of that money, in the collection of that money, in the use of that money, I had nothing whatever to do. I knew nothing whatever about it—not even the amount of it.

I make this statement not to escape any responsibility but in order that the actual facts in the matter as I know them, may be presented to the Senate. How the money was spent in the State of Michigan, how the books of account were kept, who were engaged in the work, or what they did, I did not know.

For this lavish expenditure of money the majority do not hold Mr. Newberry in any wise responsible.

The report says:

Truman H. Newberry was absent from the State of Michigan continuously during the entire campaign and until long after the election had been held. He took no part whatever either in the financial or other features of the primary campaign or its direction or control. Nor did he take any part in the general election.

Mr. Newberry was during all that time actively engaged in the service of the United States as a naval officer in New York.

He was kept fully informed from time to time as to the progress of the campaign in Michigan, but he had no knowledge of the financial management of the campaign; he did not know the amount of money being expended, nor by whom contributions were made, nor the purposes for which the money was used.

From his general knowledge of the character of the campaign that was being conducted in Michigan, and the extent of publicity given to his candidacy through the newspapers, it is presumed that he had a general idea that a large sum of money was necessarily being spent.

The evidence shows conclusively that the financial cost of the campaign was voluntarily borne by relatives and friends of Truman H. Newberry, and was entirely without solicitation or knowledge upon his part.

Your committee condemns the use of such a large sum of money in any primary campaign, but in the instant case there is not the slightest foundation upon which to connect Truman H. Newberry with its solicitation, its acquisition, or its use, nor to condemn him because of the amount.

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[1] Second session Sixty-seventh Congress Record, p. 1140.

While the aggregate was large, it was not spent for any purposes that were in themselves illegal or improper, and its use was wholly managed by a campaign committee entirely free both in its selection and its action from Truman H. Newberry.

The majority quote in support of this position the words of Mr. Justice Pitney in his opinion rendered when the Grand Rapids case came for final decision before the Supreme Court of the United States:

Justice Pitney said of Mr. Newberry's alleged connection with the campaign fund:

His mere participation in the activities of the campaign, even with the knowledge that moneys spontaneously contributed and expended by others, without his agency, procurement, or assistance, were to be or were being expended, would not of itself amount to his causing such excessive expenditure.

Justice Pitney continued:

A candidate can not be made a principal offender unless he directly commits the offense denounced. Spontaneous expenditures by others being without the scope of the prohibition, neither he nor anybody else can be held criminally responsible for merely abetting such expenditures.

His remaining in the field and participating in the ordinary activities of the campaign, with knowledge that such activities furnish in a general sense the "occasion" for the expenditure, is not to be regarded as a "causing" by the candidate of such expenditure within the meaning of the statute.

Among the purposes for which this money was expended, and which the majority do not consider illegal or improper, were the following:

The evidence discloses that a most comprehensive and far-reaching campaign of publicity was vigorously conducted in a thorough and systematic manner through the newspapers of the State of Michigan.

That, with the exception of a few Democratic newspapers, advertising was placed in practically every newspaper, daily, weekly, and monthly, published in the State of Michigan.

That a series of 13 advertising announcements, covering the entire 13 weeks of the primary campaign, were carried in upward of 500 papers and publications, going into every portion of the State.

In addition to this, a very general and systematic plan of publicity was carried on through correspondence; thousands and thousands of form letters being sent into every county in the State; the names of persons to whom sent being alphabetically arranged and card indexed. This work necessitated the assistance of a large corps of clerks and helpers. The evidence discloses that at one time more than 50 stenographers alone were employed in the Newberry headquarters.

This program of publicity necessitated the expenditure of a large amount of money. More than 80 per cent of the money spent in the primary campaign was, according to the evidence, spent for advertising and other publicity.

Accordingly, the majority thus sum up the evidence:

Two facts which are decisive of the present ease stand out clearly in the record as entirely established:

First. That none of the money spent in the primary election, large as was the amount, was spent for corrupt, illegal, or improper purposes. It was spent without the knowledge or consent of Truman H. Newberry, for publicity, and for ordinary campaign purposes and expenditures which are perfectly familiar to every man who has ever been a candidate for office, and which are generally regarded as both necessary and proper.

Second. That Truman H. Newberry had no part whatever in the solicitation of the campaign fund, or in its acquisition, or in the expenditure of it. It came from sources entirely voluntary,

and it was spent by a voluntary committee which was in no sense the agent of Mr. Newberry and which had complete control of it and entire responsibility for its use.

The minority views submitted by Mr. Atlee Pomerene, of Ohio, do not agree with the majority findings, either as to fact or theory. On the contrary, it is claimed by the minority:

First. That Mr. Truman H. Newberry participated in, if he did not dictate, the organization of his campaign committee.

Second. He knew in advance that this campaign would cost "his friends" at least $50,000.

Third. Reports almost daily were made to him by his campaign manager, Mr. Paul King, and others.

Fourth. Almost daily reports were made to him by his attorney in fact, Fred P. Smith, as to the business and financial affairs of himself, his brother, John S. Newberry, the chief contributor to the campaign fund, and of 10 other Newberry interests. He knew that Fred P. Smith, who was acting under his power of attorney, was checking money out of the bank accounts of Truman H. Newberry and other Newberry interests and depositing them to the credit of John S. Newberry, and then issuing checks on this fund payable to the Newberry campaign fund committee as its demands might require.

Fifth. He aided in the preparation of the publicity material, received constant reports concerning it, and regarded himself responsible to Mr. Templeton, Mr. King, and Mr. Oakman "for actual travel and publicity costs." (B. E. 652.)

Sixth. He knew for weeks in advance of the primary that the extravagant expenditure of money had gone to such an extent as to be a common scandal in the State, and that he was the beneficiary thereof.

Seventh. This extravagant expenditure of money was called to his attention not only by the public press of his State but by letters written to him personally by some of Michigan's most honored citizens.

Eighth. A careful study of this record will show that the campaign committee was composed of his close personal and business friends, and that they were in fact his very "alter ego," or at least they were so closely allied with him, and he was in such close touch with every phase of the campaign that it does not lie in his mouth to claim the usufruct of their work and deny the responsibility for the way in which it was brought to his door.

Ninth. With all of this knowledge brought to him in the way disclosed by this record, we fail to see how Mr. Newberry could honorably say as he did in his affidavit of August 14, 1918, filed with the Secretary of the Senate:

"The campaign for my nomination for United States Senator has been voluntarily conducted by friends in Michigan. I have taken no part in it whatever, and no contribution or expenditures have been made with my knowledge or consent."

Tenth. Nor do we understand how, in his further affidavit filed with the Secretary of the Senate on August 29, 1918, he could honorably say:

"The following is a true and itemized account of all moneys and things of value given, contributed, expended, used, or promised by me, or by my agent, representative, or other person for or in my behalf with my knowledge or consent.

"None with my knowledge or consent.

"I have read the general published statement of Paul H. King concerning expenditures made by a volunteer committee of my friends, but these were made without my knowledge or consent."

Twelfth. Neither is the minority able to understand, when Mr. Newberry't title to a seat in the United States Senate is challenged and this challenge is supported by the evidence contained in this record, why he should fail to come before the committee of his colleagues to give to them the knowledge which he possesses bearing upon this subject, but content himself with a general denial.

Thirteenth. After it was announced that Senator Newberry would not appear to testify the minority moved that he be invited to appear, and they are not able to understand why the majority

of the committee refuse to honor this request and call him before it so that the Senate might have the benefit of any explanations he might see fit to make concerning his relations to his campaign.

Fourteenth. A careful reading of this record will convince fair-minded men that the Newberry senatorial committee was the agency through which Mr. Newberry conducted the campaign, sometimes directing, sometimes vetoing, but nearly always participating in and approving its acts. The acts of this committee were his acts, and for them he is responsible at the bar of the Senate.

74. The Senate election cases of Ford v. Newberry, continued.

Though ordering a recount of the ballots the committee declined to request attendance and testimony of contestee or to require the production of bank records.

Construction of Michigan corrupt-practices act.

Instance wherein a Senator, following an inquiry vindicating his title to his seat, resigned.

The minority cite the Michigan statutes governing primary elections and make the following deductions:

We deduce from the Michigan statutes just quoted:

(a) That Mr. Newberry could not spend, or authorize, or incur obligations to be paid by him in excess of $3,750.

(b) That no candidate and no treasurer of any political committee can pay, give, or lend, or agree to pay, give, or lend, directly or indirectly, any money or thing of value in order to secure a nomination, except for the 11 purposes set out in section 3830.

(c) While the statute places no express limitation on the amount which a committee may expend for the 11 defined purposes, no candidate can under this law create or use a committee as his agency and thereby defeat the express limitation prescribed for the candidate.

(d) Every candidate and every treasurer of a political committee must file a sworn, full, true, and detailed account and statement setting forth each and every sum of money received or disbursed by him for nomination expenses, the date of each receipt, the name of the person from whom received or to whom paid, and the person to whom and object or purpose for which disbursed. It must also set forth "the unpaid debts and obligations, with the nature and amount of each and to whom owing in detail."

(e) No candidate can excuse himself for not filing such account because the treasurer of the committee may have filed one.

(f) If moneys for election purposes were paid to county chairmen or secretaries or to hired workers, the law has not been complied with, because the treasurer may have charged the sum to some one connected with the committee who acted as a disbursing officer. The law requires the naming of the ultimate payee and not the intermediate agent.

(g) No candidate can loan money to a brother or business associate in order to enable him to meet the extraordinary demands of a moneyed campaign, and thereby defeat the purpose of the iaw.

(h) The intent of section 45 is "to prohibit the prevailing practice of candidates hiring with money and promises of positions, etc., workers on primary day and prior thereto.

(i) And section 48, in part, declares:

"It shall be unlawful for any other person to do or perform for or on behalf of any such candidate, or to help or injure the candidacy of any candidate, any of the acts or things which it is by this act made unlawful for such candidate to do."

The minority then discuss evidence claimed to show that in violation of the statute as thus interpreted Mr. Newberry organized his own campaign committee, was intimately familiar with the activities of the committee in the prosecution of the campaign, and himself contributed indirectly to the campaign fund.

According to the minority:

The evidence shows conclusively Senator Newberry's active participation in the organization of his committee, his approval of all of its activities, with few exceptions, his direction as to many of them, and the contributions from his own funds as well as other family funds in which he was interested through the medium of his brother, John S. Newberry, so that it can in no sense of the word be claimed that the moneys expended were spontaneously contributed by his friends, and that he did not participate therein.

The voice of the senatorial campaigri committee may be the voice of the friends and business associates of the candidate, but its hand was the hand of Truman H. Newberry.

Therefore, the minority thus summarize their contentions:

The exorbitant expenditures in this primary campaign shocked the conscience of the country.

The attorneys for the contestant claim in their supplemental brief that the record shows disbursements in behalf of Senator Newberry aggregating $263,060.67.

Some of these expenditures may be duplicates. The original books and records of the committee have been destroyed, or at least not produced. The books of the Newberry interests are likewise gone. The majority of the committee would not permit the subpoenaing of bankers to produce their books showing the Newberry accounts. There is no way in the present state of the record to arrive at the exact cost of this campaign. We are reasonably certain that much money was expended of which there is no account.

On the other hand, the Blair report, filed under the Michigan statute, shows total disbursements of $176,568.08. After this report was filed Secretary Charles A. Floyd testified that additional bills were presented, which were paid, aggregating between twelve and fifteen thousand dollars.

Accepting this smaller figure as correct, the total cost of Mr. Newberry's primary campaign was $188,568.08. In other words, to secure him the nomination there was an outlay in Michigan of a sum sufficient to pay his salary for more than 25 years.

In the language of Senator Hoar and Senator Frye in the Payne case, "no more fatal blow can be struck at the Senate or at the purity and permanence of the republican Government itself than the establishment of this precedent.

True, Mr. Newberry, in his sworn statement filed with the Secretary of the Senate, says the campaign was voluntarily conducted by "his friends." "I have taken no part in it whatever, and no contributions or expenditures have been made with my knowledge or consent," says he.

But with the accusing finger of a large portion of the people of his State pointing at him and with this incriminating record before him he has not up to date volunteered to tell his colleagues in the Senate what the facts are, and the majority members of this committee refuse to invite him to tell them.

We submit that a careful review of this report supplemented by a reading of the record in this case will show conclusively.

First. That his nomination as a candidate for United States Senator was secured by this extravagant expenditure of money, without which he could not have hoped to win over his competitors, because he was little known in the State.

Second. This money was expended through the agency of the Newberry senatorial committee.

Third. This committee was organized at his instance and manned by executives whom he himself chose, or if they were suggested by his friends he approved them.

Fourth. While a larger part of the planning of the campaign may have been done by the executives of the committee, they were submitted to him for his approval.

Fifth. He approved or disapproved these plans according to his judgement.

Sixth. Every general activity of this committee and its executive officers, whether in organization or publicity work, was reported to him almost daily by Mr. Paul H. King, the executive chairman, and others.

Seventh. Many conferences were held between him and the executive members of his committee at New York for the purpose of originating, or criticizing, or revising the plans of the campaign

Eighth. While Mr. Paul H. King insists that he never discussed with Senator Newberry the financing of the campaign, except in his first conversation when he told him that it would cost "his friends" $50,000, he did know concededly the enormous expenses of the plan of organization and publicity of his senatorial committee, and he knew also that his own bank account and the bank accounts of the other Newberry interests were being depleted by his own attorney in fact, Frederick P. Smith, in order to replenish the waning balance in the bank account of his brother, John S. Newberry, out of which the campaign expenses were being paid. This is known because this same Frederick P. Smith testifies, as above quoted, that Senator Newberry talked to him "about the drain on the balances in the office, and he was complaining about the money that was being spent," and again that he (Senator Newberry) was "kicking about the balances."

Ninth. These drains on the Newberry finances must have been heavy because out of these various funds were furnished net $99,900, the amount charged in the Blair report.

Tenth. The Michigan law limited the expenditure of any candidate for the Senate to $3,750. We submit that this amount could not be increased by the organization of a committee to act as his agent, and this committee did so act. Qui facit per allum, facit per se.

Eleventh. The Newberry senatorial committee, the agent of the candidate, violated the Michigan law by far exceeding the limitations upon expenditures, by hiring workers on primary day and for days before, and its members by purchasing drinks and cigars for voters.

Twelfth. The Blair report of the receipts and expenditures of the Newberry senatorial committee clearly violates the Michigan law because it does not give the names of the men who did active work in the campaign and to whom money was paid, nor does it in many instances state the purpose for which it was paid, and gives no account of the liabilities which were outstanding and unpaid at the time that the report was filed.

Thirteenth. The Michigan statutes require both Senator Newberry, the candidate, and the treasurer of the senatorial committee to file accounts of their receipts and expenditures. The treasurer's account does not comply with the law for the reasons hereinbefore stated, and Senator Newberry filed no account whatsoever.

Fourteenth. Not having filed any account under the Michigan statutes it was unlawful for the Michigan authorities to issue a certificate of nomination to Mr. Newberry.

Fifteenth. The Federal corrupt practices act required statements of receipts and disbursements to be filed in connection with the primary and general election campaigns.

Under this statute and under oath he filed on August 17, 1918, a preprimary statement in which he said:

"The campaign for my nomination for United States Senator has been voluntarily conducted by friends in Michigan. I have taken no part in it whatever, and no contributions or expenditures have been made with my knowledge or consent."

Under date of August 29, 1918, he filed his account of receipts and expenses for the primary election held August 27, 1918, in which he said, under the printed words:

"The following is a true and itemized account of all moneys and things of value given, contributed, expended, used, or promised by me or by my agent, representative, or other person for or in my behalf with my knowledge or consent, etc."

Then in his handwriting appears the words "none with my knowledge and consent."

This qualification follows:

"I have read the general published statement of Paul H. King concerning expenditures made by a volunteer committee of my friends, but these were made without my knowledge or consent."

These statements were made under oath and filed in conformity with the Federal statute. Presumably they influenced to some extent the voters of Michigan. The minority members regret to say that they were not true, and while the statute under which they were filed has been held unconstitutional the moral turpitude involved in their making is just as great as if the statute had been held constitutional.

Sixteenth. In our opinion the record as hereinbefore shown conclusively establishes a conspiracy upon the part of Truman H. Newberry et al., who were indicted and tried for a conspiracy to violate both Federal and State laws; that such conspiracy had for its object the violation of the election laws of the State of Michigan as well as the Federal statute limiting the expenditures allowed by a candidate for United States Senator and contemplated the debauching of the electorate of the State of Michigan by the expenditure of large sums of money; that said Truman H. Newberry participated in said conspiracy and actively engaged in its execution; that in pursuance thereof he selected agents and directed their activities; that he was familiar with the fact that large sums of money were being expended and would be expended in the primary election for the purpose of corrupting the electorate of the State of Michigan and in violation of the election laws of said State; that he knew that not less than $188,568.08 were expended in said primary election and that the expenditure of said money was in violation of law; that he aided in the creation of a committee to take charge of his campaign as a candidate for the United States Senate and directed the work of said committee and was cognizant of its activities, including the expenditure of large sums of money in violation of the election laws of the State of Michigan; that he approved of the work of said committee and of its activities and of its large expenditures and was fully aware of the nature, character, and accomplishments of said committee and of the methods employed by it to secure his nomination at the primary election; that through his confidential agent and attorney in fact he contributed to said expenditures various large sums from time to time, but the amounts so contributed or the aggregate thereof are not known to the committee because neither said Truman H. Newberry nor those who controlled the payment of said amounts testified in respect thereto, and further contended that the books and accounts showing such payments were either lost or destroyed; that the payments so contributed by said Newberry, in the manner hereinbefore described, to said committee for the purposes aforesaid were so large as to impair the account of said Newberry at the bank where he conducted his business, resulting in his complaining to Frederick P. Smith, his confidential agent and attorney in fact, because of his reduced balances in bank, as stated in the eighth finding herein; that notwithstanding the knowledge by said Newberry of the facts hereinbefore stated, he filed under oath the statements referred to in the fifteenth finding hereinbefore set forth; that said statements submitted under oath were false and untrue to the knowledge of said Newberry in this, to wit: That he did take part in said campaign and did make contributions and expenditures and that contributions and expenditures were made to secure his nomination, with his knowledge and consent, and pursuant to his direction and control; and that the campaign for his nomination was conducted under the direction of said Newberry and pursuant to said conspiracy hereinbefore set forth.

The minority report also sets forth the following resolution submitted for adoption in the sessions of the Committee on Privileges and Elections and denied by the majority of the committee:

Resolved by the Committee on Privileges and Elections, That the subcommittee be instructed to invite Senator Newberry to appear before it to give testimony concerning the charges pending against him involving his title to a seat in the United States Senate.

A request by minority members of the committee for an inspection of bank records showing deposits and disbursements by Mr. Newberry during the period immediately preceding the election was likewise denied.

In commenting on this phase of the case Mr. Selden P. Spencer, of Missouri, said [1] in debate in the Senate:

I call the Senate's attention to the fact that every witness, that every paper, that every document, that every book, was before the grand jury in Grand Rapids; that the agents of Henry Ford scoured the State of Michigan for every man who knew anything about that election, to see if perchance there might be some remark, some event, or something unexplained, which, when

[1] First session Sixty-seventh Congress, Record, p. 7787.

presented to the grand jury, might look like evidence against Truman H. Newberry; and from that scouring of the State of Michigan 483 were subpoenaed before the grand jury at Grand Rapids. Every man who had anything to do with the primary election of Truman H. Newberry was subpoenaed. Every book, every paper, every witness was before the grand jury in Grand Rapids, and they examined into every detail of the primary election with a degree of particularity that has been unequaled in any similar election proceedings in the history of this land. And everything before the grand jury which was deemed at all relevant was introduced at Grand Rapids, and the entire testimony at Grand Rapids was available to this committee which, on the part of the Senate, examined into this matter.

So that if we hear upon the floor of the Senate anything said about a witness not being present before our committee or about any papers or checks not being presented before our committee, I ask Senators to remember that there were before our committee not only the living witnesses who were—44 in number—examined by the committee but the complete bill of exceptions in the trial at Grand Rapids as it was presented to the Supreme Court, with its summary of the testimony of every one of the witnesses. More than that, there was incorporated in our hearings the testimony of every witness taken at Grand Rapids that either side desired to have put into our record, so that when Senators come to look into the record in this instant case they will find every scrap of evidence in regard to the primary election in Michigan.

Subsequently,[1] in the Senate, Mr. James A. Reed, of Missouri, said:

Mr. President, it seems to me this case is complete, indisputable. If there were one thing needed to make it a certainty it is the failure of Senator Newberry to take the witness stand. If Senator Newberry did not know of the expenditure of this money, why did he not take the witness stand and say he did not know of it? If there was any circumstance requiring explanation and exculpation, why did he not take the stand to make that explanation? Here was a tribunal the members of which, regardless of politics, would have been glad to have heard him vindicate himself. But he did not take the stand. He remained silent. I will not vote for a an who can not testify in his own behalf. I will not vote to seat a man who dare not open his lips regarding transactions which unexplained are condemnatory.

On January 9,[2] in speaking to the report in the Senate, Mr. Newberry said:

Mr. President, I can not remain silent any longer during the consideration of my right to represent the State of Michigan as one of its Senators. I did not volunteer to appear before the committee of the Senate which took testimony in this matter because I really had no information that would assist in the investigation of the charges filed by my opponent. It seems to me that the time has come to speak, because my silence may be misunderstood by my friends.

In concluding their report the majority recommended:

(1) That the contest of Henry Ford against Truman H. Newberry be, and it is hereby, dismissed.

(2) That Truman H. Newberry is hereby declared to be a duly elected Senator from the State of Michigan for the term of six years commencing on the 4th day of March, 1919.

(3) That his qualification for a seat in the Senate of the United States, to which he has been elected, has been conclusively established, and the charges made against him in this proceeding, both as to his election and qualification, axe not sustained.

The minority express the opinion:

First. That the irregularities complained of do not relate to the general election but to the primary. Henry Ford did not receive a plurality of the votes cast at the general election. We therefore find that the petitioner, Henry Ford, was not elected and is not entitled to a seat in the Senate of the United States.

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[1] Second session Sixty-seventh Congress,[2] Record, p. 626.

[2] Record, p. 962.

Second. We find that under the facts and circumstances of this case corrupt and illegal methods and practices were employed at the primary election and that Truman H. Newberry violated the corrupt practices act and the primary act of the State of Michigan, and that by reason thereof he ought not to have or hold a seat in the Senate of the United States, and that he is not the duly elected Senator from the State of Michigan for the term of six years commencing on the 4th day of March, 1919, and we recommend, therefore, that his seat be declared vacant.

Mr. Henry F. Ashurst, of Arizona, a member of the committee, concurring in the minority report, filed views giving personal reasons therefor and declared:

The credentials of the sitting Member are stained by fraud and tainted by illegal expenditures of money. His seat should be declared vacant.

The case was exhaustively debated in the Senate on November 15, 16, 17, 18, 19, 21, 22, December 7, 12, 21, January 4, 5, 6, 7, 9, 10, 11, and 12. On January 2,[1] on suggestion of Mr. Frank B. Willis, of Ohio, the majority resolution was modified to read as follows:

Resolved, (1) That the contest of Henry Ford against Truman H. Newberry be, and it is hereby, dismissed.

(2) That Truman H. Newberry is hereby declared to be a duly elected Senator from the State of Michigan for the term of six years commencing on the 4th day of March, 1919, and is entitled to hold his seat in the Senate of the United States.

(3) That whether the amount expended in this primary was $195,000, as was fully reported or openly acknowledged, or whether there were some few thousand dollars in excess, the amount expended was in either case too large, much larger than ought to have been expended.

The expenditure of such excessive sums in behalf of a candidate, either with or without his knowledge and consent, being contrary to sound public policy, harmful to the honor and dignity of the Senate and dangerous to the perpetuity of a free government, such excessive expenditures are hereby severely condemned and disapproved.

Mr. George W. Norris, of Nebraska, proposed to add to the resolution the following:

And, therefore, Truman H. Newberry is not entitled to a seat in the United States Senate.

The amendment was disagreed to—yeas 41, nays 46.

Mr. Thomas J. Walsh, of Montana, offered the following amendment in the nature of a substitute, which was disagreed to—yeas 41, nays 46:

Strike out all after the word "*Resolved,*" in line 1, and insert in lieu thereof the following:

"That Henry Ford, contesting the election of Truman H. Newberry as United States Senator from the State of Michigan for the term commencing March 4, 1919, not having received a majority of the votes cast at the election, is not entitled to a seat in this body.

"Resolved further, Considering that it is against a sound public policy that huge sums of money should be spent for the nomination or election of a candidate for the United States Senate, and that such excessive sums were spent to secure for Truman H. Newberry the Republican nomination as such candidate for the State of Michigan at the primary election in that State for the term mentioned, and considering that the campaign for his nomination was conducted in gross and flagrant violation of the laws of the State of Michigan and in contravention of the statutes of the United States, he was not duly elected and is not entitled to a seat in this body."

Thereupon Mr. Robert L. Owen, of Oklahoma, proposed a substitute amendment, to strike out all after the word "Resolved "in line 1, and insert in lieu thereof the following:

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[1] Record, p. 1116.

That Truman H. Newberry is not entitled to a seat in this body because his relatives and friends, against a sound public policy, confessedly expended approximately $200,000 at the primary election to acquire the nomination for him, and because such a precedent would be harmful to the honor and dignity of the Senate of the United States and contrary to the best interests of the United States Government.

This substitute was disagreed to—yeas 41, nays 46.

The question recurring on the majority resolution as modified it was decided in the affirmative—yeas 46, nays 41.

So the resolution recommended by the committee as modified, was agreed to.

On November 21, 1922,[1] the President pro tempore laid before the Senate the following communication:

DETROIT, MICH., *November 17, 1922.*

Hon. CALVIN COOLIDGE,

The Vice President, Washington, D. C.

Dear Mr. President: I inclose herewith a copy of my resignation which I have this day forwarded to the Governor of the State of Michigan, and I respectfully request that this be read into the records of the Senate as soon as possible.

Yours respectfully,

TRUMAN H. NEWBERRY.

DETROIT, MICH., *November 18, 1922.*

Hon. ALEX. J. GROESBECK,

Governor of Michigan, Lansing, Mich.

SIR: I tender herewith my resignation as United States Senator from Michigan, to take immediate effect.

I am impelled to take this action because at the recent election, notwithstanding his long and faithful public service and his strict adherence to the basic principles of constructive Republicanism which I hold in common with him, Senator Townsend was defeated. While this failure to reelect him may have been brought about, in part, by over four years of continued propaganda of misrepresentation and untruth, a fair analysis of the vote in Michigan and other States where friends and political enemies allke have suffered defeat will demonstrate that a general feeling of unrest was mainly responsible therefor.

This situation renders futile further service by me in the United States Senate, where I have consistently supported the progressive policies of President Harding's administration. My work there has been and would continue to be hampered by partisan political persecution, and I, therefore, cheerfully return my commission to the people from whom I received it.

I desire to record an expression of my gratitude for the splendid friendship, loyalty, and devotion of those who have endured with me during the past four years experiences unparalleled in the political history of our country. By direction of the Democratic administration, these began immediately upon my nomination, by proceedings before a specially selected grand jury, sitting in another State, which, by a vote of 16 to 1, completely exonerated those who had conducted my campaign. Then followed my election, with every issue which has since been raised clearly before the electorate of the State. A recount was demanded, and after a thorough and painstaking review of the ballots by the United States Senate, I was found to have received a substantial majority. While this was in progress I was subjected, with a large number of representative men of Michigan who had supported me, to a trial, following indictments procured by a Democratic Department of Justice, which through hundreds of agents had hounded and terrified men in all parts of the State into believing that some wrong had been done. Under the instructions given by the court, convictions of a conspiracy to spend more than $3,750 naturally followed, and sentence imposing fines and imprisonment was immediately passed. All charges of bribery and corruption were, however, quashed by the specific order of the presiding judge.

[1] Third session Sixty-seventh Congress, Record p. 14.

On appeal, the Supreme Court of the United States reversed the action of the court below, because, as stated by Chief Justice White, of the grave misapprehension and the grievous misapplication of the statute, which was also declared unconstitutional. A protracted investigation before the Committee on Privileges and Elections of the Senate resulted in a report sustaining my election; and after a bitter partisan debate the Senate declared that I was entitled to my seat.

In view of all these proceedings my right to my seat has been fully confirmed, and I am thankful to have been permitted to serve my State and my country, and to have the eternal satisfaction of having by my vote aided in keeping the United States out of the League of Nations.

For those who so patriotically and unselfishly worked for my election, and in defense of my own honor and that of my family and friends, I have fought the fight and kept the faith. The time has now come, however, when I can conscientiously lay down the burden, and this I most cheerfully do. If in the future there seem to be opportunities for public service, I shall not hesitate to offer my services to the State which I love and the country I revere.

Respectfully,

TRUMAN H. NEWBERRY.

75. The Pennsylvania election case of Farr v. McLane in the Sixty-sixth Congress.

Although sitting Member disclaimed knowledge of campaign expenditures in his behalf the House held he must be presumed to have had constructive knowledge of such expenditures.

The House unseated returned Member for whom campaign expenditures had been made in excess of amount permitted under the corrupt practices act.

Charges of fraud in the voting of persons under the legal age, of persons who had not registered as required by law, of fictitious persons, of persons who were not citizens, of persons who were fighting overseas or had died, of persons disqualified on account of nonpayment of taxes, having been sustained, such votes were rejected and were deducted from the total vote of the candidates for whom cast.

Illegal change of a polling place on election day, taken in connection with other evidence of fraud, was deemed sufficient cause for rejecting the entire vote of the precinct.

The alphabetical arrangement of names in the poll books constitutes evidence of collusion and fraud on the part of election officials.

Delay in opening the polls at the time fixed by law, where unattended by evidence of fraud, does not justify rejection of the vote.

Where the rejection of votes alleged to be illegal would not alter the result of the election it was not deemed necessary to consider the charge.

Discussion of methods of deducting illegal votes from the official returns.

Where irregularities occur in isolated instances and the illegal votes are capable of identification those votes only will be rejected, but where disregard of the law by election officials has been so flagrant as to render their returns unreliable the entire vote of the precinct will be rejected.

On February 15, 1921,[1] Mr. Frederick W. Dallinger, of Massachusetts, from the Committee on Elections No. 1, submitted the report in the Pennsylvania case of John R. Farr v. Patrick McLane.

[1] Third session Sixty-sixth Congress, House Calendar No. 1325, Record, p. 3202.

The sitting Member had been returned by an official majority of 201 votes. The notice of contest charged violation of the federal corrupt-practices act in exceeding the limit placed upon campaign expenditures, and specified frauds and irregularities in numerous voting precincts of the district. The contestee in his answer made countercharges of fraud and irregularity in various other precincts.

The act of August 19, 1911, commonly known as the corrupt-practices act, provided in part:

No candidate for Representative in Congress or for Senator of the United States shall give, contribute, expend, use, or promise, or cause to be given, contributed, expended, used, or promised, in procuring his nomination and election, any sum, in the aggregate, in excess of the amount which he may lawfully give, contribute, expend, or promise under the laws of the State in which he resides: *Provided,* That no candidate for Representative in Congress shall give, contribute, expend, use, or promise any sum, in the aggregate, exceeding $5,000 in any campaign for his nomination and election; and no candidate for Senator of the 'United States shall give, contribute, expend, use, or promise any sum, in the aggregate, exceeding $10,000 in any campaign for his nomination and election: *Provided further,* That money expended by any such candidate to meet and discharge any assessment, fee, or charge made or levied upon candidates by the laws of the State in which he resides, or for his necessary personal expenses, incurred by himself alone, for travel and subsistence, stationery and postage, writing or printing (other than newspapers), and distributing letters, circulars, and posters, and for telegraph and telephone service, shall not be regarded as an expenditure within the meaning of this section, and shall not be considered any part of the sum herein fixed as the limit of expense and need not be shown in the statements herein required to be filed.

The committee found:

The evidence shows that on December 5, 1918, Patrick McLane filed a personal return of his campaign expenses showing total receipts of $275 and total expenditures or disbursements of $748.04.

On the same date George Hufnagel, treasurer, filed a return in behalf of the "McLane Campaign Committee" showing total receipts of $12,800 and total expenditures of $11,749. Under the head of "Expenditures or disbursements" occurs this item:

"November 3, P. J. Noll, secretary Democratic county committee, $6,000."

On December 2, 1918, Albert Gutheinz, treasurer of the Democratic county committee of Lackawanna County, which county is situated in the tenth congressional district of the State of Pennsylvania, filed a return with the Clerk of the House of Representatives showing total receipts of $10,195 and total expenditures or disbursements of $7,476.96 and unpaid debts and obligations of $158.79. At the top of this return, the original of which was examined by the committee, appears the following statement:

"I hereby certify that the following is a full, correct, and itemized statement of all moneys and things of value received by me as treasurer of the Democratic county committee of Lackawanna County, Pa., together with the names of all those who have furnished the same, in whole or in part, in aid or support of the candidacy of Patrick McLane for election as Democratic Representative in the Congress of the United States for the tenth congressional district of the State of Pennsylvania at the general election to be held in said district on the 5th day of November, 1918."

It is evident, therefore, that in spite of the fact that Congress by statute has expressly forbidden any candidate for Representative in Congress to expend more than $5,000 in any campaign for his nomination and election, after deducting $6,000 which was received by the McLane campaign committee and paid by it to the Democratic county committee of Lackawanna County and expended by the latter, and also deducting the amount of $760.75 expended for purposes for which no return is required by the Federal statute, there was expended in the interest of the contestee, Patrick McLane, $7,853.49 in excess of the statutory amount. But omitting entirely the expenditures of the Democratic county committee, the "McLane Campaign Committee"

alone, which was organized solely for the purpose of promoting the election of the contestee, Patrick McLane, spent $11,749, the whole amount of which, with the exception of items aggregating $292.50, was expended for purposes for which, if expended by the candidate himself, a return is required to be made by the Federal law.

It was contended by the contestee, Patrick McLane, that he had not violated the corrupt practices act, because he personally had expended only $748.04 and that the balance of the money was expended by a committee of which he claims that he had no knowledge. If his contention is correct then the corrupt practices act becomes a farce and the limitation placed by Congress upon campaign expenditures is meaningless. The reading of the entire statute clearly shows that it was the intent of Congress to prohibit a candidate for Congress from expending directly or indirectly more than $5,000 for his nomination and election.

After quoting from the report in the case of Gill *v.* Catlin in the Sixty-second Congress on this point the committee held:

The committee therefore finds that the contestee, Patrick McLane, must under the law be held to have had constructive knowledge of expenditures made in excess of the amount permitted under the corrupt practices act. For that reason, in accordance with congressional precedent and as a matter of principle, he is not entitled to his seat in the Sixty-sixth Congress.

Charges of fraud and irregularity were considered by the committee in detail, precinct by precinct. According to the report, the evidence showed that persons were permitted to vote in many precincts who were not legally qualified to vote because they had not registered and did not make affidavit of their right to vote in absence of their registration as required by law. In a number of precincts unnaturalized aliens voted with the knowledge and consent of the election officials. One precinct returned 16 more votes than were actually cast. In two precincts votes were cast by persons who had not reached the legal age. In other precincts votes were cast by persons disqualified under the State law on account of nonpayment of taxes. In a number of instances the poll books bore the names of soldiers who were known to be fighting overseas or who had died. In many instances names appeared on the lists of names returned by the election officials as having voted who as a matter of fact did not vote.

As to the change of the polling place in Archbald Borough, third ward, on election day:

The contestant also claims that the polling place in this district was illegally changed on election day contrary to the laws of Pennsylvania, and that, in accordance with the decisions of the supreme court of that State, the entire returns of that district should be thrown out. While the committee finds that the evidence and decisions strongly support this contention, this fact alone would not have caused the committee to recommend the rejection of the entire return. Considering the question, however, in connection with the evidence of fraud hereinbefore referred to, the committee is of the opinion that the entire return from this district should be rejected, as recommended hereafter.

In the second ward of Dickson Borough it appeared that the names were written on the poll books in alphabetical sequence as if the voters had appeared and voted in that order.

The report says:

The committee finds that this was true in at least 10 instances. The committee also finds that the alphabetical arrangement of the names in the poll book constitutes strong circumstantial evidence of collusion and fraud on the part of the election officers.

The contestee submitted that the returns from the first precinct of the sixth ward in Taylor Borough should be rejected because the polling place was not opened on time.

The committee say:

The contestee claims that the returns from this district should be thrown out on the ground that the polls were not open at the time fixed by law and that in the absence of the regular election officers an irregular election board was chosen. The committee finds that while the polls were late in opening, the election in the district in question was carried on in good faith, and that there are no facts which would justify the committee in throwing out the vote of the district.

The contestee also claimed that the votes taken in various military encampments and naval stations should be rejected because not taken in accordance with the requirements of the law, of the State of Pennsylvania

The committee decided:

While it is undoubtedly true, as the contestee claims, that some camps and naval stations submitted returns which failed to comply with all the provisions of the statute, nevertheless, your committee feels that in the absence of evidence that the soldiers who voted were not otherwise disqualified to vote, it would be reluctant to disfranchise them. Inasmuch, however, as the rejection of the entire soldier vote would not alter the result arrived at by the committee upon all the other evidence in the case, it is not necessary to pass upon this question.

Some of the returns were so tainted with fraud as to necessitate the rejection of the entire poll. In other instances it was impossible to determine for which candidate the illegal votes were cast. The report discusses these questions as follows:

In a vast majority of these cases there is no way of ascertaining for whom these illegal votes were cast for the office of Representative in Congress. In many of these districts there is conclusive evidence of actual fraud on the part of the election officers, which would justify the rejection of the entire vote of the district in accordance with a long line of State and congressional precedents. In all of them there was a reckless disregard of the essential requirements of the Pennsylvania election laws on the part of the officers conducting the election, to such an extent as to render their returns unreliable and to bring about the same result as actual fraud.

In the case of In re Duffy (4 Brewster, 531), a Pennsylvania case, in which were involved some of the very election districts that are involved in the present case, the court held that when there is a reckless disregard of the provisions of the election law on the part of the election officers, such a condition renders the returns of the election officers unreliable and is sufficient to set them aside. If in the present case the entire vote of the districts in question should be rejected, as has been done by election committees of the House of Representatives in a large number of contested-election cases, the most recent of which was the Massachusetts case of Tague *v.* Fitzgerald in the present Congress, the result would be as follows: John R. Farr, 10,858 votes; Patrick McLane, 8,438 votes; and John R. Farr would be elected by a plurality of 2,420 votes.

If, on the other hand, the rule of deducting the illegal votes pro rata from the total vote of the two candidates, which rule was followed in the case of Finley *v.* Walls in the Forty-fourth Congress and in other contested-election cases, notably, in the recent case of Wickersham *v.* Sulzer in the Sixty-fifth Congress, it would result in a deduction of 164 votes from the total vote of John R. Farr, and in a deduction of 841 votes from the total vote of Patrick McLane, which would make the result as follows: John R. Farr, 11,400; Patrick McLane, 10,924; and John R. Farr, would still be elected by a plurality of 476.

After most careful consideration your committee is of the opinion that in the present case both methods should be used. While in all of the election districts in question persons were permitted to vote who had not been legally registered—in certain of the districts there was in addition evidence of other fraud of various kinds, together with collusion on the part of the election officials of such a character as to destroy the integrity of the returns and to justify their

absolute rejection. Accordingly, your committee has rejected the entire returns from the last mentioned districts, in which John R. Farr received 322 votes and Patrick McLane received 1,669 votes.

In accordance with their findings the committee conclude:

The evidence in this case, therefore, clearly shows that the contestee, Patrick McLane, must under the law be held to have had constructive knowledge of expenditures made in excess of the amount permitted under the corrupt practices act, and for that reason, in accordance with congressional precedent, he is not entitled to a seat in the Sixty-sixth Congress.

Moreover, entirely apart from the unlawful expenditure of money incurred to secure the election of the contestee, there was widespread fraud and illegality in the election itself. The rejection of the entire vote of the election districts in which such fraud and illegality occurred, in accordance with a long line of congressional and State precedents, results in the election of John R. Farr, the contestant, by a plurality of 2,420 votes.

Your committee therefore respectfully recommends to the House of Representatives the adoption of the following resolutions:

"Resolved, That Patrick McLane was not elected a Member of the House of Representatives from the tenth congressional district of the State of Pennsylvania in this Congress and is not entitled to retain a seat herein.

"Resolved, That John R. Farr was duly elected a Member of the House of Representatives from the tenth congressional district of the State of Pennsylvania in this Congress and is entitled to a seat herein."

When the case came up in the House for debate, on February 25, 1921,[1] Mr. James V. McClintic, of Oklahoma, a member of the committee, claimed that only 8 boxes impounded by the committee had been examined, and urged that the remaining 32 be counted. Mr. Leonidas D. Robinson, of North Carolina, explained that ballots were examined from those precincts only in which the returns were disputed, and as there were no allegations of fraud in the precincts represented by the 32 boxes they were not examined by the committee.

Mr. McClintic thereupon offered the following motion which was disagreed to, yeas 120, nays 161:

"Resolved, That the report in the Farr against McLane contested case be recommitted to the Committee on Elections No. 1, with instructions to examine the tally sheets and the registration lists in the 32 boxes impounded by a court order under date of April 5, 1919, on the prayer of the contestee, and to report back to the House when all of the testimony and facts have been properly considered.

The resolutions recommended by the committee were then agreed to; the first resolution unseating the returned member, yeas 161, nays 113; and the second resolution seating the contestant, yeas 158, nays 106.

76. The Illinois election case of Rainey v. Shaw in the Sixty-seventh Congress.

The Federal corrupt practices act held to be unconstitutional so far as it relates to nominations.

The statute requiring filing of statements of receipts and expenses of candidates is directory rather than mandatory, and failure to comply with its requirements will not invalidate election.

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[1] Journal, p. 190; Record, p. 3899.

Where no resulting injury or moral obliquity is shown, failure to comply with the statutory requirements for filing of answer to notice of contest within stipulated time does not warrant exclusion from the House.

On December 6, 1921,[1] Mr. Robert Luce, of Massachusetts, from the Committee on Elections No. 2, submitted the report of the committee in the case of Henry T. Rainey *v.* Guy L. Shaw from the twentieth district of Illinois.

The sitting member was conceded to have received a majority of the votes cast at the election, and no charges were made reflecting upon the regularity of the election or the integrity of the count.

The only point involved was the failure of contestee to comply with the technical provisions of the corrupt practices act relative to the filing of statements of receipts and expenditures in connection with the primary and election, and of the statute requiring that answer to notice of contest be filed within 30 days.

As to the application of the corrupt practices act the report says:

After notice of contest had been filed, the Supreme Court, in the case of Truman H. Newberry et al. *v.* The United States, gave an opinion, May 2, 1921, bearing upon the corrupt practices act. As to the effect thereof, the Attorney General had advised your committee as follows:

"It is my opinion that the Newberry decision should be construed as invalidating all of the provisions of the act referred to, relating to nominations for the office of Senate or Representative in Congress, whether by primaries, nominating conventions or by indorsement at general or special elections. I am also of the opinion that as to statements of receipts and disbursements to be filed by candidates for the office of Representative in Congress under section 8 of the act, the only provision now in force and effect is the one which requires such statements to be filed in connection with the election of such candidates."

Agreeing with this view, we conclude that such of the allegations of the contestant as concerned the primaries in the district in question fall to the ground, by reason of the unconstitutionality of so much of the act as related to nominations.

With the elimination of issues relating to the primary, the committee turn to the question of contestee's failure to file statements of receipts and expenditures within the stipulated time:

On this point the testimony of Mr. Shaw is to the effect that he duly mailed such statements. They were not received by the Clerk of the House. Had Mr. Shaw taken advantage of the statute and sent the documents by registered mail, no question would have arisen. However, the law does not make registration a requisite, and, as a matter of fact, many returns forwarded without registration have been unhesitatingly accepted. Apart from the nonarrival of the statements, there was no evidence tending to contradict Mr. Shaw's testimony, but, on the other hand, there was evidence to the effect that at least some of the statements had been duly prepared. With the case so standing, it seemed clear to your committee that in this particular no sufficient reason had been advanced for declaring Mr. Shaw to be disqualified, even if it were to be assumed that the requirements of law in the matter of filing statements are mandatory rather than directory. Therefore that question need not here be once more discussed, though in passing it may not be undesirable to point out that the precedents support in general the view such requirements are directory and therefore that failure to observe them will not of itself invalidate an election.

Relative to observance of the statute specifying the time within which answer to notice of contest may be filed the committee conclude:

The only other contention seriously pressed in behalf of the contestant was that Mr. Shaw had failed to comply with the statutory requirements for the filing of an answer to notice of contest

[1] Second session Sixty-seventh Congress, House Report No. 498; Report p. 55.

within a stipulated time. Here the evidence showed no willful neglect on the part of Mr. Shaw, nor any injury to Mr. Rainey. Mr. Shaw appears to have erred in his understanding as to what would be a compliance with the law, and did not receive legal advice in the matter until the time for proper reply had passed, but a proper reply was then made, and in ample tune to protect all of Mr. Rainey's rights. Under such circumstances, where no harm has resulted to anybody, where no act of failure to act has shown moral obliquity, where no statutory purpose has been thwarted to the public detriment, there is no ground for the contention that a district ought to be deprived of the services of its duly chosen representative, or that the dignity or the honor of the House calls for his exclusion.

The report was considered on December 15, 1921,[1] when the usual resolutions reported by the committee, declaring the contestant not elected and the sitting member entitled to his seat, were agreed to without division.

77. The South Carolina election case against Richard S. Whaley in the Sixty-third Congress.

Instance of a case instituted by memorial from an elector of the district.

The willful making of a false oath to statements required by the corrupt practices act constitutes perjury.

Violation of the corrupt practices acts, either Federal or State, are tried in the respective courts having jurisdiction and not in the House of Representatives, but any Member found to have violated such acts is subject to prompt expulsion.

An election committee, while authorized to subpoena witnesses and compel the production of papers in an election case, is without such authority in proceedings for expulsion unless authorized by the House.

A committee lacking the power of subpoena permitted the petitioner to present evidence ex parte in the form of affidavits.

The ordinary rules of evidence govern in election contests as in other cases.

On December 20, 1913[2] Mr. James D. Post, of Ohio, from the Committee on Elections No. 1, submitted the majority report on the charges filed against Richard S. Whaley, of South Carolina.

This case concerns two primary elections held in the first congressional district of South Carolina for the purpose of nominating a Democratic candidate to fill out an unexpired term in the House.

Under the election laws of the State of South Carolina, if there were more than two candidates, the two receiving the highest number of votes in the first primary were required to.submit to a second primary.

At the first primary there were five candidates, of whom Mr. Whaley and E. W. Hughes received the highest number of votes, and participated in the second primary. In the second primary Mr. Whaley received a majority of the votes and became the Democratic candidate at the special election held April 29, 1913. There was no other candidate and Mr. Whaley was unanimously elected. None of the candidates instituted contest proceedings, but on September 20, 1913, one John P. Grace,

[1] Journal, P. 37.

[2] Second session Sixty-third Congress, House Report No. 158; Record, p 1323.

mayor of the city of Charleston, filed charges in the form of an affidavit alleging violation of the Federal and State corrupt practices acts, in promising Federal offices, and in the receipt and expenditure of large sums of money unaccounted for, and in making affidavit to false statements filed with the Clerk of the House as required by the corrupt practices act. The memorial closed with the prayer that these charges be investigated and if substantiated that Mr. Whaley be expelled from the House.

This case, while considered by an election committee of the House, is not in fact the adjudication of an election contest, but proceedings on a proposition to expel.

As the committee say:

> The procedure is an anomalous one, and so far as we have been enabled to determine without precedent. The ultimate object sought to be obtained by the petitioner is to expel a Member of the House. Under the circumstances this can only be done upon two-thirds vote of its membership. The question readily occurs to the mind, How is such a case to originate? Can an elector of a congressional district by simply filing an affidavit with the Speaker of the House, invoke the power of the House to expel one of its Members? Will the House upon the complaint of a single elector, ipso facto, take jurisdiction of the subject matter of such a complaint? We call attention to the fact that the charges of bribery and misconduct relate principally to the manner and methods employed in the nomination of the accused. That no charges are made in the complaint against the accused as to the manner and method of his election. The real gist of the petitioner's complaint is the charge of perjury committed before and after the election of the accused as he claims in violation of the Federal statutes.

The majority report sets out the two Federal corrupt practices acts (36 U. S. Stat. L. 822, and 37 U. S. Stat. L. 25,) claimed to have been violated. In neither is the making of a false oath to any statements required by the acts to be filed specifically made the crime of perjury.

However, section 5392 of the Revised Statutes of the United States provides:

> Every person who, having taken oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than $2,000, and by imprisonment at hard labor not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed.

And the report deduces:

> It is apparent that the willful making of a false oath to the statements required by the publicity act would, under the general perjury statute, constitute such willful oath the crime of perjury.

The report then quotes sections 359 to 363 and 365 of the Criminal Code of the State of South Carolina and continues:

> A perusal of these sections discloses that repeating, bribery, offering to procure voters by bribery, threats, and duress are all made crimes alike applicable to primary elections and general elections. A candidate for Congress must file with the secretary of state a pledge that he will not give nor spend money nor use intoxicating liquors for the purpose of obtaining or influencing votes. His neglect to file such a statement is a misdemeanor. His violation of such a pledge nullifies his election. It is made a penal offense to give a bribe for the purpose of influencing a voter, but not to receive one, and under section 368 one-third of the pecuniary penalty shall go to the informer and the remainder to the State.

We have cited these statutes, both State and Federal, for the purpose of showing that the memorialist, if the voters at the two primary elections held in the first district of the State of South Carolina were by Mr. Whaley and his friends debauched and the enormous sum of money alleged to have been spent was spent for that purpose, could, and as the majority of the committee believe should, have resorted to the criminal courts either of the State or Federal Government.

As we have heretofore pointed out, the proceeding is not one of contest, but of expulsion. The committee finds that in a proceeding of this nature it is without authority to subpoena witnesses or to compel the production of papers or records, and it was therefore obliged to require the petitioner to present his case by affidavits and such witnesses as he might produce before the committee.

A digest of evidence in support of the memorial and of other evidence in refutation of the charges therein contained is then given and summarized:

The majority of the committee respectfully submit that no testimony whatever was produced in support of the charges that was relevant or that would be accepted in any court at law or would be admissible before the Elections Committees of the House. A careful survey of the testimony will disclose that nothing can be found in any way compromising the accused. It must not be forgotten that the evidence taken in this case was mostly ex parte and without the right of cross examination. Notwithstanding this fact, the committee has searched in vain for any relevant testimony implicating Mr. Whaley of any of the acts alleged in the complaint. It is well settled that the ordinary rules of evidence applies as well to election contests as to other cases; that the evidence must be confined to the point in issue and must be relevant. (McCreary on Elections, 4th ed., see. 459.)

78. The case against Richard S. Whaley, continued.

The power of the House to expel one of its Members is unlimited; a matter purely of discretion to be exercised by a two-thirds vote, from which there is no appeal.

An election case may be instituted by a contest filed in accordance with the law, by protest or memorial from an elector of the district, by protest or memorial filed by any other person, or on motion of a Member of the House.

The report differentiates between the present case and an election contest discussing, incidentally, the power of the House to expel:

The question presented to the committee is not a question as to the election, returns, or qualifications of the sitting Member. If it related to the election of the sitting Member, then the House would deal alone with the question of the number of legal votes he received. If it related to the returns of the sitting Member, then the House would deal with the form of returns on which he was admitted to a seat in the House. If it related to his qualifications, neither the question of election nor of returns is involved. The question, however, relates to the eligibility of the sitting Member. Ineligible not for a want of any of the constitutional qualifications, but because it is alleged that the sitting Member was guilty of the crime of bribery in the conduct of his election and the crime of perjury in the verification of his expense statement required to be filed with the Clerk of the House, and which crimes, it is contended, are inconsistent with the trust and duty of the Member.

The Federal Constitution provides that each House may determine the rules of its proceedings, punish its Members for disloyalty, and with the concurrence of two-thirds expel a Member. The power of expulsion is a necessary and incidental inherent in all legislative bodies. It is a power of protection. It necessarily abides in the House in order that it may perform its high functions and is necessary to the safety of the State. A Member may be wholly unfit through some physical disorder or mental derangement to perform the duties of his office. His conduct may be so disorderly as to obstruct the business of the House. He may commit a crime or may be disloyal

or do many things which would render him ineligible as a Member. The precedents are numerous that in cases like these the power to expel a Member is invaluable. This power may be exercised for misconduct on the part of a Member committed in any place and either before or after conviction in a court of law. From a careful survey of the precedents of the House and Senate, its extent seems to be unlimited. It seems to be a matter purely of discretion to be exercised by a two-thirds vote. Of course, this unlimited power must be fairly, intelligently, and conscientiously made with due regard to the propriety, honor, and integrity of the House and the rights of the individual Member affected. For an abuse of this discretion there is no appeal. The honest election of each Member of this House is a matter of the highest importance both to the House and to the people at large.

The election was held April 29, 1913, while Congress was in session. The law requires the filing of notices of contest within 30 days after determination of the result. The memorial, however, was not filed until September 20, 1913, a period of five months.

The report holds:

Mr. Grace has been guilty of laches in that he did not institute a proceeding to contest the seat of Mr. Whaley. The House may adjudicate the question of the right to a seat in either of the four following cases:

(1) In the case of a contest between the contestee and the return Member of the House instituted in accordance with the provisions of law.

(2) In the case of a protest or memorial filed by an elector of the district concerned.

(3) In the case of the protest or memorial filed by any other person.

(4) On motion of a Member of the House.

Mr. Grace could, and we think should, have filed a protest in the nature of a contest and within the time prescribed by the statute. By his own admission he knew about the things of which he now complains within the time for filing a contest, because he was a part and parcel as the manager of Mr. E. W. Hughes in both of the primary elections, the conduct of which he complains.

Had he filed his contest within the time prescribed by the statute, a method of taking testimony would have been provided for and the sitting Member would have been given an opportunity to have known the nature and cause of the accusations, the right to answer thereto, and to examine and cross-examine the witnesses.

The committee in accordance with their conclusions recommended the following:

Resolved, That the charges filed by John P. Grace against Richard S. Whaley, Representative from the first congressional district of the State of South Carolina to the Sixty-third Congress, be dismissed.

Mr. Charles M. Borchers, of Illinois, a member of the committee, considered the evidence as warranting an investigation, but did not file minority views. Mr. Burton L. French, of the committee, concurred in the majority report but submitted that the corrupt practices act was as binding upon unsuccessful candidates as upon those elected, and that while Congress manifestly had no disciplinary authority over the defeated candidate, it was within the province of the House to inquire into the incidental allegations which had been made touching the expenditure of money on his part and the application of the law thereto.

Mr. James A. Frear, of Wisconsin, did not concur in the opinion of the committee and submitted minority views reviewing the testimony in detail and holding

the evidence submitted before the committee sufficient to justify an investigation, and recommended the following:

Whereas the charges of John P. Grace, of Charleston, against Richard S. Whaley, Congressman from the first oongressioi2al district of South Carolina, have been supported by oral testimony and other evidence that presents prima facie a violation of law on the part of said Richard S. Whaley which, if true, disqualifies him from remaining a Member of Congress:

Resolved, That this committee request its chairman to immediately prepare and introduce a resolution in the House asking for authority to prosecute a thorough investigation as to the facts and to extend its inquiry to the several counties of said first Carolina district, if need be, in order to ascertain the truth or falsity of such charges.

The case was fully debated on January 26 and 27 [1] On the latter day the House disagreed to the minority resolution offered by Mr. Frear—yeas 98, nays 227. The resolution of the majority was then agreed to without division.

79. The Missouri election case of Gill. v. Catlin in the Sixty-second Congress.

Interpreting the corrupt practices act of the State of Missouri.

A candidate who purposely remained in ignorance of the acts of agents in his behalf when the means of information were within his control was held to have ratified such acts and to have assumed responsibility therefor.

The election laws of a State are followed by the House, which is influenced in its construction of such statutes by well-considered decisions of the State courts.

On August 5, 1912,[2] Mr. James A. Hamill, of New Jersey, from the Committee on Elections No. 2, submitted the report of the majority of the committee on the Missouri case of Patrick F. Gill *v.* Theron E. Catlin.

The principal question involved in the case was the expenditure of money by the sitting Member in excess of the amount allowed under the corrupt practices act of the State.

Section 6046 of the Revised Statutes of the State of Missouri (1909) provides:

No candidate for Congress or for any public office in this State, or in any county, district, or municipality thereof, which office is to be filled by proper election, shall, by himself or by a through any agent or agents, committee, or organization, or any person or persons whatsoever, in the aggregate pay out or expend, or promise or agree or offer to pay, contribute, or expend, any money or other valuable thing in order to secure or aid in securing his nomination or election or the nomination or election of any other person or persons, or both such nomination and election, to any office to be voted for at the same election, or in aid of any party or measure, in excess of a sum to be determined upon the following basis, namely: For five thousand voters or less, one hundred dollars; for each one hundred voters over five thousand and under twenty-five thousand, two dollars; for each one hundred voters over twenty-five thousand and under fifty thousand, one dollar; and for each one hundred voters over fifty thousand, fifty cents, the number of voters to be ascertained by the total number of votes cast for all the candidates for such office at the last preceding regular election held to fill the same; and any payment, contribution, or expenditure, or promise or agreement or offer to pay, contribute, or expend any money or valuable thing in excess of said sum, for such objects or purposes, is hereby declared unlawful.

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[1] Journal, p. 152; Record, p. 2350; Moores' Digest, p. 67.

[2] Second session Sixty-Second Congress, House Report No. 1142; Journal, p. 923; Record, p 10225.

On this basis the personal expenses of a candidate in the election in question were limited to $662.

The sworn statement filed by the contestee in conformity with this act showed an expenditure of $611, but it appeared from the testimony as outlined in both the majority and minority reports that relatives of the contestee have expended in his interest during the campaign sums in excess of $10,000.

Testimony was introduced to prove that these expenditures were made without the knowledge or consent of the contestee and was rebutted by other evidence introduced to show that he had attended dinners at which campaign expenditures were discussed and provided for; that he had access to office records relating to them; that he canvassed the district in company with men who expended money in his behalf; that those who made expenditures acted as his agent; and that he could have been fully informed in the matter had he chosen to avail himself of the sources of information at hand.

Evidence of agency is particularly stressed:

One occurrence during the campaign is well worthy of notice as showing a studied purpose on the part of the contestee to remain designedly in ignorance of the transactions carried out during his campaign. A meeting was arranged at the home of the elder Catlin to which all the congressional committeemen and Mr. Kirby were invited. A dinner was served and at its conclusion some one suggested that the party "get down to business." Immediately the contestee arose and left the gathering, although the business to be discussed was the conduct of his own campaign, something in which he was necessarily, vitally, and deeply interested. From the evidence it appears that the business lasted about 15 minutes, and at its conclusion it never occurred to the contestee to ask what had taken place at the meeting. This action on the part of the contestee, far from establishing his innocence of any knowledge, tends strongly to confirm his knowledge and connivance in a plan for the consequences of which he wanted to escape responsibility. We are irresistibly compelled to conclude that Daniel N. Kirby was the agent of Theron E. Catlin.

It is therefore ruled that:

It is fundamental that one may, by affirmative acts and even by silence, ratify the acts of another who has assumed to act as his agent. (Clark and Styles on the Law of Agency, Vol. I; p. 264.) It is further laid down that:

"Although as a general rule a principal must have full knowledge of all the facts, * * * yet the principal can not purposely remain ignorant where the means of information is within his control, so as to escape the effect of his acts that would otherwise amount to a ratification. (Clark and Styles on the Law of Agency, Vol. I; p. 339.)"

Therefore Daniel N. Kirby having acted in behalf and for the benefit of the contestee, with the latter's full knowledge and consent, the failure to file a statement of these expenditures and the fact that they exceeded the amount permitted by the law of Missouri, under the laws of that State necessitate the ousting of the contestee from office.

In support of this position the following statute of the State of Missouri was cited:

In any such action, such applicant, upon his own motion or on the motion of the defendant, shall be made a party plaintiff; and in any case in which such applicant shall be a party, if judgment of ouster against the defendant shall be rendered, as provided in section six thousand and fifty-four of this article, said judgment shall award such office to said applicant, unless it shall be further determined in such action, upon appropriate pleading and proof by the defendant, that some act has been done or committed which would have been ground in a similar action against such plaintiff had he been declared elected to such office, for a judgment of ouster against him,

and if it shall be so determined at the trial, such office shall be in the judgment declared vacant, and shall thereupon be filled by appointment or a new election, as may be otherwise provided by law regarding such office.

The majority then make the following application:

It is, we believe, incumbent upon this committee to follow the law of Missouri. It has been held in this House in the Forty-second Congress (McCreary on Elections, 422) that:

"It is a well-established and most salutary rule that where the proper authorities of the State government have given construction to their own constitution or statutes that construction will be followed by the Federal authorities. This rule is absolutely necessary to the harmonious working of our complex Governments, State and National."

This law has been adjudicated by the Supreme Court of Missouri and held to be constitutional. We are therefore not only justified but constrained in following this enactment. Therefore, the contestee, Theron E. Catlin, is not entitled to hold the office of Representative in Congress from the eleventh congressional district of Missouri in the Sixty-second Congress.

80. The case of GM v. Catlin, continued.

Where it was impossible to ascertain which votes in a precinct were properly cast and counted the entire vote of the precinct was rejected.

A Member whose seat was being contested did not vote on a question incidental to the contest.

Having determined that a returned Member had subjected himself to the penalties of a State election law necessitating his ousting from office, the House held he was not entitled to his seat.

The further question of fraud in the casting and counting of votes alleged by the contestant were also investigated and the majority of the committee held the proof of fraud to be conclusive, especially as to the third and eighteenth wards of St. Louis. As to these wards the report says:

It is impossible for this committee to apportion the number of votes in these wards and determine how many were cast respectively for each of the candidates. The total vote of both wards is so characterized by fraud that it is absolutely inseparable. The only course the committee feel they are warranted in following when dealing with the vote of these wards is the one outlined by the House in the Fifty-seventh Congress, in the ease of Wagner *v.* Butler. In this ease the committee eliminated altogether the votes in the tainted territory and expressed its reason for doing so by stating:

"There was such manifest fraud and gross irregularity in each of these precincts that it is absolutely impossible to ascertain what votes, if any, were honestly cast and counted."

The committee adopts this language as its own and determines to follow the principle therein enunciated.

Following this rule the majority deducted the vote credited to each candidate from these wards from their respective total vote in the district.

The official returns from the entire district gave Catlin 20,089 votes and Gill 18,612 votes. Subtraction of the votes credited from the two wards reduced the vote of Catlin to 14,612 and that of Gill to 15,043, resulting in a majority of 431 votes for the latter.

The majority of the committee, therefore, recommended the following resolution:

Resolved, That Theron E. Catlin was not elected a Representative from the eleventh district of Missouri in the Sixty-second Congress.

Resolved, That Patrick F. Gill was duly elected a Representative from the eleventh district of Missouri to the Sixty second Congress and is entitled to the seat therein.

From this recommendation the minority report presented by Mr. Sidney Anderson, of Minnesota, dissents as follows:

The contestee having presented a certificate from the appropriate officers of the State of Missouri to the effect that he was duly elected a Member of Congress from that State, and he having been sworn in and having taken his seat, every presumption must be indulged in favor of the legality of his election and its freedom from fraud, corruption, or violation of law. It necessarily follows, therefore, that the burden is on the contestant to prove to the satisfaction of the House that such fraud, intimidation, corruption, or violation of law was used or occurred in the election of contestee as to vitiate and invalidate that election.

The minority report then joins issue on the contention that there has been any violation by the contestee of the provision of the Missouri law limiting the amount which may be expended by a candidate. It fails to find in the evidence adduced any testimony which would warrant the conclusion reached by the majority.

It also dissents as follows from the statement in the majority report that the statute quoted had been held constitutional by the Supreme Court of Missouri.

The Supreme Court of Missouri in the case of State ex. inf. *v.* Towns (153 Mo., 91) declared the particular section of the Missouri law cited and relied upon by the majority to be unconstitutional. The syllabus which states the conclusion of the court in that case is as follows:

"So much of the corrupt-practices act as authorizes a trial of a person elected to the office of county clerk for a violation thereof, and his removal from office therefor, is constitutional. But so much thereof as directs the court to include in its judgment of ouster an award of the office to the defeated candidate is violative of the constitutional provision which confers on the governor the power of appointment in case of vacancy in the office of a clerk of a court of record."

This decision unquestionably disposes of that part of the statute so far as this case is concerned.

As to charges of fraud in the casting and counting of votes, the minority call attention to the fact that on a recount of the votes, substantially as many errors were found to have been made in favor of the contestant as in favor of the contestee, indicating that no conspiracy to defraud existed in favor of the contestee and disproving fraud in the counting of the ballots.

The minority therefore declined to concur either in the views expressed or the resolution proposed by the majority of the committee.

On August 12,[1] Mr. Hamill called up the case, when Mr. James R. Mann, of Illinois, raised the question of consideration, which was decided in the affirmative. At the conclusion of the roll call on the question of consideration, the Speaker, in order to make a quorum, directed the clerk to enroll the names of several members, including that of Mr. Catlin, the contestee, who were present but not voting. Mr. Mann submitted that as it was a matter involving Mr. Catlin personally he was not required to vote. The Speaker sustained the point of order and directed that Mr. Catlin's name be not recorded.

After debate, Mr. Anderson offered a substitute resolution declaring the sitting Member elected and entitled to the seat. The question on the substitute was decided in the negative, yeas 70, nays 122. A division of the question then being demanded on the pending resolution, the first section declaring the sitting Member not elected was agreed to, yeas 121, nays 71, and the section seating the contestant was agreed to, yeas 104, nays 79. Thereupon Mr. Gill appeared and took the oath.

[1] Journal p. 951; Record, D. 10748; Moores' Digest, p. 52.

81. The Wisconsin election case of Gaylord v. Cary in the Sixty-fourth Congress.

Construing the corrupt practices act of the State of Wisconsin.

A strict observance of the Federal corrupt practices acts and the corrupt practices acts of the State from which returned is incumbent upon candidates and is essential to continued Membership in the House.

No person whose seat in the House has been obtained by fraud or questionable methods should be allowed to perform the duties of the office or receive the emoluments thereof or enjoy the prerogatives with which a Member is clothed.

Hearsay evidence is inadmissible in contested election cases.

In the absence of fraud the voter can not be deprived of his vote by the omission of election officers to perform duties imposed upon them by law.

Only upon proof of conditions under which the law has expressly declared ballots to be void have the courts sanctioned their rejection.

While the failure to observe statutes merely directory is not necessarily fatal, it is the duty of election officers to observe rigidly the directory as wall as the mandatory requirements of the election laws.

An election law failing to indicate clearly that a compliance with its provisions is essential to the validity of the election is directory and not. mandatory.

The inadvertent omission from the statement filed with the Clerk of the House of items, the inclusion of which would not otherwise prejudice, held not sufficient to warrant action by the House.

Introduction under agreement with a civic organization of pension bill prior to election held not to constitute proof of bribery.

On May 1, 1916,[1] Mr. Lewis L. Morgan, of Louisiana, from the Committee on Elections No. 3, submitted the report in the Wisconsin case of Winfield R. Gaylord *v.* William J. Cary.

The principal question in the case was whether the contestee had violated the Federal corrupt practices acts and those of the State of Wisconsin.

The committee say:

> The proposition that met your committee at the very threshold of the owe at bar was whether the contestee had violated the Wisconsin corrupt-practices acts. If so, whether he thereby rendered himself ineligible, unfit, and unworthy to be a Member of the House of Representatives.
>
> Your committee contend that no person should be permitted to further his own political fortunes by willfully violating the Federal corrupt-practices acts or the corrupt-practices acts of his own State. These highly commendable statutes are intended to stand as a barrier between public decency and the political corruptionist. Hence the necessity of their observance.
>
> Now, after a methodical analysis of the evidence, we find that the contestee failed to include in his State report two items aggregating $32.25; but these items appear in the statement filed by him with the Clerk of the House of Representatives. The total disbursements of the contestee, as shown by his statement filed with the secretary of the State of Wisconsin, amount to $1,952.75,

[1] First session Fifty-Fourth Congress, House Report No. 619; Journal, p. 640; Record, p. 7144; Moores' Digest. p. 91.

and under the Wisconsin statute a candidate for Congress is authorized to expend $2,500. Hence, it requires no unusual keenness to perceive that there was no conceivable reason why the contestee, should have knowingly excluded these items from his State report. To hold that the contestee is ineligible because he inadvertently omitted to report the items referred to would not only be an inexcusable misconception of the real object of the corrupt-practices acts, but, moreover, it would mean the establishment of a most dangerous precedent. Therefore, we are unwilling to do violence to our judgment by adopting or sanctioning any such construction.

The fundamental purpose of this law is to prevent fraud, bribery, and corruption of every conceivable character. In the word of the highest court of Wisconsin, "The aim of the statute is to require the aspirant for office to resort to honest means to get it, "and your committee are in entire harmony with the principle thus enunciated. The law should be interpreted and enforced to fulfill its aim. To do otherwise would be a clear perversion of the law.

It was also urged in the notice of contest that the contestee in violation of the corrupt-practices act had dispensed large sums of money to various men for political purposes.

The report, however, considered:

The testimony relating to these charges is wholly hearsay and was given mainly by witnesses whose character and credibility were thoroughly impeached. It is axiomatic that hearsay evidence is inadmissible in contested-election cases. This proposition of law is so unequivocal that we shall refrain from citing authorities in its support.

It was further contended that the contestee had introduced a pension bill for the purpose of influencing political support, but in the absence of evidence the committee agreed the mere fact that the contestee had fathered a pension bill was no proof of bribery under any reasonable construction of the law.

It was also averred that in certain precincts in the city of Milwaukee voters were unlawfully assisted, and that ballots were handed out by persons other than the election officers, but the committee point out:

The courts have uniformly held that in the absence of fraud, the voter can not be deprived of his vote by the omission of the election officers to perform the duties imposed upon them by law. It is only where a law has expressly declared the ballot to be void that the courts have sanctioned its rejection. In other words, an act is considered merely directory when it does not clearly indicate that a compliance with the provision in relation to the method of conducting the election is essential to the validity of the election.

While this is a well-established rule of law, yet your committee firmly believe that there ought to be a rigid observance of the directory as well as the mandatory requirement of the election laws by the election officers. Otherwise elections will never be entirely free from fraud or the suspicion of fraud.

However, after a painstaking examination of the evidence presented by contestant relating to these precincts we find that there was not the slightest semblance of an effort made to establish the names of the illegal voters; no definite evidence as to the number of illegal voters; no evidence that the election officers were guilty of fraudulent misconduct in the booths with reference to the preparation and marking of ballots for illiterate voters; no proof that the returns made by the election officers are false. Hence, we feel impelled to conclude that the facts as disclosed in the record do not justify the exclusion of the returns from the precincts hereinabove enumerated.

In conclusion the committee declare—

The honest election of each member of the House of Representatives is a matter of the gravest moment, both to this body and to the American people. No person whose seat in this House has been obtained by fraud or questionable methods should be allowed to perform the duties of the office and receive the emoluments thereof and enjoy the prerogatives with which a Member is clothed.

However, after a careful consideration of the evidence in the record, your committee are unanimously of the opinion that the contestant's averments have failed of proof and therefore recommend the adoption of the following resolutions:

Resolved, That Winfield R. Gaylord was not elected a Representative to the Sixty-fourth Congress from the fourth congressional district of Wisconsin and is not entitled to a seat therein.

Resolved, That William J. Cary was elected a Representative to the Sixty-fourth Congress from the fourth congressional district of Wisconsin, and is entitled to retain his seat therein.

The resolution reported by the committee was agreed to without debate or division.

82. The Senate case of Howard Sutherland, of West Virginia, in the Sixty-fifth Congress.

Instance of an election case inaugurated in the Senate by memorial. Discussion of corrupt practices law of State of West Virginia.

In absence of evidence the Senate declined to investigate charge of improper registration.

No arrest having been made or conviction had for violation of State election law limiting amount to be expended in procuring election, the Senate did not pursue the inquiry.

A petitioner complaining of irregularities in election having failed to present evidence, the Senate confirmed the title of the sitting member.

On June 26, 1918 [1] (legislative day, June 24), Mr. Atlee Pomerene, of Ohio, from the Committee on Privileges and Elections ' submitted a report on the memorial of Mr. William E. Chilton, of West Virginia, asking an investigation of the election of Howard Sutherland, elected a Senator from the State of West Virginia for the term commencing March 4, 1917. The memorial alleged the violation of the corrupt practices law of West Virginia and asked that the seat be vacated for the following reasons:

First. That Howard Sutherland was not the nominee of the Republican Party for the office of United States Senator, because his nomination was brought about by practices which violate the statutes of West Virginia, in that no candidate is permitted to spend at the primary more than $75 for each county in the State; that there are 55 counties in the State, making a maximum amount to be expended $4,125; that the statement of his receipts and expenditures which he filed June 6, 1916, before the primary, shows a total expenditure by him of $4,395.69, which is $270.69 in excess of the amount permitted to be spent under the statute; that after the primary, on or about June 20, 1916, he filed another statement, as required by the statute, in which he recites among other things that the sum of $375 was improperly charged to primary-campaign expenses in the first account filed, leaving a balance of $4,020.69; that expenses incurred by him after the filing of the first account amounted to $155.94, making the total amount thus expended in the primary campaign $4,176.63, or $51.63 in excess of the maximum permitted by the West Virginia statute; and that, because of these facts, the election should be set aside and his seat declared vacant.

Second. The petitioner further charges that Howard Sutherland's election was brought about by practices which were corrupt and illegal, in that hundreds of persons known to be dead or nonresident of Mingo County were placed on the registration books; that an appeal was made to the county courts, under the statute, to hear evidence touching the legality of these registrations, but the court declined to hear the evidence; that said names were allowed to remain on the registration list and were used in repeating for the Republican ticket, including the said Sutherland;

[1] Second session Sixty-fifth Congress, Senate Report No. 525; Record, p. 8308.

that thousands of votes were cast by persons not registered; that they voted the Republican ticket in various localities; that enough such votes were cast to change the result in the election of the United States Senator; that large sums of money were used for the purpose of corrupting the voters of the State and inducing them to vote the Republican ticket; and that, except for such expenditures contrary to the laws of the State and such illegal votes, the said Howard Sutherland would not have been elected.

Mr. Sutherland entered a general denial of all charges of corrupt, illegal, or improper registration or voting which affected the result of the election.

On the issue thus submitted the committee decided:

In view of these statements by Mr. Chilton and Mr. Sutherland, your committee is of the opinion that there is no evidence before it to justify any investigation of alleged improper registration or improper or illegal voting, and that the charges in respect thereto have been entirely abandoned.

As to expenditures in excess of the statutory limit, Mr. Sutherland admitted that his preprimary account showed an apparent excess expenditure of $270.69, and that after certain deductions were made there was still an expenditure of $51.63 in excess of the amount permitted by the law of West Virginia. He claimed, however, that the account included items aggregating $1,500 which did not constitute expenditures within the limits prescribed by the Federal statutes.

The committee say:

The corrupt-practice act of West Virginia, as amended in 1915, limits the amount of expenditures by the senatorial candidate at the primary election to $75 for each of the 55 counties in the State, or to $4,125. His preprimary account, as filed, shows a total expenditure of $4,395.69, or $270.69 in excess of the amount permitted by the statute.

The afterprimary account, as filed, recites that $375 was improperly charged to primary campaign expenses, and after deducting this sum his disbursements totaled $4,176.63, or $51.63 in excess of the amount permitted to be spent by the West Virginia statutes.

The only evidence before the committee as to the amount of the expenditures are the statements referred to and which are attached to the memorial or petition. If we accept them as correct, without other proof before us, we must also assume that the sum of $375, claimed to be improperly charged to primary expenses, was in fact improperly charged.

If, then, the sum of $51.63 was spent in excess of the statutory limitations, what is the legal effect? It is not claimed that any of the money set forth in the accounts referred to was corruptly spent; the only complaint relates to the amount.

Paragraph b of section 14 of the West Virginia "corrupt-practice act" provides that for certain violations of its provisions, which include excessive expenditures, any person "shall, on conviction, be disqualified from voting or holding any public office or employment during a period of three years from date of conviction, and if elected to or occupying any public office or employment, such office or employment shall be vacated from the date of conviction." But no arrest has been made for this alleged violation of this statute and no conviction has been had for such violation. Senator Sutherland is therefore not subject to the penalties therein provided.

As related in the report, Mr. Chilton filed his petition in the circuit court of the State asking for judicial inquiry into the election.

Thereupon Mr. Sutherland applied to the Supreme Court of Appeals of West Virginia for a writ of prohibition.

In passing upon the case the supreme court of appeals held the corrupt-practices act of the State violative of both State and Federal constitutions.

Quoting the language of the syllabus, it contravened the constitution of the State, because:

In so far as sections 15 and 16, chapter 27, act 1915, purport to authorize a judge to whom application is made, as therein provided, to order a judicial inquiry, if in his opinion the interests of public justice require it, to ascertain whether a candidate for United States Senator, in person or by agents, expended to secure his election money or other things of value in excess of the amount allowed in that chapter sufficient to influence materially the result of the election, and to require the judge to certify his opinion and determination and the evidence adduced before him upon such investigation "to the governor of the State, who shall transmit the same to the proper authorities of the United States Government for such action as said authorities may deem proper, "they are obnoxious to and conflict with Article V of the constitution of this State, in that they attempt to empower a member of the judiciary as such to exercise a volition to determine when, to what extent, or whether the judicial inquiry into alleged corrupt practices shall be undertaken by him upon such application.

It contravened the Constitution of the United States, because:

"In the Senate of the United States, under an express declaration of the Federal Constitution, vests the exclusive power and authority to judge of the election, returns, and qualifications of its Members, and no other power or body lawfully can interpose or in any wise attempt to control or influence the determination of these questions, or declare void an election held to select such a Member."

In conclusion, let it be observed that Mr. Sutherland filed with the secretary of state his preprimary expense statement May 26, 1916, and his after primary statement June 20, 1916, as the statutes of West Virginia required. The information contained therein became accessible to all the electors of the State from the dates these accounts were filed.

So far as this committee is informed no one before the election saw fit to challenge Mr. Sutherland's right to a place on the ticket as a candidate for Senator because of these excess expenditures, and no one either before or since the election has seen fit to institute criminal proceedings against him under the criminal statutes of the State, to which reference is above made. He has neither been arrested nor convicted of any offense against the corrupt-practices act of the State, and the subcommittee does not therefore believe that it would be justified, under all the circumstances, in holding that this excess expenditure of $51.63 should operate to vacate his seat, particularly when that fact itself is disputed.

Therefore, the committee unanimously conclude:

The subcommittee, however, believes that all election laws, State or Federal, relating to the election of Senators should be strictly complied with, and therefore does not desire this report to be regarded as a precedent for disregard of State laws limiting expenditures in elections, under circumstances differing from those of this particular case. They therefore recommend the adoption of the accompanying resolution.

"Resolved by the Senate of the United States, That Howard Sutherland has been elected as Senator from the State of West Virginia, for a term of six years commencing on the fourth day of March, nineteen hundred and seventeen, and that he is entitled to a seat in the Senate as such Senator.

On June 29,[1] the report was called up in the Senate, and was agreed to without debate or division.

83. The Senate election case of Isaac Stephenson, of Wisconsin, in the Sixty-second Congress.

[1] Record, p. 8499.

Under instructions from the Senate to investigate and report whether corrupt methods were employed in election of a Senator, the committee investigated expenditures in the primary campaign.

Duty of presiding officer of joint convention of legislature to declare result of ballot for Senator is purely ministerial and failure to perform that duty does not prejudice validity of the election.

On March 15, 1909,[1] in the Senate, Isaac Stephenson, whose credentials were on file as Senator from Wisconsin, appeared and took the oath without question.

On June 30, 1911,[2] the Vice President laid before the Senate a communication from the secretary of the State of Wisconsin transmitting a resolution passed by the Legislature of Wisconsin charging that corrupt methods were used in procuring Mr. Stephenson's election.

The communication with accompanying testimony was referred to the Committee on Privileges and Elections, and subsequently the following resolution was agreed to by the Senate:

Resolved, That the Senate Committee on Privileges and Elections or any subcommittee thereof be authorized and directed to investigate certain charges preferred by the Legislature of Wisconsin against Isaac Stephenson, a Senator of the United States from the States of Wisconsin, and report to the Senate whether in the election of said Isaac Stephenson, as a Senator of the United States from the said State of Wisconsin there were used or employed corrupt methods or practices; that said committee or subcommittee be authorized to sit during the recess of the Senate, to hold its session at such place or places as it shall deem most convenient for the purposes of the investigation, to employ stenographers, to send for persons and papers, and to administer oaths; and that the expenses of the inquiry shall be paid from the contingent fund of the Senate, upon vouchers to be approved by the chairman of the committee or chairman of the subcommittee.

On February 12, 1912,[3] the majority of the committee submitted a short report which after reviewing briefly the methods adopted by the committee in making the investigation, concludes as follows:

Wherefore your committee, having given full consideration to the law and to the testimony and to all of the facts and circumstances brought to its notice, does find that the charges preferred against Isaac Stephenson, a Senator of the United States from the State of Wisconsin, are not sustained, and your committee further finds that the election of said Isaac Stephenson as a Senator of the United States was not procured by corrupt methods or practices.

Mr. Weldon B. Heyburn, of Idaho, chairman of the subcommittee appointed by the Committee on Privileges and Elections, submitted with the report views giving in detail reasons for the conclusions reached by the committee.

These views set out the following specific charges preferred by the Legislature of Wisconsin:

1. That Isaac Stephenson, of Marinette, Wis., now United States Senator and a candidate for reelection, did, as such candidate for reelection, give to one E. A. Edmonds, of the city of Appleton, Wis., an elector of the State of Wisconsin and said city of Appleton, a valuable thing, to wit, a sum of money in excess of $106,000, and approximating the sum of $250,000, as a consideration for some act to be done by said E. A. Edmonds, in relation to the primary election held on the 1st day of

[1] First session Sixty-first Congress, Record, p. 16.

[2] First session Sixty-second Congress, Record, p. 2599.

[3] Second session Sixty-second Congress, Record, p. 1946, Senate Report No. 349.

September, 1908, which consideration was paid prior to said primary election, and that said Isaac Stephenson was at the time of such payment a candidate for the Republican nomination for United States Senator at such primary, and did by such acts as above set forth violate section 4543b of the statutes.

2. That said Isaac Stephenson did, prior to said primary, pay to said Edmonds above-mentioned sums with the design that said Edmonds should pay to other electors of this State, out of said sums above-mentioned and other sum of money received by said Edmonds from said Isaac Stephenson, prior to said primary, sums ranging from $5 per day to $1,000 in bulk, as a consideration for some act to be done in relation to said primary by said electors for said Isaac Stephenson as such candidate, in violation of said section.

3. That with full knowledge and with instructions from said Isaac Stephenson, as to how and for what purposes said sums were to be expended, said sums were so paid as above stated to said Edmonds by said Isaac Stephenson and that said sums were paid as above stated for the purposes above stated and also for the purpose of bribing and corrupting a sufficient number of the electors of the State of Wisconsin to encompass the nomination of said Isaac Stephenson at said primary for the office of United States Senator.

4. That in pursuance of the purposes and design above stated said Isaac Stephenson did, by and through his agents, prior to said primary, pay to one U. C. Keller, of Sauk County, an elector of this State, the sum of $300 as a consideration for some act to be done by said Keller for said Stephenson preliminary to said primary, corruptly and unlawfully.

5. That in further pursuance of such purposes and design said Isaac Stephenson, by and through his agents, prior to said primary, paid to one Hambright, of Racine, Wis., large sums of money as a consideration for some act to be done by said Hambright for said Stephenson preliminary to said primary, said Hambright being then an elector of this State, corruptly and unlawfully.

6. That in further pursuance of the purposes and design above stated said Isaac Stephenson did by and through his agents, prior to said primary, pay to one Roy Morse, of Fond du Lac, Wis., then an elector of this State, the sum of $1,000 as a consideration for some act to be done by said Morse for said Isaac Stephenson preliminary to said primary, and corruptly and unlawfully.

7. That in further pursuance of such purposes and design said Isaac Stephenson, by and through his agents, prior to said primary, paid to diverse persons, then electors of the county of Grant, Wis., ranging from $5 per day and upward, as a consideration for some act to be done by said several electors for said Isaac Stephenson preliminary to said primary, corruptly and unlawfully.

8. That in further pursuance of such purposes and design, said Isaac Stephenson, by and through his agents, prior to said primary, did pay to diverse persons who were at such time electors in this State a consideration for some act to be done for said Isaac Stephenson by such electors preliminary to such primary, corruptly and unlawfully.

9. That in further pursuance of such purposes and designs said Isaac Stephenson, by and through his agents, prior to said primary, did pay to electors of this State, who were of a different opinion and who held to other political principles than those of the Republican Party, more particularly Democrats, sums of money as a consideration for some act to be done by such electors for said Isaac Stephenson preliminary to said primary, corruptly and unlawfully.

10. That in further pursuance of such purposes and design said Isaac Stephenson, by and through his agents, prior to such primary, did offer to pay to Edward Pollock, of Lancaster, Wis., certain sums of money, as editor of the Teller, a newspaper published in said city of Lancaster, Wis., and to other editors of newspapers who were at such time electors of this State, and for the purpose of purchasing the editorial support of such editors, and as a consideration of something to be done relating to such primary, corruptly and unlawfully.

11. That said Isaac Stephenson did, prior to such primary, by and through his agents, promise and agree to pay to one Lester Tilton, a then resident and elector of this State, and residing at the city of Neillsville, Wis., a sum in excess of $500 to procure or aid in procuring the nomination of said Lester Tilton to the assembly of this State from Clark County, and did offer to give to said Lester Tilton a sum in excess of $500 if said Lester Tilton would become a candidate for the assembly from said Clark County, if said Lester Tilton would support said Isaac Stephenson for the office of United States Senator, all of which is in violation of sections 4542b and 4543b of the statutes.

12. That said Isaac Stephenson did, by and through his agents, give and promise and pay, or agree to pay to other electors of this State, sums of money to procure or aid in procuring the nomination of such electors to the senate and assembly of this State, other than those electors residing in the district where said Isaac Stephenson resides.

13. That E. M. Heyzer and Max Sells, prior to said primary, being at such time employees of the Chicago & North Western Railway Co., a corporation doing business in this State, did contribute and agree to contribute free services as such employees for the purpose to defeat the candidacy of former assemblyman E. F. Nelson, from the district embracing Florence, Forest, and Langlade Counties, for the nomination for assemblyman from said district, all of which was done with the knowledge and consent and under the direction of said Isaac Stephenson, his agents, and employees, contrary to chapter 492, laws of 1905.

14. That in further pursuance of the purposes and design above set forth said Isaac Stephenson by and through his agents, did, in addition to paying certain sums as above set forth, offer and agree to pay to electors of this State, prior to said primary, a premium or bonus to those who in his employ carried their respective precincts in such primary for said Stephenson as such candidate.

15. That said Isaac Stephenson, if claiming an election by virtue of receiving a plurality of votes at such primary, then said Isaac Stephenson has violated chapter 502 of the laws of 1905 by failing and neglecting to file his expense account as provided by said chapter.

16. Charging generally the primary nomination or election of said Isaac Stephenson was obtained by the use of large sums of money corruptly and illegally, by the violation of sections 4542b, 4543b, and 4478b of the statutes relating to illegal voting, bribery, and corruption, and other laws above set forth relating to elections and primary elections.

These charges are further supplemented as follows in minority views submitted by Mr. Wesley L. Jones, of Washington:

The following may be taken as admitted facts in this case: Three men were selected as managers by Senator Stephenson; money was placed in their hands from time to time as called for to the amount of over $107,000; they were not asked how they expended it, nor for what purpose; no accounting was requested; they paid it out in various sum to different individuals in different wards, precincts, and counties; large sums were paid to different individuals holding official positions, and to individuals recognized to be leaders, and to others of prominence in different organizations; no directions were given to these men how the money should be expended; no reports were required and no knowledge obtained as to how they spent the money or for what purpose; men were hired for the ostensible purpose of going over the country talking Stephenson and creating Stephenson sentiment; men, whose occupations led them into different sections of the country, were paid large sums of money for talking Stephenson on their travels; men were paid three, five, and ten dollars per day to be at the polls on election day, or to haul voters to the polls; large sums were paid leaders in different wards and precincts to look after their wards and precincts; hundreds of dollars were spent for treating to cigars, liquors, meals, etc., as much as $135 in one day by one man; money was paid to candidates for the legislature, at least three of whom were nominated and elected; detailed expenditures were not kept; memoranda were destroyed; records and papers concerning the campaign were shifted from one place to another; mysterious methods and round about ways were employed; original records were destroyed; items and amounts were grouped in such a way as to give no knowledge to the public except the amount of each class of expenditures; a banker acted as treasurer; no account was opened as is usually done by depositors; remittances were received, private memoranda kept, cash disbursements of funds made, but no record was kept on the bank's books, and when the committee of the general assembly started to investigate, local counsel for Mr. Stephenson had such records and correspondence as had not already been destroyed moved out of the State, for the purpose of keeping them beyond the jurisdiction of the general assembly.

The first question discussed by the majority relates to proceedings in the State legislature. The legislature consisted of 33 State senators and 100 assemblymen. The vote on the election of United States Senator was first taken in the two houses

separately. In the senate the total number of votes cast was 17, of which Mr. Stephenson received 12. In the house the total number cast was 84 of which Mr. Stephenson received 60.

On the following day the two houses met in joint session and the lieutenant governor, presiding, announced:

Gentlemen of the joint convention, you are assembled here for the purpose of expressing your choice for United States Senator. In order to comply with the Federal law the clerk of the senate and the clerk of the assembly will read from the journal of each house, respectively, the proceedings of the preceding day with reference to the election of a United States Senator.

At the conclusion of the reading of the respective journals of the two houses the president said:

The clerk will call the roll. As your names are called you will rise from your seats and announce the candidate of your choice.

Thereupon Mr. Hudnull, a member of the State senate, made the following point of order:

I rise to protest against any other proceedings being taken in the joint assembly at this time except the announcement of the presiding officer that Hon. Isaac Stephenson is elected to the United States Senate for the term commencing March 4, 1909. I do that for the reason that it appears from the journal of the senate that the total number of votes cast for persons were 17, of which Isaac Stephenson received 12, Neal Brown 4, Jacob Rummel 1, and the journal of the assembly shows that of the members who voted for persons there were 60 for Stephenson, 10 for Brown, and 3 for Jacob Rummel; and it further appears from both journals of senate and assembly that Isaac Stephenson received a majority of all the votes cast in each house.

It devolves then upon the president of this joint assembly to declare Isaac Stephenson duly elected to the United States Senate, and then the duty devolves upon the president of the senate and speaker of the assembly to certify his election to the governor and to the secretary of state, and they to certify his election to the United States Senate. Any other proceeding is out of order and nugatory.

The president overruled the point of order, and the joint assembly proceeded to vote for a United States Senator. There were 131 votes cast, 65 of which were cast for Mr. Stephenson. Thereupon the president announced that no one had received a majority, and the joint assembly adjourned.

The views say:

At each session of the joint assembly the question as to whether any vote in the joint assembly was necessary was raised by protest against such proceedings upon the grounds that, Mr. Stephenson having received a majority of the votes cast in each house voting separately, no other or further duty remained for the joint assembly than that of reading the journals of the two houses of the proceedings in each relative to the election of a United States Senator on the day previous. These journals were read and the fact disclosed that in each house Mr. Stephenson had received a majority of all votes cast. It remained only that "he shall be declared duly elected Senator." The statute does not prescribe who shall declare the person receiving a majority of the votes in each house elected Senator, nor in what form such declaration shall be made.

From the reading of the law it would seem that when the two Houses voting separately each gave Mr. Stephenson a clear majority and having met in joint session on the day following the vote in the separate houses, the journal of the proceedings of the two houses voting separately being read in joint convention and the result announced, the election was completed; the mere failure to declare him elected could not in any way defeat the will of the two houses as expressed in their separate votes.

The failure to make a specific declaration of his election was not vital. The action of the governor and secretary of state in deferring the certificate of his election or in misstating the time of his election could not affect that election.

If we are correct in assuming that the election of Isaac Stephenson was accomplished when the record of the two houses was read and announced in the joint assembly, then the failure or delay of the executive officers to perform their duty could in no way defeat his election as of the date of the meeting of the first joint assembly.

In this opinion Mr. Pomerene and Mr. Sutherland concur as follows:

On the same day in the assembly 82 votes out of the 100 assemblymen were cast, and Isaac Stephenson received 60 out of the 82 votes. He, therefore, received, in our judgment, "a majority of the whole number of votes east in each house." The vote thus cast was entered upon the journal of the senate and of the house. In conformity with the provisions of the Federal statute, the members of the two houses convened at 12 o'clock noon, on the day following, in joint assembly. The journal of each house was read, and showed the result of the balloting on the previous day in each house separately, as hereinbefore stated. Having received a majority of all of the votes cast in each house, it was the duty of the presiding officer to declare Senator Stephenson duly elected. This was purely a ministerial duty, and the mere fact that he failed to perform that duty could not, under any legal principle, undo that which was legally done in the separate and joint sessions, and, except for this failure of the presiding officer, was completely done.

84. The Senate election case of Isaac Stephenson, continued.

Expenditure of money for advertising space or editorial comment in newspapers or for the hiring of speakers or personal workers held not to constitute bribery.

Contributions to party campaign committees held not to constitute bribery.

Prior to the adoption of the seventeenth amendment to the Constitution the primary was no part of the election of a United States Senator.

Although condemning lavish expenditure of money in procuring election of Senator, the committee found no evidence warranting recommendation that seat be vacated.

Votes of members of legislature answering present in ballot for election of Senator considered blank ballots and not counted.

Another question relating to the legislative proceedings was the effect of a vote of "present" by members of the legislature on the ballot for Senator. Separate views submitted by Mr. Atlee Pomerene, of Ohio, and Mr. George Sutherland, of Utah, members of the committee concurring in the majority report, thus discuss this question:

Thirty-three members of the senate were present, and, before balloting, passed a resolution providing that "any senator who does not wish to vote for a candidate may vote by answering 'Present.'" The roll was called, and 17 senators voted for candidates, 12 of whom voted for Isaac Stephenson. The 16 other senators simply voted "present." In other words, a quorum, in the language of the statute, voted for "one person for Senator in Congress," and of this quorum Isaac Stephenson received a majority. While the vote "present" of the 16 senators was in accordance with the resolution passed, we do not believe it could either add to or detract from the requirements of the statute. All members, no doubt, should have voted for "some person," but 16 voted "present," which was equivalent to a blank vote.

The views submitted by Mr. Pomerene and Mr. Sutherland give particular attention to the question of bribery, and divide expenditures disclosed by the evidence into the following classes:

First, moneys paid out to persons employed by him or in his behalf to circulate nomination papers in order to get the number of signatures required by the Wisconsin statutes before his name could be placed upon the ticket.

Second, moneys paid out as follows:

(a) to newspapers for political advertising;

(b) for editorial support:

(c) for lithographs, campaign material, postage, telephone, telegraph, and express charges;

(d) office expenses, including rent, clerk hire, and assistants.

Third, payment for services of speakers, hall rent, music, and for men devoting their time and efforts in cultivating Stephenson sentiment throughout the State;

Fourth, moneys expended for workers at the polls, and for conveyances and services in getting out the voters;

Fifth, for drinks and cigars;

Sixth, money given to C. C. Wellensgard, L. L. Bancroft, and Thomas Reynolds, who were candidates for the legislature, to be used by them in the interest of Senator Stephenson;

Seventh, money paid to the game warden, James W. Stone, for use in the Senator's campaign;

Eighth, $2,000 contributed by Senator Stephenson to the State campaign committee for general election purposes; and

Ninth, expenses incurred during the session of the general assembly in opening and maintaining headquarters at Madison from the beginning of the session until after March 4, 1909, and for hotel bills and traveling expenses.

No part of the contribution to the general campaign committee or the expenses incident to the headquarters during the session of the general assembly were ever reported to the secretary of state.

The above we believe to fairly represent the different classes of expenditure, which were disclosed by the evidence.

While the views conclude that none of the money so classified was expended for unlawful purposes, the lavish use of money in political campaigns is condemned in the following terms:

We have no sympathy whatever with the expenditure of money in excessive amounts, whether in a senatorial or any other political campaign. That an expenditure of $107,793.05 is an excessive amount to be spent in the candidacy for the office of United States Senator, which pays a salary for six years' service amounting to $45,000, goes without question; that it is demoralizing and should be prevented can not be denied; that some of this money might have been spent corruptly may, for the sake of argument, be conceded, but it is not sufficient that possible or even probable corruption or bribery exists. The evidence must show it, and this case, like all other cases, must be determined from the facts as they are disclosed in the trial and under the law as it then existed. The committee, proceeding upon the assumption that the expenditure of so large a sum of money required the fullest investigation and explanation, probed every rumor and followed every clue which was brought to its attention, with the result that no evidence was discovered which would justify the conclusion that any of this sum of money was corruptly or illegally spent.

At the time of this primary there was no statute, either State or National, limiting the amount of expenditures. There is no judicial or legislative decision, so far as we are advised, limiting the amount which may be legally expended. Since that election the State of Wisconsin has limited the amount of expenditure in a senatorial campaign to $7,500 and the Federal Government has limited it to $10,000.

The majority coincide in this view as follows;

The amount of money expended by Mr. Stephenson, Mr. Cook, Mr. Hatton, and Mr. McGovern in the primary campaign was so extravagant and the expenditures made by and on behalf of these gentlemen were made with such reckless disregard of propriety as to justify the sharpest criticism. Such expenditures were in violation of the fundamental principles underlying our system of Government, which contemplated the selection of candidates by the electors and not the selection of the electors by the candidate.

Regardless of any statute requiring that strict accounts be kept of money expended by and on behalf of candidates, a candidate and every man representing him should know that public opinion would expect the parties to place and maintain themselves in a position so that if any of their acts were questioned they could justify such acts to the extent of giving every detail in regard thereto.

While I do not believe that the law of Wisconsin could constitute any man a candidate or place him in the position of and under the responsibilities of a candidate for an office over which the State had no control and which was not to be filled under any law of the State, yet I feel impelled to criticize the acts of those in charge of the expenditure of the money of men who are called candidates for the Senate, and especially of Mr. Stephenson, in the irresponsible and reckless manner in which they disbursed the money furnished them by Mr. Stephenson during the period of the primary campaign.

The failure to keep detailed accounts, the destruction of memoranda, the shifting of records and papers concerning the campaign from one place to another, the adoption of mysterious methods and roundabout ways in regard to matters that might just as well have been performed in open daylight in the presence of the people, would go far toward creating the impression that there was some occasion for Mr. Stephenson's representatives to avoid candor and to obscure conditions.

The minority also concur:

The expenditure of such a sum of money at a primary election on behalf of one candidate in itself shocks the judgment and conscience of honest men generally, and disbursed as disclosed by the record in this case is conclusive proof of corrupt methods and practices.

The charge of bribery is still more specifically treated in the majority report. The majority views say:

Charges of bribery in the interest of Mr. Stephenson's election had been freely made both before the subcommittee and before the legislative investigating committee. Not one of these charges have been sustained by the testimony.

The word "bribery" has been applied to many acts that do not constitute bribery.

The procurement of advertising space or editorial comment in the newspapers upon the payment of money by or on behalf of a candidate for office can not under any construction of law be held to be bribery.

The procurement of the services of men to speak either publicly or personally on behalf of any candidate, or to canvass the electorate on his behalf, is not bribery under any reasonable construction of the law.

If the testimony were true that money was offered to Assemblyman Leuch to go upon the floor and vote for the purpose of effecting a quorum it would not constitute bribery. It was the duty of such member to go upon the floor and vote.

As to charges of corruption in influencing members of the legislature to absent themselves from the joint session the majority views say:

The next charge is that the election of Mr. Stephenson was made possible by three members, who, it is claimed, at the instigation of Mr. Stephenson's managers and agents, absented themselves from the joint assembly when it became known that their presence would prevent the election of Mr. Stephenson, and it was charged that the absence of these three members had been procured by fraudulent or wrongful means by or on behalf of Mr. Stephenson. It was the only charge of corruption in connection with the election of Mr. Stephenson by the legislature worthy of consideration.

It is true that had these three members been present and voted the total vote would have been 126, and the 63 votes received by Mr. Stephenson would not have elected, but the evidence clearly

establishes the fact that Mr. Ramsey, one of the three absentees, was paired with Mr. Fenelon and that such pairs had been universally recognized, so that Mr. Ramsey can not be said to have been absent for any corrupt purpose, nor would his absence from the joint assembly affect the result of the vote. Being paired, he could not have voted. In that event, had Farrell and Towne been present the total vote would have been 125, of which Mr. Stephenson received 63. Sixty-three would have been a majority and would have elected Mr. Stephenson, so that the absence of Farrell and Towne did not affect the result of the election, and it can not therefore be said that the election was brought about through corrupt practices so far as the absence of Farrell and Towne was concerned.

It is not charged that any other member who voted for Mr. Stephenson did so either from corrupt motives or actions on his own part or that he was procured to do so by any corrupt action on the part of any person in the interest of Mr. Stephenson.

Does the evidence show or tend to show that there were corrupt measures or unlawful methods adopted to secure the absence of either Farrell or Towne?

There has been much sensational testimony introduced before the subcommittee, which was heard largely because such testimony had been received by the legislative investigating committee for the purpose of showing bribery or corrupt methods in connection with the absence of Ramsey, Farrell, and Towne. It was not shown that any money had been traced to either of these men from any source in connection with the matter; but it was claimed that a fund had been raised to be used for corrupt purposes, and that, on the assumption that such fund had been raised, it must at least in part have been used to bring about the absence of these three members of the legislature.

The subject of contributions to campaign committees is also discussed:

It appears that Mr. Stephenson contributed $2,000 to the Republican State central committee. Against this contribution no legitimate objection can be urged. It was not in violation of any law nor for other than general election purposes.

It was also shown by testimony that Mr. Stephenson before the primary gave money to C. C. Wellensgard, Levi H. Bancroft, and Thomas Reynolds, who were candidates for the legislature. These men testified that they used the money in the interest of Mr. Stephenson at the direct primaries. If we eliminate Mr. Stephenson from the direct primaries the contributions which he made to these candidates for nomination and election to the legislature would be in violation of no law. It appears from the testimony that they were at the time voluntary and ardent supporters of Mr. Stephenson regardless of any money which they may have received or which may have been placed in their hands by him for any purpose.

There is not sufficient evidence upon which to base a charge of bribery or any other charge that would affect the validity of the election of Mr. Stephenson in either of these cases.

The majority views therefore conclude:

We may therefore safely dismiss the charges of corruption in connection with the action of the legislature in electing Mr. Stephenson, whether such election is held to have been on January 26 or on March 4, 1909.

This conclusion is fully concurred in by Mr. Pomerene and Mr. Sutherland as follows:

We therefore conclude:

First, that the election in fact occurred on January 26, 1909; and

Second, that there is no evidence justifying the conclusion that corrupt "methods or practices "were employed in securing the vote on March 4, 1909, even if it should be held that the election took place on March 4.

85. The Senate election case of Isaac Stephenson, continued.

Discussion of status of primary as part of election of Senator prior to adoption of seventeenth amendment to the Constitution.

Discussion of effect upon election of Senator of corrupt practices in the primary, and as to whether practice of corrupt methods in primary campaign warrant invalidation of election.

Interpretation of the Wisconsin corrupt practices law.

Validity of election of Senator held not to be affected by failure to perform thereafter some act enjoined by State statute.

A question arising for the first time in the history of Senate election cases relates to the power of the Senate to inquire into practices and methods employed in primary elections.

The minority contend that:

When candidates for the legislature announce that they will vote for the choice of the primary for Senator, then to buy or corrupt the primary is to buy the member of the legislature; and if it was corrupt to buy off a candidate for the Senate and thereby secure the votes of his friends it is also corrupt to buy the primary and thereby secure the votes of those who announce that they will be controlled by the primary; and if the Senate can go outside of the proceedings of the legislature and investigate corruption in preventing men from being candidates for the Senate before the legislature, then it can certainly investigate methods and proceedings in the primary.

The majority, however, hold:

The subcommittee, in determining the scope of the investigation, was confronted with the question as to how far, if at all, the charges affecting the candidacy of Isaac Stephenson before the direct primary should be considered.

The State legislative committee had directed its attention principally to the direct primary and the conduct of the candidates therein.

It was doubtless competent for the legislature to provide for direct primaries for the nomination of candidates for the legislature and to place legal restrictions about them to secure the integrity of their elections, but, as herein elsewhere more fully stated, it is not competent for the legislature to provide for the nomination of candidates for the United States Senate at direct primaries.

The status of Mr. Stephenson at such primaries is not comparable to that of candidates for the legislature or for any State office.

The language of the resolution under which the subcommittee acted directs it to report whether "in the election of Isaac Stephenson there were used or employed corrupt methods or practices," and the language of the last paragraph of section 1 of the resolution, bringing the matter to the attention of the United States Senate, strictly construed, refers only to the election.

When we speak of the election of a United States Senator under existing constitutional and legislative provisions we contemplate only the election by the legislature of the State. There is as yet no recognition to be given extra-legislative proceedings in the nature of what is termed "direct primaries," no such method of selection being recognized by any law of the United States.

The direct primary, legally speaking, is no part of an election of a United States Senator. The duty of an election of a Senator does not under any law rest with the electorate, but is vested by the Constitution solely in the legislature. The legislature electing had no existence until after the general election. The nomination of such members at the primary vested in the nominees not even an inchoate status. A State may give force and effect to a direct primary law providing for the nomination of candidates for State or minor offices to be elected under the laws of the State, but the legislature has no power to regulate in any manner or to any extent the election of a United States Senator, and there is no such proceeding known under any law of the United States as the nomination of a candidate for the United States Senate.

It would be entirely within the power of a legislature, charged with the responsibility of electing a United States Senator before proceeding to elect a Senator, to repeal any legislation enacted by a previous legislature which placed a limit upon or directed its action.

It seems from this consideration of the question we must conclude that the direct-primary proceedings can not be held to affect the validity of an election by the legislature.

A further charge made by the State legislature was based upon the failure to file and expense account as required by the corrupt practices act of the State of Wisconsin.

The statute requires the filing with the secretary of state of a statement by the candidate—

setting forth in detail each item in excess of five dollars in money, or property contributed, disbursed, expended, or promised by him, and to the best of his knowledge and belief by any other person or persons for him, or in his behalf, wholly or in part in endeavoring to secure or in any way in connection with his nomination or election to such office or place, or in connection with the election of any other person at said election, the dates when, and the persons to whom, and the purpose for which all said sums were paid, expended, or promised by such candidate in any sum or sums whatever.

With reference to the failure to comply with this law the views of Mr. Pomerene and Mr. Sutherland say:

No account whatever was filed of the amount contributed by Mr. Stephenson to the State campaign committee, nor of the amount expended during the session of the general assembly. The account which was filed of the expenses incurred in connection with the primary did not comply with the law in that it lumped the expenses; gave the names of but very few of the persons to whom money was paid; did not give the dates when expended, nor as fully as contemplated by the statutes the purposes for which expended. The account as filed was approved by the general counsel of Mr. Stephenson without any examination of the statute, and simply because it conformed with certain accounts, which had been filed by prominent candidates for other offices. A careful examination of this account justifies the belief that it was purposely drawn so as to give the public as little information as possible.

The penalty for failing to comply with this statute is a fine only, and it does not provide for the forfeiture of the office. If it did, the statute to that extent would be unconstitutional, but Mr. Stephenson, because of his failure to file a proper account, has violated the statute and is subject to a fine. However, he must be absolved from any moral delinquency, because in the preparation and filing of his account he consulted with counsel, and followed their advice, and if it was not properly done they were to blame rather than he.

In addition to this, the validity of the election which had already taken place could not be affected by the failure to thereafter perform some act enjoined by the State statute. The election was already an accomplished fact and its validity must be determined by the facts theretofore or then existing. Anything done thereafter can not be regarded as a substantive ground for invalidating the election. Its only evidential value would be in reflecting light upon or as giving color to the preexisting facts.

The majority views are in harmony with this conclusion:

The fifteenth specific charge is based upon the failure or neglect of Isaac Stephenson to make and Me an expense account under the laws of Wisconsin. This requirement is under section 270 of the election laws which provides that every person who shall be a candidate before any convention or at any primary or election to fill an office for which a nomination paper or certificate of nomination may be filed, shall, within thirty days after the election held to fill such office make out and file with the officer empowered by law to issue the certificate of election to such office or place, a statement in writing, etc., and that any person failing to comply with this section shall be punished by fine of not less than $25 or more than $500. This being a penal statute, the validity of an election could not be affected by the failure to comply with it.

In conclusion the majority and minority members of the committee differ widely in their recommendations.

The majority hold:

The testimony clearly shows that the candidates felt compelled to spend more money than they wanted to spend. The pressure upon them from those who were undertaking to manage their campaigns seems to have been very great and persistent, but I can find nothing in the testimony nor in the circumstances or conditions surrounding the senatorial contest which resulted in the election of Mr. Stephenson that in my judgment would justify the committee in recommending that the seat be vacated, or that he be declared not legally elected to the United States Senate; and therefore I recommend that the Senate find that the charges preferred by the Legislature of Wisconsin against Isaac Stephenson, a Senator of the United States from the State of Wisconsin, are not true, and that Isaac Stephenson be acquitted of such charges.

In opposition to this view the minority say:

We regret that we can not feel warranted in finding for the sitting Member, but we believe the methods employed at the primary were corrupt; that they were against public policy; that they were demoralizing in character; that they directly contributed to destroy the purity and freedom of the election; that they violated the fundamental principles at the basis of our system of government; and that they are not to be tolerated by the Senate of the United States as a means of procuring a seat in that body.

We desire to submit the following resolution:

"Resolved, That Isaac Stephenson was not duly and legally elected to a seat in the Senate of the United States by the Legislature of the State of Wisconsin."

The case was debated in the Senate on February 19, 20, 21, 29, March 1, 2, 4, 25, 26, and 27. On March 22,[1] Mr. Jones offered the following amendment in the nature of a substitute for the motion of Mr. Heyburn that the Senate agree to the report of the committee:

Resolved, That Isaac Stephenson was not duly and legally elected to a seat in the Senate of the United States by the Legislature of the State of Wisconsin.

The question on agreeing to the amendment was decided in the negative, yeas 27, nays 29.

The question recurring on the motion of Mr. Heyburn that the report of the committee be adopted and that Isaac Stephenson be declared entitled to a seat as Senator from the State of Wisconsin in the United States, there were—yeas 40, nays 34. So the majority motion was agreed to unamended.

86. The question of eligibility of Edward E. Miller, of Illinois, in the Sixty-eighth Congress.

A resolution relating to the right a member to his seat was entertained as a question of the privilege although the organization of the House had not been completed.

A question of the privilege of the House is presented in the form of a resolution.

A question being raised as to the eligibility of a member under the operation of the corrupt practices act, a resolution authorizing inquiry was referred.

When resolution is brought directly before the House independently of a committee the proponent's right to prior recognition for debate takes precedence over the motion to refer.

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[1] Second session Sixty-second Congress, Record p. 3777.

A motion to lay a proposition on the table is in order before the member entitled to prior recognition for debate has begun his remarks.

On December 5, 1923,[1] at the organization of the House, Mr. Henry T. Rainey, of Illinois, claiming the floor for a question of privilege,[2] said:

I have in my possession here evidence which shows that Edward E. Miller, a Member elect from the State of Illinois, has expended nearly $65,000 in securing his election to a position in this House, and that over $63,000 of that amount was a part of a trust fund.

Mr. Everett Sanders, of Indiana, made the point of order that a question of privilege of the House should be presented in the form of a resolution.

The Speaker[3] sustained the point of order and Mr. Rainey thereupon submitted the following preamble and resolution:

Whereas it is charged that Edward E. Miller, a Representative elect from the State of Illinois, is probably ineligible to a seat in the House of Representatives;

Whereas such charge is made through a Member of the House and on his responsibility as a Member;

Whereas it is charged that said Miller has grossly misused two trust funds committed to his charge by the State of Illinois while he was treasurer of the State of Illinois in promoting his candidacy for election to the Sixty-eighth Congress; and

Whereas it is charged that said fund so used also greatly exceeds the amount he is permitted by law to expend for said purpose;

Resolved, That the question of the right of said Miller to a seat as a Representative of the State of Illinois in the Sixty-eighth Congress, in the House be referred to a committee of seven Members of the House, to be appointed by the Speaker, and said committee shall have the power to send for persons and papers and examine witnesses on oath as to the subject matter of the resolution.

Mr. Nicholas Longworth, of Ohio, moved to refer the resolution to one of the three Committees on Elections when constituted.

Mr. Rainey made the point of order that the gentleman from Ohio did not, have the floor to make the motion since he as the proponent of the resolution had not yielded it.

The Speaker sustained the point of order, saying that while certain motions. were privileged the motion to refer was not one of them.

Mr. Longworth thereupon moved to lay the resolution on the table.

Mr. Rainey again made the point of order that he was entitled to the floor.

The Speaker said:

The matter is very simple. The gentleman from Illinois raises the question of privilege of the House, the right of a Member to his seat. That is always privileged. Such a resolution is customarily referred to one of the Committees on Election and have it there considered, but the House has a right to have it considered by a committee, and considered at once. On the other hand, the House has the right, if it prefers, when the resolution is offered to lay it on the table. That motion the gentleman from Ohio has made. The motion is always in order and takes precedence.

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[1] First session Sixty-eighth Congress, Record, p. 7.

[2] For preliminary proceedings see section—of this work.

[3] Frederick H. Gillett, of Massachusetts, Speaker.

Whereupon, on motion of Mr. Finis J. Garrett, of Tennessee, by unanimous consent the resolution was referred to the Committee on Elections No. 3.

On January 18, 1924, Mr. Richard N. Elliott, of Indiana, from the committee, submitted the following report: [1]

A thorough hearing and investigation was made by the committee, and after hearing the evidence presented it finds that no good reason has been shown to it which would justify the passage of the resolution and the appointment of a special committee of seven Members of the House of Representatives to investigate the charges contained in said resolution.

And it unanimously recommends to the House of Representatives that said House Resolution No. 2 be laid on the table.

In the absence of a request for reference to the calendar the report was laid on the table.

87. The Senate election case of Clarence W. Watson and William E. Chilton, of West Virginia, in the Sixty-second Congress.

The Senate declined on vague and indefinite charges of corruption to investigate the election of duly returned Members.

Mere rumors of bribery in election of Senator unsupported by evidence do not warrant investigation by the Senate.

Charges that corrupt practices were resorted to in procuring election of Senators being retracted and withdrawn, the Senate did not consider it necessary to order an investigation.

On February 2, 1911,[2] the credentials of Clarence Wayland Watson, elected a Senator by the legislature of the State of West Virginia to fill the vacancy occasioned by the death of Stephen Benton Elkins for the term ending March 3, 1913, were presented and Mr. Watson took the oath of office.

On the following Monday, February 6,[3] the credentials of William Edwin Chilton, elected Senator by the same legislature for the term beginning March 4, 1911, also were presented and on April 4, following,[4] Mr. Chilton was sworn and took his seat in the Senate.

More than a year after, on the last day of the second session of the Sixty-second Congress, and on August 26, 1912,[5] the President pro tempore laid before the Senate a petition from the governor of West Virginia and others alleging that bribery and corruption were practiced in the election of Mr. Watson and Mr. Chilton, and asking an investigation by the Senate. The petition was referred to the Committee on Privileges and Elections.

On February 5, 1913,[6] Mr. Chilton, for himself and Mr. Watson, made a statement in the Senate denying the charges, and submitted a communication from the

[1] First session Sixty-eighth Congress, House Report No. 56.

[2] Third session Sixty-first Congress, Record, p. 1797.

[3] Record, p. 1969.

[4] First session Sixty-second Congress, Record, p. 2.

[5] Second session Sixty-second Congress, Record, p. 11862.

[6] Third session Sixty-second Congress, Record, p. 2582.

principal witness, on whose information the charges were based, retracting statements made and withdrawing the charges as follows:

BURNSVILLE, VA., *January 8, 1913.*

Hon. C. W. Watson, *Washington, D. C.*

DEAR SIR: The time has come when you should know the truth about the so-called Shock statement. I never have signed any statement that was read before the legislature and I never have been under oath. I have let the talking go on because I hated to be put in a wrong light. The truth is that I set up the whole business. Nobody tried to buy my vote and would not swear that they did. I wanted to nominate McGraw, and I thought if I got this thousand dollars and made this play it would hurt you and Chilton. The trick failed to work, and now you have the truth. I do not know you and am sending this to you because I want justice to be done. So far as I know, your election and Chilton's was honest and fair, and it is wrong to have this report going around.

Very truly yours,

L. J. SHOCK.

On February 11, 1913,[1] Mr. William P. Dillingham, of Vermont, from the committee, submitted the report[2] of the committee:

The report gives the following statement of facts:

First. That the Legislature of West Virginia, which convened on the 11th day of January, A. D. 1911, chose Messrs. Clarence W. Watson and William E. Chilton as Senators of the United States from the State of West Virginia, and that they appeared, took their oath of office, and are now sitting as Senators in this body. The petitioners do not state or allege that in such election any individual member of the legislature was bribed to vote for either of the persons named, or that, in voting for them, or either of them, any member thereof was actuated by any corrupt or improper motive.

Second. It does not appear upon any of the papers before this committee that in such election any member of the Legislature of West Virginia was improperly approached by any person interested in the election of either of the said Senators, or that any improper offer or inducement of any kind or nature was made to any such member to cast his vote for said Senators, or either of them.

Third. The only direct charge that money was improperly used, or attempted to be used, by anyone is contained in a purported statement of L. J. Shock, a member of the West Virginia Legislature, that, on the 18th day of January, 1911, prior to the caucus of the Democratic members of the legislature, which was held to nominate party candidates for United States Senators, he was paid $1,000, and promised a further sum, to vote for Messrs. Watson and Chilton for United States Senators. This statement was read by Hon. George W. Bland, a State senator, before the Joint Assembly of the Legislature of West Virginia, on the 25th day of January, 1911. But it affirmatively appears, from the papers submitted to this committee, that the charge made by Mr. Shock was without foundation, and has been fully retracted in a statement made by him to Senator Watson.

Fourth. All other matters contained in the petition aforesaid are rumors without apparent foundation—statements of individual opinion, newspaper stories, and speculations as to general conditions existing in and about the legislature and throughout the State of West Virginia just previous to and at the time of such election. These do not in any instance refer to the action of any particular member of the Legislature of West Virginia. They do not charge any act of bribery or attempted bribery. They neither name any member of that body as having received nor as having been asked to receive, money for his vote, nor do they indicate any person who made any attempt to bribe or improperly influence any member of the legislature. They are of that general character too frequently indulged in both by individuals and by the public press on the

[1] Record, p. 2970.

[2] Senate Report No. 1206.

occasion of election in connection with which great public interest is aroused, and, while calculated to arouse suspicion and create prejudice, they do not, in the opinion of the committee, present a proper basis for action on the part of the Senate.

After consideration of all evidence submitted, the committee was unanimous in declaring that the charges had not been sustained, and recommended the following resolution:

Resolved, That the Committee on Privileges and Elections be discharged from further consideration of the subject.

The resolution was adopted without debate or division.

Chapter CLX.[1]

CREDENTIALS AND PRIMA FACIE TITLE.

1. Questions as to validity of Section 88

88. The Senate case of John W. Smith, from Maryland, in the Sixtieth Congress.

The credentials of a Senator elect being regular and there being no contest, the Senate seated the bearer on prima facie showing, although credentials and Senate records indicated that he had been elected in advance of time prescribed by law.

Discussion as to whether a law was mandatory or directory.

On March 26, 1908,[2] in the Senate, Mr. Isidore Rayner, of Maryland, presented the following credentials of John Walter Smith, elected a Senator by the Legislature of Maryland:

THE STATE OF MARYLAND,
EXECUTIVE DEPARTMENT.

To the President of the Senate of the United States:

This is to certify that on the 25th day of March, 1908, John Walter Smith was, in accordance with law, duly chosen by the legislature of the State of Maryland a Senator from said State to represent said State in the Senate of the United States for the unexpired portion of the term of six years, beginning on the 4th day of March, 1903, to fill the vacancy caused by the decease of Hon. William Pinkney Whyte.

Witness his excellency our governor and our seal hereto affixed, at Annapolis, this 25th day of March, in the year of our Lord 1908:

[SEAL] AUSTIN L. CROTHERS.

By the Governor:

N. WINSLOW WILLIAMS,
Secretary of State.

Mr. Rayner moved that the oath be administered, when Mr. Julius C. Burrows, of Michigan, objected to administration of the oath for the reason that the election was not in accordance with the act of 1866.

That portion of the act of 1866 enacted as section 17 of the Revised Statutes provided:

SEC. 17. Whenever, during the session of the legislature of any State, a vacancy occurs in the representation of such State in the Senate, similar proceedings to fill such vacancy shall be had on the second Tuesday after the legislature has organized and has notice of such vacancy.

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[1] Supplementary to Chapter XVIII.

[2] First session Sixtieth Congress, Record, p. 3938.

According to the Journal of the Senate, the death of Senator Whyte and the ensuing vacancy occurred on the 17th day of March. The second Tuesday thereafter fell on March 31. The Legislature of Maryland, however, under necessity by constitutional limitations of adjourning prior to that date, proceeded to the selection of a successor, resulting in the election of Mr. Smith on March 25, one week in advance of the time prescribed by the statute.

In stating his contention Mr. Burrows said:

My contention is that the legislature of Maryland, in proceeding to the election of a Senator on the 25th day of March to fill the vacancy occasioned by the death of Senator Whyte, which occurred on the 17th day of the same month, acted prematurely and in violation of the statute of 1866.

I have taken occasion to look over the precedents of the Senate since 1866, when this measure was enacted. There have been fourteen deaths in the Senate at a time when the legislature of the State in which the vacancy happened was in session and in not one single instance has any State presumed to defy or ignore this statute and elect until the second Tuesday after they were notified of the vacancy.

The cases are all like the one now pending before the Senate—a death during the session, an election by the legislature after the legislature had been notified and the second Tuesday after such notification—and in no single instance has a Senator been permitted to take his seat who has not conformed to that statute.

In all the cases in every State where a vacancy has occurred in the representation in the Senate from such State during the session of the legislature that legislature has conformed to the statute and waited before filling the vacancy until the second Tuesday after notice of the vacancy.

Now, I submit, Mr. President, to admit the gentleman holding these credentials to a seat in this body is not only in violation of the Constitution and laws of the United States, but he has not even a prima facie ease which would entitle him to admission. I insist, therefore, to admit Mr. Smith under these circumstances will be to reverse the judgment of the Senate for forty years, overthrow all precedents, and receive into the membership of this body a person under circumstances which can not for one moment, in my judgment, be justified.

Mr. Rayner argued that the statute was merely directory and not mandatory, citing in support of that interpretation reports in the cases of Hart *v.* Gilbert in the Forty-first Congress and Lapham *v.* Miller in the Forty-seventh Congress.

Mr. Rayner further said:

There is no contestant here at all. There is no protest whatever against the seating of the Senator-elect. Senator Whyte died last Tuesday a week at 7 o'clock. The general assembly of Maryland, then in session, had immediate notice of his death. The law does not speak of any official notice, and does not require any.

On the following Tuesday—that is to say, Tuesday of this week—the two houses initiated their proceedings for the election of a Senator to fill the unexpired term of Senator Whyte. They met on Tuesday for that purpose, and yesterday, Wednesday, met in joint convention. The Senator-elect who is now present was declared in accordance with the law to have received the majority of votes and to be duly elected Senator. The Legislature of Maryland adjourns next Monday by constitutional limitation. If the Senator is right in what he states, Maryland will be without its proper representation upon this floor.

* * * * * * * * * *

I rest upon these four propositions: First, that the section is not entitled to the interpretation the Senator from Michigan puts upon it; second, that the section is only directory, not mandatory; third, the State of Maryland has decided it; and fourth, if I am all wrong in everything else I have said, the Senator-elect is now entitled to be sworn in, and this question should go to the committee, as has been done in every other case, for further examination. I ask, therefor, that the Senator be sworn in.

Mr. Burrows offered the following:

Resolved, That the credentials of John Walter Smith, claiming a seat in the Senate from the State of Maryland, be taken from the files of the Senate and referred to the Committee on Privileges and Elections.

The resolution was disagreed to, yeas 28, nays 34.

The question recurring on the motion offered by Mr. Rayner, it was decided in the affirmative without division.

Mr. Smith then took the oath.

Chapter CLXI.[1]

IRREGULAR CREDENTIALS.

1. House exercises discretion in case of informality. Section 89.

89. An instance wherein the House gave prima facie effect to credentials irregular in form against which a technical question had been raised.

The credentials of a Member elect having been challenged, the Speaker submitted the question to the House.

On June 2, 1930,[2] Mr. John N. Garner, of Texas, presented the credentials of Mr. Thomas L. Blanton, a Representative elect from the State of Texas, and requested that he be sworn in.

Mr. Robert H. Clancy, of Michigan, objected on the ground that the credentials were not in proper form in that they certified to the election of Mr. Blanton as "Congressman," when the legal designation is "Representative in Congress."

By direction of the Speaker[3] the Clerk read the credentials, as follows:

CERTIFICATE OF ELECTION.

THE STATE OF TEXAS,
DEPARTMENT OF STATE,
Austin.

This is to certify that at a special election held in the State of Texas for Representative in Congress from the seventeenth congressional district, composed of the following counties: Burnet, Llano, Comanche, McCulloch, San Saba, Lampasas, Mills, Brown, Coleman, Callahan, Eastland, Stephens, Shackelford, Jones, Palo Pinto, Taylor, Nolan, Concho, and Runnels, on the third Tuesday in May, A. D. 1930, being the 20th day of said month, Thomas L. Blanton, having received the highest number of votes cast for any person at said election for the office hereinafter named, was duly elected as Congressman for the State of Texas to fill the unexpired term of the late Ron. R. Q. Lee.

In testimony whereof I have hereunto subscribed my name and caused the seal of state to be affixed at the city of Austin on this 31st day of May, A. D. 1930.

[SEAL.]

DAN MOODY, *Governor of Texas.*

By the Governor:

JANE Y. MCCALLUM,
Secretary of State.

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[1] Supplementary to Chapter XIX.

[2] Second session Seventy-first Congress, Journal p. 13; Record, p. 10312.

[3] Nicholas Longworth, of Ohio, Speaker.

Mr. Garner renewed his demand that the oath be administered, maintaining that the certificate should be construed in its entirety; that it named the district and enumerated the counties composing the district, and was incapable of misinterpretation.

The Speaker said:

The Chair is prepared to express his opinion on this matter. There is sufficient ground here for contending that this certificate is not without fault, because it has used the word "Congressman," which is never used, and which has never been used, so far as the Chair knows, in swearing in a Member. The Clerk informed the Chair this morning that on a number of occasions he has returned certificates to Texas, where the word "Congressman" was used, and when the correction was made and the certificate was returned here the Member was sworn in as a Representative in Congress. So far as the Chair knows, no man has ever taken the oath as "Congressman" but only as "Representative in Congress." Under the circumstances, however, the Chair would not undertake to assume the responsibility of refusing administration of the oath to any person where the certificate was no more to be criticized than this. However, the Chair thinks that is a matter for the House to determine. Section 5 of Article I of the Constitution says:

"Each House shall be the judge of the elections, returns, and qualifications of its own Members."

Under the circumstances the Chair will put the question to the House. Does the House desire that the Chair shall administer the oath of office to the gentleman from Texas?

The question being taken, it was decided in the affirmative and Mr. Blanton appeared before the bar and took the oath.

Chapter CLXII.[1]

THE HOUSE THE JUDGE OF CONTESTED ELECTIONS.

1. **House not bound by agreement of parties. Section 90.**
2. **House not bound by decisions of State tribunals. Sections 91, 92.**
3. **Relations of House to acts of canvassing officers. Sections 93–95,**
4. **House ascertains intent of voter when ballot is ambiguous. Section 96.**

90. The Connecticut election case of Jodoin v. Higgins in the Sixty-second Congress.

A stipulation by parties for a recount of ballots is not binding on the House or its committees.

Although not bound by agreement of parties for a recount of ballots, the committee in view of the difficulty in securing a recount under the laws of the State, and evidence indicating the probability of inaccuracy in the returns, ordered a recount.

On August 3, 1912,[2] Mr. Henry M. Goldfogle, from the Committee on Elections No. 3, submitted the report of the committee in the Connecticut case of Raymond J. Jodoin *v.* Edwin W. Higgins.

Under the law of the State of Connecticut a recount of ballots might be had only when application was made within three days after the election by an elector in the town in which recount was desired.

However, after answer had been served to the notice of contest, the parties and their attorneys entered into a stipulation dated March 16, 1911, in which, among other things, the following was stated:

> That in many voting districts it is probable that the moderators were mistaken in their decisions as to the validity or invalidity of ballots cast for said office of Representative in Congress from said district, and that without opening the boxes and examining the ballots therein it is impossible to determine the extent of such mistaken decisions.
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> * * * * * * * * *
>
> That it is impossible to tell with accuracy what ballots have been improperly counted or rejected for the contestant or contestee without opening said boxes and examining said ballots.
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> * * * * * * * * *
>
> That said contestant desires that said boxes be opened and said ballots examined and recounted and that the lawful and correct count of mid ballots be ascertained thereby without objection on the part of the contestee.
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> * * * * * * * * *
>
> That said contestant and contestee waive any question of formality or sufficiency of the pleadings as to said matter of contest and agree that all issues are properly raised and presented

[1] Supplementary to Chapter XXI.

[2] Second session Sixty-second Congress, House Report No. 1136; Record p. 10145; Moore's Digest, p. 51.

for the opening of said ballot boxes and for a recount of all the ballots cast at said election for the office of Representative in Congress for said congressional district in said Sixty-second Congress.

* * * * * * * * *

That said contestant and contestee stipulate and agree to waive any and all claims which they or either of them might make under any of the pleadings or any part of the proceedings for the determination of said question so that a full recount of all ballots cast for Member of Congress from said congressional district in said Sixty-second Congress may be had.

The congressional district affected was composed of 36 towns. In only one of the 36 was application made within the 3 days specified, but on recount in the one town the contestant gained 3 votes, indicating the possibility of similar changes in the returns from other towns in event of a general recount.

The committee held that:

A stipulation of parties to an election contest for a recount of ballots cast for Representative in Congress is not binding or conclusive either on the House of Representatives or its Committee on Elections. In view, however, of the stipulation to which we have above referred and of the declarations upon the hearings by the counsel for the contestee of his willingness that such recount should be had, and of the circumstances existing with regard to the counting of the vote in the town of Plainfield which reduced the meager majority by which the contestee was declared elected, and of the difficulty that the contestant would experience to secure a recount under the Connecticut law within the very brief period of time limited by the laws of that State, the committee concluded to give heed to the stipulation and render it effective by ordering a recount.

On March 21, 1912,[1] Mr. Goldfogle offered the following resolution in the House which was agreed to:

Resolved, That the Committee on Elections No. 3 be, and it hereby is, authorized to send for ballots cast for Representative in Congress in the third congressional district of Connecticut, at the election held in November, 1910, and that such ballots be brought from said congressional district by such person as may be designated by the committee or its chairman, and the expenses incurred therefor shall, upon vouchers approved by the chairman of the committee, be paid out of the contingent fund of the House.

In compliance with this resolution the ballots were brought from Connecticut and opened by the committee in the presence of counsel and representatives of both parties to the contest, but before the completion of the recount the counsel for the contestant announced that from an examination of the ballots he was convinced that the returns would not be materially changed by the recount. The committee, therefore, without proceeding further with the recount recommended resolutions declaring that Raymond J. Jodoin was not elected and Edwin W. Higgins was elected.

The House agreed to the resolutions without debate or division.

91. The Michigan election case of Camey v. Smith in the Sixty-third Congress.

The House in deciding a Federal election case, acts in the capacity of a court and is not bound by decisions of State courts unless such decisions are founded upon sound principles and comport with reason and justice.

Decisions of State tribunals are not binding on Congress for the reason that State election laws are made Federal laws by the Federal Constitution.

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[1] Journal, p. 919: Record, p. 3766.

A recount of ballots having been agreed upon by contestant and contestee it is the duty of the House to accept the revision in official returns made by such recount.

Votes sought to be influenced by election officials must be rejected.

Where the soliciting of votes by election officials continued during the whole day the entire poll should be rejected, but where solicitation is shown to have applied to a limited number of votes those votes only should be deducted from the poll.

Irregularities in the conduct of an election unaccompanied by fraud do not vitiate the returns.

Adjournment of election officials contrary to provision of law before completion of the count, where untainted with fraud or misconduct does not warrant rejection of the poll.

On January 30, 1914,[1] Mr. James D. Post, of Ohio, from the Committee on Elections, No. 1, submitted the report in the Michigan case of Claude C. Carney *v.* John M. C. Smith.

The contest in this case was predicated on various irregularities in several precincts in the district.

In Climax Township of Kalamazoo County, a recount made by agreement between the parties reduced contestee's plurality in the district from 127 to 116. The recount having been made by mutual agreement the committee held:

> Your committee makes no question as to the right and duty to accept the revised figures as to the township of Climax. We do not believe that in the original canvass of the votes in that township there was any intentional fraud. The evidence shows that the election officials were unanimously of the opinion that when the original figures were received that they could not be correct; that more votes had been cast in that precinct than the total as shown by the returns. Besides, contestant and contestee agree that the correction should be made.

In ward 3, of the city of Charlotte, Eaton County, inspectors of the election repeatedly went into the booths when voters were preparing their ballots. Section 3642, Michigan Compiled Laws of 1897, paragraph 169 provides:

> When an elector shall make oath that he can not read English, or that because of physical disability he can not mark his ballot, or when such disability shall be made manifest to said inspectors his ballot shall be marked for him in the presence of the challenger of each political party having a challenger at such voting place, by an inspector designated by the board for that purpose, which marking shall be done in one of the booths.

Paragraph 170 of section 3643 further provides:

> It shall be unlawful for the board, or any of them, or any person in the polling room or any compartment therewith connected, to persuade or endeavor to persuade any person to vote for or against any particular candidate or party ticket.

It developed that the inspectors entered the booths without requiring the oath specified in the statutes.

The opinion of the Supreme Court in the case of Attorney General *v.* McQuade (94 Mich., 439) was cited to show this statute was mandatory, and on this ground

[1] Second session Sixty-third Congress, House report No. 202; Record, p. 2586.

it was urged that the entire poll of ward 3 of the city of Charlotte should be thrown out.

The committee, decided:

We must concede under the case cited, the law in this respect being mandatory, that the votes sought to be influenced by the election inspectors must be cast out. In the McQuade case the court cites with approval the following excerpt from Payne on Elections, section 499, and McCreary on Elections, sections 190 and 192:

"When fraud on the part of the officers of the election is established, the poll will not be rejected, unless it shall prove to be impossible to purge it of fraud. When the result at a poll, as shown by the returns, is false and fraudulent, and it is impossible to ascertain the actual vote from the other evidence in the case, the vote of such poll must be wholly rejected."

This rule is certainly founded in good sense and is sustained by the overwhelming weight of the authorities.

In the American and English Encyclopedia of Law, page 353, the rule is thus bid down:

"Fraud does not invalidate the legal votes cast, but by destroying the presumption of the correctness of the returns it makes it necessary that any person who claims any benefit from the votes shall prove them; and where no proof is offered and the frauds are of such a character that the correct vote can not be determined, the return of the precinct will be rejected."

The total vote cast in this precinct was 363. The record shows the mistake complained of did not apply to more than 8 votes. Should 355 voters be disfranchised, the integrity of whose ballots can not be and is not questioned? To segregate the tainted votes in this ward would be in harmony with the great weight of the authorities, and give full force and effect to the mandatory provisions of the Michigan laws relative to the marking of the ballots, but we do not believe that more than 8 votes should be deducted from the poll in this precinct. We believe such a conclusion is in exact accord with the intent and spirit in the decisions laid down in the case of the Attorney General *v.* Furgason (91 Mich., 438) and Attorney General *v.* May (99 Mich., 545).

If the records show that the soliciting of votes in this precinct was open and continued during the whole day, the opposite conclusion should be reached; but we have searched the record in vain to find that these two election inspectors solicited any of the voters except those who called for instructions. In neither of the three cases cited, and upon which the contestant relied, did the Supreme Court of Michigan hold that the entire poll should be vitiated

In Sunfield Township of Eaton County the board adjourned before completion of the count, leaving the ballots and books in the voting place. Subsequently on the same night they reassembled upon advice of the prosecuting attorney and continued the counting. It was not claimed or shown that there was any disturbance of the ballots or modification of figures during the adjournment, and the committee held:

I do not believe that any one would contend for a single moment that the poll of this precinct should be thrown out simply on account of this unwarranted adjournment. To disfranchise the 345 electors who voted in this township at that election upon this mere irregularity would certainly be a most dangerous precedent.

Upon the question of a recess taken by the officers, we cite Payne on Elections, section 463:

"A recess of an hour taken by the officers at noon for dinner without fraudulent or wrongful purpose or result will not warrant the rejection of the poll of the precinct."

It is decided even in Michigan, in the case of The People *v.* Avery (102 Mich., 572), that electors are not to be deprived of the result of their vote at an election by mere mistakes of their officers when it does not appear to have changed the result.

A further complaint was that in this township the board without authority of law appointed one Albert Sayer to deliver ballots to the voters. Section 3640 of the Michigan Compiled Laws of 1897 provides:

No ballot shall be distributed by any person other than one of the inspectors of the election, nor in any place within the railing of the voting room, to show electors how to vote, and no ballot which has not the initials of a member of the board of election, written by such member on the back thereof, shall be placed in the ballot box.

On the strength of this statute the contestant claimed that the entire vote of this precinct should be thrown out, and cited in support of that contention a decision of the Supreme Court of Michigan in the case of McCall *v.* Kirby (120 Mich., 592).

However, as nothing of a dishonest nature was claimed or shown to have been done by Sayer, the committee decided:

We do not believe that a committee of this House, looking for the truth to determine who in fact was elected by the voters, should, on account of this irregularity, disfranchise the electors of this township. No question is made but that the ballots cast in this precinct were cast by legal voters and in good faith. Nor is it claimed that the contestee received a single vote more than was intended to be cast for him, or that the contestant lost a single vote. We do not believe that the facts warrant the rejection of the entire poll of this township, nor does the law as practiced in almost every jurisdiction warrant such a result. McCreary on Elections, section 488, says:

"The power to reject an entire poll is certainly a dangerous power, and, though it belongs to whatever tribunal has jurisdiction to pass upon the merits of a contested-election case, it should be exercised only in an extreme case; that is to say, where it is impossible to ascertain with reasonable certainty the true vote."

Paine on Elections, section 497, says:

"Ignorance, inadvertence, mistake, or even intentional wrong on the part of the local officers should not be permitted to disfranchise a district."

Section 498 says:

"The rules prescribed by the law for conducting an election are designed chiefly to afford an opportunity for the free and fair exercise of the elective franchise, to prevent illegal votes, and to ascertain with certainty the result.

"The departure from the mode prescribed will not vitiate an election, if the irregularity does not deprive any legal voter of his vote, or admit an illegal vote, or cast uncertainty on the result and has not been occasioned by the agency of a party seeking to derive a benefit from them.

"Power to throw out the vote of an entire precinct should be exercised only under circumstances which demonstrate beyond a reasonable doubt that there has been such a disregard of law or such fraud that it is impossible to determine what votes were lawful or unlawful, or to arrive at any result whatever, or whether a great body of voters have been prevented from exercising their rights by violence or intimidation. (Case of Daley *v.* Petroff, 10 Philadelphia Rep., 389.)

"There is nothing which will justify the striking out of an entire division but an inability to decipher the returns or a showing that not a single legal vote was polled or that no election was legally held. (In Chadwick *v.* Melvin, Bright's Election cases, 489.)

"Nothing short of an impossibility of ascertaining for whom the majority of votes were given ought to vacate an election, especially if by such decision the people must, on account of their distant and dispersed situation, necessarily go unrepresented for a long period of time. (McCreary on Elections, 489.)

"If there has been a fair vote and an honest count, the election is not to be declared void because the force conducting it were not duly chosen or sworn or qualified."

In the second ward of the city of Charlotte, Eaton County, it was charged that one John C. Nichols, who was at the time a candidate for circuit court commissioner was asked to assist during the illness of one of the election inspectors, and deposited some ballots in the box.

Section 3612 of the Michigan Compiled Laws of 1897 provides that no person shall act as inspector who is a candidate for office at such election. The contestant

claimed that under the decision of the Supreme Court of Michigan, passing upon a similar case, the entire vote of this ward should be rejected.

The committee, however, say:

It is contended by the contestant that the Supreme Court of Michigan upon the points involved ought to be followed by Congress, and that it is against the settled doctrine of both Congress and the Federal judiciary to disregard the decisions of State tribunal in construing their own laws. The position can not be successfully maintained. Where a line of decisions have been made by the judiciary of a State and those decisions have become a rule of property, the Federal judiciary will follow them; but the rule is different as to all other cases. In the ease of the Township of Pine Grove *v.* Talcott (19 Wall., 666), the Supreme Court of the United States in passing upon the validity of a Michigan statute says:

"It is insisted that the invalidity of the statute has been determined by two judgments of the Supreme Court of Michigan and that we are bound to follow these adjudications.

"With all due respect to the eminent tribunal by which these judgments were pronounced, we must be permitted to say that they axe not satisfactory to our minds. The question before us belongs to the domain of general jurisprudence. In this class of cases this court is not bound by the judgment of the courts of States where the cases arise; it must hear and determine for itself. It must be conceded that in matters not local in their nature the Supreme Court of the United States has uniformly held that the decisions of the State courts were not binding upon it. (Swift *v.* Tyson, 16 Pet., 1–18.)"

A cogent reason why Congress should not be bound by decisions of State tribunals with regard to election laws, unless such decisions are founded upon sound principles and comport with reason and justice, is that every State election law is made a Federal law by the Constitution of the United States, where Congress has failed to enact laws on that subject. To say that Congress shall be bound absolutely by the adjudication of the State courts on the subject of the election of its own Members, is inimical to the soundest principles of national unity. If a State legislature should pass a law unreasonable and unjust in its terms, and the State courts should uphold such unreasonable and unjust law, should Congress be bound by such law or adjudication? To say that it should would be subversive of the constitutional provision that each House shall be the judge of the election, qualifications, and returns of its own Members.

The House in deciding upon a Federal election case acts in the capacity of a court, and it should not be bound by decisions of the State courts unless the reasons given by them are not only convincing but sound. There was cast in the second ward, city of Charlotte, county of Eaton, 300 votes for the office of Representative in Congress. By a fair preponderance of the evidence it is shown that John C. Nichols did not handle more than 7 ballots; no question was made as to the honesty and bona fides of the voters who cast the 300 ballots for Representative in Congress. So far as the evidence discloses, every ballot was cast by a qualified elector. To cast out this entire poll and disfranchise 300 electors, every one of whom intended to and did honestly vote for some one of the candidates for Congress, does not, in our opinion, comport with the precedents firmly established by this House. In the absence of any proof of misconduct or fraud on the part of the election inspectors, or on the part of John C. Nichols, to nullify the poll of this ward, would not be in keeping with the precedents of the House. We believe that the entire poll should be counted as cast and canvassed in accordance with the canvass made by the supervisors of elections. The very most that your committee believes that the contestant can claim is that the 7 ballots alone might be purged from the poll. To go beyond this, in our opinion, would be to do violence to the expressed will of the public.

92. The case of Carney v. Smith, continued.

Mistakes of election officials, neither operating to change the result nor accompanied by fraud, do not warrant rejection of the poll.

Error of election officer in removing initials properly affixed as required by law does not invalidate ballot.

Opening of the ballot box in violation of law and swearing in of unauthorized clerks held, in the absence of fraud, not to vitiate the vote.

Illegal votes should be deducted from the total vote in proportion to the entire vote returned for each candidate.

In Carmel Township, of Eaton County, it is alleged that as the voting proceeded the ballot became full and the election officers thereupon unlocked the box and poured the ballots out upon a table. They reclosed the box and continued to receive ballots and deposit them in the box. Also that two outsiders were called in and sworn as extra clerks. That these two clerks sorted the ballots which had been poured out on the table, placing the straight Democratic votes in one pile, the straight Republican votes in another pile, and the split votes in a third pile.

Section 3618 of the Michigan Compiled Laws of 1897 provides:

That the box shall not be opened during the election except as provided by law in case of adjournments.

In view of this provision the contestant contends, first, that the opening of the box before the closing of the polls vitiated the entire poll; second, that the tally by two persons not members of the board violated the secrecy and integrity of the ballot of the voter and therefore vitiated the entire poll.

The committee decide as to the first proposition:

As to the first proposition: It was very unfortunate that the election inspectors did not procure another box in which to deposit the ballots after the ballot box furnished them by the proper authorities had become filled, yet there is no law of Michigan providing for the use of a second ballot box. The contingency seems to have been wholly overlooked by the State legislature. Had they adopted this course and procured another box no doubt complaint would have been made that this would vitiate the entire poll, because there was no law permitting the use of a second ballot box. The judges of the election were confronted by a condition; they were compelled to adopt some means for the conduct of the election during the remainder of the afternoon, and while some other method might have been less objectionable as the one adopted, yet in the absence of any showing of fraud we do not believe that the whole poll should be cast out for the fact that the ballot box was opened and emptied of its contents before the time prescribed by law.

As to the second proposition:

As to the second proposition. The two clerks did not leave the voting place until after 5 o'clock; the ballots were separated, the straight tickets and split tickets being placed in separate piles. There was no evidence to show that any voter had access to any of the ballots. The only information that voters might receive in passing by the table would be the announcement of a name by an inspector. It is not shown that any voter saw either of the tally sheets kept by the clerks. While this was an irregularity that should not be encouraged, your committee does not believe that it destroys the secrecy or integrity of the ballot.

In Windsor Township of Eaton County, it was discovered that the ballots were not initialed by the election officials.

Section 3640 of the Michigan Compiled Laws of 1897 provides:

No ballot shall be distributed by any person other than one of the inspectors of election, nor in any place except within the railing of the voting room, to electors about to vote, and no ballot which has not the initials of a member of the board of election written by such member on the back thereof shall be placed in the ballot box.

On this point the report cites the opinion of the Supreme Court of the State of Michigan in the case of The People *v.* Avery (102 Mich. 572):

We have frequently held that the electors are not to be deprived of their votes by mere mistakes of their election officers when such mistakes do not indicate that the result has been changed thereby, and many things may occur that can be treated as irregularities.

The report continues:

It must be borne in mind that the acts complained of was the mistake on the part of the supervisor in initializing the ballots and no act on the part of the electors.

In Loranger *v.* Navarre (102 Mich., 259) we find this language:

"The voter finding the ticket upon the official ballot is not required to determine its regularity at his peril. This might involve a necessary knowledge of facts difficult to ascertain. He may safely rely upon the action of the officers of the law, whom he has a right to suppose have done their duty."

In The People *v.* Avery (102 Mich., 572) this principle is laid down:

"The electors are not to be deprived of the result of their votes at an election by the mistake of election officers when it does not appear to have changed the result."

The committee, therefore, deduce that acts done by the elector are mandatory, while those by the inspector are directory, and quote supporting citations from McCreary on Elections, from Paine on Elections, and the decision of the Michigan court in the case of People *v.* Rinehaxt, and conclude:

The committee having under consideration the questions involved make these observations: The voter is not to be deprived of his right and the citizens are not to lose the result of an election fairly held because of some important omission of form or of the neglect or carelessness or ignorance on the part of some election officers or the failure to carry out some important direction of the law.

In the case of Cox *v.* Straight, volume 2 Hinds' Precedents, 142, the House unanimously held that irregularities unaccompanied by fraud did not vitiate the returns. Now, let us apply these salutary rules to the case in hand. The proper inspector initialed the ballots above instead of below the perforated line. The ballot was given to the voter, who marked the same, returned it to the proper inspector, who, on receiving the ballot, would determine that the ballot was initialed by the proper inspector. By this procedure no spurious ballot could have been placed in the ballot box and no fraud could have occurred. The record does not disclose that either the electors or the inspectors knew any mistake had been made in the initialing of the ballots. The ballots were voted and counted without their validity being questioned. There is nothing to indicate that the inspector who marked them, or the elector who voted them, discovered they were not properly marked or that there was any wrong intended by anyone in connection with the transaction, nor could it be told for whom any individual elector voted. Under such a state of facts, should the electors voting these tickets be disfranchised? How could such a transaction destroy the integrity or secrecy of the ballot? Your committee feels impelled to follow the reasoning of a long line of decisions of the Supreme Court of Michigan, and the conclusion reached in the Homing ease, than to adopt the more recent rule enunciated in the Rinehart case, and in so doing hold that there was nothing shown by the contestant to vitiate the poll in this township.

In the second precinct, second ward of Battle Creek, Calhoun County, the election officials in making up the statement sheets showing the results of the election omitted to credit the candidates with the number of straight votes each candidate had received, and gave the candidates from governor down credit only for the number of votes each had received upon the split tickets. The result showed that contestant had received 23 votes and the contestee 31 votes. The error being discovered, the board of county canvassers caused the ballot box to be brought before them on November 13, aud corrected the returns, adding to the 31 votes already

recorded for Smith 66 straight votes, making a total of 97; and to the 23 already recorded for Carney, 38 votes, making a total of 61.

The contestant complains that the action of the county board of canvassers and supervisors of the election, in changing the final returns, was in violation of the provisions of the law; that the board of county canvassers were obliged to canvass the vote according to the returns made by the inspectors on the night of the election; and that the board of election inspectors had no authority to reconvene and correct the returns. By the express terms of section 3665, Michigan Compiled Laws, 1897, the board of county canvassers are given, if they find a mistake has been made, power to correct the returns. The committee accordingly find:

It might well be said that the mistake that was made in this ward, being apparent from the face of the papers, from the fact that the presidential electors had received a vote largely in excess of the candidates from the governor down, was merely clerical, and that the board, from the evidence before them, had a perfect right to correct the returns, but in order to reach a proper conclusion it is not necessary for us to so hold.

The decision in the case of Roemer *v.* Canvassers (90 Mich., 27) was made on the 22d day of January, 1892. Subsequently the legislature of the State enacted paragraph 239 of the Compiled Laws of Michigan, 1897, expressly granting to the board of county canvassers the right to call before them the proper witnesses and correct any mistake that was manifest upon the face of the returns.

The statute above quoted gives to the board of county canvassers and the board of election inspectors absolute authority and power to do precisely what they did in this case. It was not shown, and in fact not even claimed, that John M. C. Smith was not credited with every vote that he received in this ward or that the contestant, Claude S. Carney, was not credited with every vote that he received. To vitiate this entire poll on account of the things complained of by the contestant, when such acts were expressly authorized by the statutes of Michigan, and, in the face of the fact that no fraud actually or constructively existed, would be repugnant to our ideas of right and justice.

In conclusion the committee summarizes:

It is well settled by the precedents of the House that illegal votes in any poll should be taken from the total vote of the poll proportionately according to the entire vote returned for each candidate. The record does not disclose the votes that were cast for each of the congressional candidates in the precincts where we have found illegal votes, and for that reason and the further reason that it does not affect the result, we have apportioned these illegal votes between the contestant and the contestee in proportion to the votes that each received in the several precincts.

Deducting Mr. Smith's loss from Mr. Carney's loss makes a gain of 7 votes for Mr. Smith, which added to Smith's plurality, conceded to be 116 votes upon the face of the returns after making the correction for the township of Climax, county of Kalamazoo, would give Mr. Smith a majority of 123 votes.

Your committee, therefore, offers for adoption the following resolutions:

"Resolved, That Claude S. Carney was not elected as a Representative to the Sixty-third Congress from the third congressional district of Michigan; and

"Resolved, That John M. C. Smith was duly elected as a Representative from the third congressional district of Michigan to the Sixty-third Congress, and is entitled to retain the seat which he now occupies in this House."

On February 6, 1914,[1] the resolutions recommended by the committee were unanimously agreed to without debate or division.

[1] Journal, p. 195, Record, p. 3050; Moores' Digest, p. 73.

93. The Michigan election case of MacDonald v. Young in the Sixty-third Congress.

Irregularity of nomination does not prejudice claimant's case in the House. It is sufficient if the candidate's name was duly certified as required by law and printed on the ballot at the November election.

Irregularity in the manner of nomination should be tested in the courts and under the laws of the State and is not considered by the House.

The House is not bound to take cognizance of the manner of nomination, unless fraudulent methods appear to have thwarted the will of the electorate.

On August 22, 1913,[1] Mr. James D. Post, of Ohio, from the Committee on Elections No. 1, submitted the report in the Michigan case of William. J. MacDonald *v.* H. Olin Young.

The report embodies a sufficient statement of the facts in the case:

> The case arises out of the election held on the 5th day of November, 1912, for the election of presidential electors and public officers, including a Representative to Congress from the twelfth district of the State of Michigan.
>
> This district is composed of counties and occupies what is generally known as the Upper Peninsula of the State.
>
> At the election there were four candidates, the contestant, William J. MacDonald, being the candidate upon the National Progressive ticket, and the contestee, Hon. H. Olin Young, was the candidate of the Republican Party for the office of Representative in Congress. In 14 of the counties Mr. MacDonald received 17,975 votes. In one of the counties, Ontonagon, his name appeared upon the ballot as Sheldon William J. MacDonald, and under such designation, he received 458 votes, making a total in the 15 counties of 18,433. Mr. Young received 18,190. The State board of canvassers, composed of the secretary of state, treasurer of state, and commissioner of the land office, canvassed the returns of the district, allowing the contestant 17,975 in the 14 counties and canvassed the vote for Ontonagon County under the name of Sheldon William J. McDonald, thus giving to the contestee upon the face of the returns a plurality of 215 votes, and on the 10th day of December, 1912, issued to him his certificate of election. When the Congress convened in extraordinary session at the beginning of the Sixty-third Congress Mr. Young appeared at the bar of the House, took the oath of office, and served as a Member until the 10th day of May, 1913, when he resigned his seat.
>
> It was generally understood in the district that the contestant had been elected until the 10th day of December, when the State board of canvassers issued the certificate of election to Mr. Young.

When Congress convened in extraordinary session at the beginning of the Sixty-third Congress, Mr. William H. Hinebaugh, of Illinois, objected to the swearing in of Mr. Young and offered a resolution[2] providing for the appointment by the Speaker of a select committee to investigate and report upon his right to a seat in the House. A substitute offered by Mr. John J. Fitzgerald, of New York, directing the administration of the oath forthwith was agreed to and Mr. Young was sworn in.

On May 10, 1913,[3] on motion of Mr. James R. Mann, of Illinois, by unanimous consent, Mr. Young was granted an hour in which to discuss the case, and at the

[1] First session Sixty-third Congress; House Report No. 60; Record, p. 2640.

[2] Journal, p. 249; Record, p. 65.

[3] Record, p. 1479.

conclusion of his speech announced that he had forwarded to the governor his resignation [1] as a Member of the House.

The contestee both in his answer and in debate in the House admitted the facts as set forth in the contestant's notice of contest, but charged irregularity in the nomination of the contestant through noncompliance with the primary laws of the State of Michigan, and submitted that votes cast for Sheldon William J. MacDonald could not be canvassed or counted for the contestant, as no evidence was admissible under the election laws of the State of Michigan to determine the intention of the voter.

Following the contestee's resignation the committee took evidence and heard arguments.

On the question of irregularity of nomination the committee found:

Whether the nomination of Rogers was regular and in conformity with the primary act, or whether the congressional committee was regularly formed, we do not deem fatal to contestant's claim to a seat. It is sufficient to say that the contestant's name was duly certified as required by the general laws of the State of Michigan to the election boards of the several counties, and by them printed upon the official ballot for the use of the voters at the November election. This certification took place as early as the 11th day of October, and the certificate was made a matter of public record in each county in the district. No objections were made in any county in the district by Mr. Young, any elector of the district, any officer of any political party, or by any of the election officials to the manner in which Mr. Rogers, or Mr. MacDonald had been nominated, until four days prior to the 5th day of November, the date of the general election. The contestee, who was more vitally interested than any other person, by telegram to all of the boards of election commissioners in the district requested that Mr. MacDonald's name remain upon the ballots as they were printed and in his circular invoked the rule of the people. His desires in this regard were respected by the election officials in every voting precinct in the district, with the exception as shown by evidence, in one voting precinct the election officers pasted blank paper over the name of the contestant, thus depriving him of the Progressive votes in that precinct.

The primary act provides that any candidate, feeling aggrieved on account of fraud or error by the board of primary election inspectors, or in the count of the votes cast, or returns made by the board, may file a petition to correct any error or fraud complained of, and that the board of election inspectors may correct any fraud practiced, or irregularity in the election. This is a remedial statute and if the manner of the nomination of Joseph M. Rogers was irregular or fraudulent, its provisions should have been invoked at the proper time. In addition to this your committee finds that the courts of the State of Michigan had the inherent right and power if the name of William J. MacDonald was not entitled to be printed upon the ballots for the use of the voters at the general election, to have corrected such irregularity, and that recourse should have been had to the courts if complaint was to be made prior to the existence of the right of suffrage by the electors of the district.

The committee further found:

It is not claimed that the nomination of Rogers, his resignation, and the filling of the vacancy with the name of the contestant, or with the formation of the congressional committee who selected the contestant to fill the vacancy caused by Rogers, were fraudulent. It is only contended that it was irregular and not in strict conformity to the primary act of the State of Michigan. By a long line of unquestioned precedents established by the House it is not bound to take cognizance of the manner in which a candidate for Congress is nominated, unless the methods employed are unfair or fraudulent and have resulted in thwarting the will of the electorate. Objections made by the contestee to the manner and form of the nomination of the contestant am highly technical,

[1] Journal, p. 150; Record, p. 1569.

and if enforced by the House would result in the disfranchisement of not only the 458 votes cast in Ontonagon County, but of the 17,975 votes cast in the remainder of the district.

We believe that if the contestee or any elector in the district were dissatisfied with the manner in which contestant's name appeared upon the official ballot such dissatisfaction should have been exemplified prior to the general November election; that it would be exceedingly unfair and inequitable to wait until after the voters had made their choice between the candidates, and if not then satisfactory, to urge objections. But we believe the nomination of Rogers and the formation of the congressional committee were regular and legal under the provisions of the primary act

94. The case of MacDonald v. Young, continued.

Enrollment as a member of one party does not preclude election by another.

In determining an election case the House is not limited to the powers of a court of law but possesses all the functions of a court of equity.

The House may go behind the ballot to ascertain the intention of the voter, State statutes to the contrary notwithstanding.

Where clearly demonstrated that voters were misled by typographical errors in the ballot, the intention of the voter was taken into consideration by the House.

While not obliged to consider any issue not specifically raised in the pleadings, the House may do so if the integrity of the election appears thereby to be conserved.

The House has the undoubted right to refuse to seat a person violating the corrupt practices act or practicing methods in any other way violative of law.

Violations of laws merely directory, as failure to comply with technical requirements within time specified, while subject to extreme penalties, may be disregarded by the House under extenuating circumstances.

Failure to file with the Clerk of the House before and after election affidavits required by law held not to justify vacating seat.

Sitting Member having resigned, the House did not regard it necessary formally to pass upon the question of his election.

Application of the corrupt practices act.

As to election by one party while enrolled with another:

The contention that votes cast for the contestant because at the time of the primary election and at the time of the general election he was enrolled as a Republican can not be counted for him is wholly untenable. No evidence whatever was introduced even tending to show that the persons who voted for him were not qualified electors of the district. So far as the evidence discloses the election was fair and honest, and the votes cast were by honest electors, and the election was regularly and legally conducted. The claim that he was disqualified from receiving votes upon the National Progressive ticket when he was enrolled as a Republican imposes a qualification upon a Member of Congress not sanctioned by the Constitution of the United States or by the constitution of the State of Michigan.

Section 5, Article I, of the Federal Constitution provides that the House shall be the judge of the election returns and qualifications of its own Members.

Section 2, Article I, provides that the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature; and that a Member of Congress shall be 25 years of age, 7 years a citizen of the United States, and an inhabitant of the State in which he shall be chosen. The constitution of Michigan, article 6, section 1, provides

that in all elections every male inhabitant of the State a citizen of the United States, 21 years of age, a resident of the State for 6 months, the township or ward for 20 days, shall be an elector and entitled to vote.

Section 5, article 5, of the constitution of the State of Michigan provides that the qualifications of a representative to the State legislature are that he shall be a citizen of the United States and a qualified elector of the district he represents.

As the contestant at the time of the general November election, 1912, possessed all the qualifications required by the Constitution of the United States and the constitution of the State of Michigan, to superadd a new qualification would be to deny to the House the right to be the judge of the qualifications, election and returns of its Members.

The provisions in the primary act to the effect that votes cast for a person not enrolled as a member of the party casting such votes are applicable only to the primary election held in accordance with the terms of its provisions, and if its provisions relate to the general November election it superadds a qualification to those embraced in the Constitution of the United States. Mr. Justice Story, in his Commentaries, volume 2, page 101, lays down the doctrine "that the States can exercise no powers whatsoever which exclusively spring out of the existence of the National Government which the Constitution does not delegate to them.

"They have just as much right, and no more, to prescribe new qualifications for a Representative as they have for a President. Each is an officer of the Union, deriving his powers and qualifications from the Constitution, and neither created by, dependent upon, nor controllable by States."

If the ballots cast for him at the election were void, it could only be so upon the theory that by the statutory and adjudged law of the State he was ineligible to receive votes cast by Progressive electors and ineligible to be a candidate for the office, because enrolled as a Republican. In other words, it was contended such enrollment disqualified him from receiving votes on Progressive ballots, and for that reason 18,443 votes of the district should be disfranchised. Such a contention is unsound. If the laws of the State of Michigan lead to such results, then it is absolutely certain that they superadd a qualification to a Member of Congress not contemplated by the Federal or State Constitutions.

In this connection the committee define the constitutional powers of the House in the adjudication of election cases:

"It being conceded that the votes cast for the contestant were cast by honest voters and qualified electors of the district, and such votes were intended to be cast for the contestant, then the case should not be decided upon any technicalities arising in the manner or form in which he was nominated. The House should not confine itself to such narrow limits. It possesses the power of a court, having full jurisdiction to try the question, Who was elected? and is not limited to the powers of a court of law, but clearly possesses all the functions of a court of equity, which, in a forum governed by broad equitable rules, would justify a verdict in my favor." The committee unanimously concur with contestee in these views.

The powers of the House in this respect when in conflict with State laws:

(4) The 458 votes cast for the contestant in Ontonagon County should be counted for him. The evidence is uncontradicted that the word "Sheldon" was placed before his name in that county through a mistake pure and simple. The recipient of the telegram from the secretary of the National Progressive committee to the clerk of the board of election commissioners misinterpreted the telegraphic characters for the word "spelled" to mean the word "Sheldon," and in transcribing the name made it Sheldon William J. McDonald. This fact is conceded by all. Is the House powerless to correct this mistake? Notwithstanding the fact that it is the settled law of the State of Michigan that the intention of the voter can be determined only from the face of the ballot, the House can go behind the ballot to ascertain the intention of the voter; it may consider the circumstances surrounding the election; it can determine who were the candidates; whether there were other persons of the same name residing in the district who were candidates; whether the ballot was printed perfectly or imperfectly; and if imperfectly, how it came to be so printed.

Knowing how the word "Sheldon" became prefixed upon the printed ballot before the name of the contestant, and it being conceded that 458 of such ballots were intended for him, it would be eminently unjust or unfair not to grant him the benefit of such votes.

The contestee did not raise the issue of the contestant's failure to comply with the statutory requirements in the filing of statements of campaign contributions and expenses, but the subject was strongly stressed by others in debate in the House and during the hearings before the committee.

Accordingly the committee in their report unanimously agree:

Evidence was taken showing that the contestant failed to file with the Clerk of the House, as provided by law, prior to the general election held on November 5, 1912, an affidavit setting forth the source or sources of moneys contributed to his campaign fund, and also failed to file, as provided by law, an affidavit touching election contributions and expenses within 30 days following the general election.

No issue was made in the pleadings upon this subject, and the precedents are numerous to the effect that no issue having been raised upon it the committee is not bound to give the subject consideration. However, your committee feel that in the investigation of a contested-election case where facts are disclosed that might have a bearing upon the right of a Member to his seat, whether these facts be advanced by any of the parties to the controversy or not, it is proper for the committee to investigate the same and to come to some conclusion thereon. Moreover, it is important that the House take full notice of the compliance with the law looking to the purification of elections. In view of this, your committee has given full consideration to the question raised.

The correctness of these statements touching the facts has not been questioned. Your committee finds, however, that on the 21st day of April, 1913, contestant filed an affidavit with the Clerk of the House showing that he had incurred no election expenses required by law to be reported subsequent to the filing of his statement before the election on October 26, 1912. Contestant also filed an affidavit with the Clerk of the House on April 24, 1913, setting forth that during the month of October, 1912, he received a contribution to his campaign fund in the amount of $300 through George P. Shiras on behalf of the National Progressive Party.

The House has repeatedly affirmed its right to consider the eligibility of a person presenting himself as a Member elect to the House of Representatives from the standpoint of the manner in which his campaign for election has been conducted under the corrupt practices acts, and the House has the undoubted right to refuse to seat a person presenting himself for membership for violation of the law.

In this case, however, it does not appear that the failure of contestant to comply with the law was willful or on account of ulterior purposes. The money contributed was not an unreasonable amount and was from a source that was legitimate, and the failure of contestant to file an affidavit within 30 days following the election, as is provided by law, when, as a matter of fact, no expenses had been incurred subsequent to the affidavit filed on October 26, 1912, can not have been to avoid the disclosure that such an affidavit might reveal. The delinquency of contestant lies solely in his failure to comply with the law within the time required.

In view of this the committee feels that while the Congress must retain the principle of reserving to itself the right to seat, or refuse to seat, a person presenting himself as a Member elect, on account of his conduct in attaining his election, in this instance the failure to comply with the law, as has been disclosed, carries with it nothing of opprobium, and your committee can not recommend that contestant be denied his seat on account of his failure to comply with the technical provisions of the law.

In conclusion the committee recommend:

We can not fail to recognize the frank and honorable manner in which Hon. H. Olin Young has conducted himself with relation to the pending contest, nor fail to approve his candor in reaching a conclusion touching the question of his own election which prompted him to tender his resignation to the House of Representatives on May 10, 1913. In view of this waiver of any rights that contestee may have had in the contest, the committee does not regard it necessary to present

for the consideration of the House a separate resolution bearing upon the question of the election of Mr. Young.

The committee, therefore, offers for adoption the following resolution:

"Resolved, That William J. MacDonald was duly elected a Representative from the twelfth congressional district of Michigan to the Sixty-third Congress and is entitled to a seat therein."

The report was debated at length on August 26, 1913,[1] when the House unanimously agreed to the resolution.

Thereupon Mr. MacDonald appeared and took the oath.

95. The North Carolina election case of Britt v. Weaver in the Sixty-fifth Congress.

Discussion of the distinction between directory and mandatory election laws.

Instance wherein the House overruled the report of the majority of the elections committee.

Committee resolutions based on the counting of ballots failing to comply with statutory requirements were rejected by the House.

On February 21, 1919,[2] Mr. Walter A. Watson, of Virginia, from the Committee on Elections No. 3, submitted the report of the majority of the committee in the North Carolina case of James J. Britt *v.* Zebulon Weaver.

The majority and minority reports in this case differ sharply as to what is the real question at issue.

The majority report that the official returns in the case were:

Weaver	18,023
Britt	18,014
Majority	9

The contestant claims that if properly ascertained they would have been:

Britt	18,008
Weaver	17,995
Majority	13

and that the difference is occasioned by the counting or the failure to count certain ballots not marked in accordance with directions of the State law. The disposition of these ballots, the majority contend is the one decisive issue in the case.

The minority do not agree with this statement of the issue. According to the minority views submitted by Mr. Cassius C. Dowell, of Iowa, the county boards met in each of the 13 counties of the district November 9, 1916, and the vote was on that date counted and certified in each county, with the single exception of Buncombe County. The returns as certified in the 12 counties other than Buncombe gave the contestant 13,971 votes and the contestee 13,670. In Buncombe County, according to the minority views, the original returns gave the contestant 4,037 votes and the contestee 4,325, aggregating a total return for the district of 18,008 votes for the contestant and 17,995 votes for the contestee, a majority of 13 voters in favor of the contestant.

[1] Journal p. 253; Record, p. 3780; Moores' Digest, p. 63.

[2] Third session Sixty-fifth Congress, House Report No. 1115, Record, p. 3936.

The minority claim, however, that when the canvassing board of Buncombe County met on November 9, instead of completing its work as in the other counties of the district, it adjourned from time to time until November 17, when amended and supplemental returns were brought in from five precincts in Buncombe County, which were secured by adding to the official returns from the five precincts certain ballots not marked in accordance with the directions of the State law. These unmarked ballots, the minority allege, were originally rejected but later counted for the purpose of overcoming the 13 majority which had been received by the contestant in the district. The question at issue, then, as propounded by the minority is whether or not the evidence in the case is sufficient to overcome the original returns.

The State law of North Carolina referred to by both majority and minority follows:

> That opposite the name of each candidate on the general ticket to be voted at the general election shall be a small square, and a vote for any candidate shall be indicated by making a cross mark thus (X) in such square, and no voter shall vote for more than one candidate for any office; but there shall also be a large circle opposite the names of each party's candidates on each ticket and printed instructions on said ticket that a vote in such large circle will be a vote for each and all of the candidates for the various offices of the political party the names of whose candidates are opposite said large circle; and if a voter at the general election indicates by a cross mark in such large circle his purpose to vote the straight or entire ticket of any particular party, his vote shall be counted for all the candidates of such party for the offices for which they are candidates, respectively, as indicated on such ticket.

The congressional ballots distributed under the law and used at the election were in the following form:

For the Democratic Party:

> DEMOCRATIC CONGRESSIONAL BALLOT.
> (To vote this ticket make a cross mark (X) in the square.)
> For Representative in 65th Congress,
> Tenth District,
> ☐ ZEBULON WEAVER.

For the Republican Party:

> REPUBLICAN CONGRESSIONAL BALLOT.
> (To vote this ticket make a cross (X) in the square.)
> For Representative in 65th Congress,
> Tenth District.
> ☐ JAMES J. BRITT.

The evidence tends to show that some 90 electors cast their ballots in the election without marking a cross in the square opposite the candidate's name as provided by the statute. The decision of the case lies in the acceptance or rejection of these ballots. A majority of them apparently were cast for the sitting Member, and if they are counted his majority is conclusive; if rejected, the majority is transferred to the contestant. The acceptance or rejection of the ballots turns upon the construction of the section of the statute quoted. If mandatory, the failure of the voter to place a mark in the square would invalidate the ballot; if merely directory, his failure to follow the statute would not deprive him of his vote.

The majority thus discuss the distinction between mandatory and directory election laws:

It is hard to lay down any precise rule of construction so as to determine in every case what provisions of a statute are mandatory and which directory; but it is easy to gather from the legal text writers and from court decision what the general principle is applicable to the case in hand.

Judge Cooley's rule:

"Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly, and prompt conduct of the business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it may still be sufficient, if that which is done accomplishes the substantial purpose of the statute. (Constitutional limitations, p. 113, and the following cases from State courts; Odiorne *v.* Rand, 59 N. H., 504; Pond *v.* Negus, 3 Mass. 230; Holland *v.* Osgood, 8 Vt., 275; Colt *v.* Eves, 12 Conn., 243; People *v.* Hartwell, 12 Mich., 508; Edmonds *v.* James, 13 Tax., 52; People *v.* Tompkins, 64 N. Y., 53; State *v.* Balti. Comrs., 29 Md., 516; Fry *v.* Booth, 19 Ohio, 25; Slayton *v.* Halings, 7 Ind., 144.)"

And relative to the construction of election laws in particular, the same author says:

"Every ballot should be complete in itself and ought not to require extrinsic evidence to enable the election officers to determine the voter's intention. Perfect certainty, however, is not required in these cases. It is sufficient if an examination leaves no reasonable doubt upon the intention, and technical accuracy is not required in any case. The cardinal rule is to give effect to the intention of the voter, wherever it is not left in uncertainty, etc. * * * A great constitutional privilege—the highest under the Government—is not to be taken away on a mere technicality, but the most liberal intendment should be made in support of the elector's action wherever the application of the common-sense rules which are applied in other cases will enable us to understand and render it effective. (Idem, pp. 914 and 920.)"

McCrary, some time a representative from Iowa and a leading authority on election cases, laid down this rule:

"The language of the statute construed must be consulted and followed. If the statute expressly declares any part of an act to be essential to the validity of the election, or that its omission shall render an election void, all courts whose duty it is to enforce such statutes must so hold, whether the particular act in question goes to the merits, or affects the result of the election, or not. Such a statute is imperative, and all considerations touching its policy or impolicy must be addressed to the legislature. But if, as in most cases, the state simply provides that certain acts or things shall be done, within a particular time or in a particular manner, and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they do, and directory if they do not, affect the actual merits of the election. * * * The principle is that irregularities which do not tend to affect the results, are not to defeat the will of the majority; the will of the majority is to be respected even when irregularly expressed. (McCrary on Elections, pp. 93 and 94; and see to the same effect, Tucker *v.* Com. Penn. St. R. 493.)"

"Where the intention of the voter is clear the ballot will not be rejected for faulty marking by the voter, unless a law undoubtedly mandatory so prescribes," was the rule formulated by Mr. McCall, of Massachusetts, in a very able report from the Elections Committee and adopted by the House of Representatives in the case of Yost *v.* Tucker in the Fifty-fourth Congress.

"Where the intention of the voter was not in doubt the House in the case of Moss *v.* Rhea followed the rule of the Kentucky court and declined to reject a ballot because not marked strictly within the square required by the State ballot law."

In many cases the House has counted ballots rejected by the election officers under an erroneous construction of the law, and reference may be made particularly to the case of Sessinghaus *v.* Frost in the Forty-seventh Congress where this course was pursued.

The Supreme Court of North Carolina in construing the very statute under review said:

"If the matter was properly before us and we had jurisdiction to decide it, we would hold as to the congressional ticket, which has only one name on it, that all unmarked ballots ought to be

counted for the respective candidates, because the purpose of the election is to ascertain the will of the voter, and the marking of the ballot can only serve a useful purpose in ascertaining this will when there are more names than one upon the ballot. (See Britt *v.* Board of Canvassers, 172 N. C., p. 797.)"

Applying this construction the majority claim:

Applying the foregoing principles then to the question at issue, we have these facts before us:

The statute nowhere else declares it to be mandatory to mark the ballot in the square, nor pronounces the ballot invalid if not so marked; the marking could serve no purpose in indicating the will of the elector where only one name appeared, as his intention was manifest upon the face of the ballot itself; and lastly the marking of the ballot under such circumstances could not, by any stretch of the imagination, be deemed of the essence of the election or to affect its validity in any way.

For these reasons, therefore, we have no hesitancy in holding that section 32 of the North Carolina primary law of 1915 was not mandatory; but that its provisions were directory only, and that the failure of the voter to comply therewith did not invalidate his ballot. All the unmarked ballots properly cast at the election should have been counted, and it was a mistake of law for the election officers to have excluded them from their official returns.

The minority oppose this view and contend:

The language of the above provision of the North Carolina statute is clear, concise, and unequivocal. It is subject to one interpretation, to wit, that a ballot must be marked. It is similar to the provisions of the election laws of nearly every State in the Union, and its purpose is to guard against the very thing which happened in this case, that while the ballot is made plain and easy in order that everyone, regardless of his education, may have an equal opportunity to understand it and vote according to his desires, yet it requires some affirmative act on the part of the voter to express his intention. This act was to place a cross mark in the square in front of the name of the candidate the voter desires to vote for.

The minority of your committee believe that the law of North Carolina, providing for the manner of voting and the manner of marking the ballot is mandatory, and that the ballot should have been marked as provided by this statute, in order to become a legal ballot. This is the general rule laid down by the courts in construing similar statutes. And it is our opinion that the unmarked ballots should not be counted.

We call attention to a few of the cases bearing upon this question.

"Where the law provides that the voter shall indicate the candidates for whom he desires to vote by stamping the square immediately preceding their names or in case he desires to vote for all the candidates of the party, etc.: Held, that this provision is mandatory; the stamping of the square being the only method prescribed by which the voter can indicate his choice. Parvin *v.* Wirnberg (Ind.), 30 N. E. 790.)"

From the opinion of the court in this case, on page 791, we quote:

"The doctrine that it is within the power of the legislature to prescribe the manner of holding general elections, and to prescribe the mode in which the electors shall express their choice, is too familiar to call for the citation of authority. In this instance it has declared that the mode by which the elector shall express his choice shall be by stamping certain designated squares on the ballot. There is nothing unreasonable in the requirement, and it is simple and easily understood. Furthermore, if he is illiterate or is in doubt, the law makes ample provision for his aid. If he does not choose to indicate his choice in the manner prescribed by law, he can not complain if his ballot is not counted. (Kirk *v.* Rhoads, 46 Cal. 399.) If we hold this statute to be directory only and not mandatory, we are left entirely without any fixed rule by which the officers of election are to be guided in counting the ballots."

Under a statute similar to the North Carolina statute, it was held that a ballot on which the names of candidates were written in, but no cross mark made after any of the names, can not be counted for any candidate. (Riley *v.* Traynor (Col.), 140 Pac. 469.)

After quoting the statute, the court, on page 470 says:

There can be no mistaking this language. It requires that in order to designate his choice, the voter must use a cross mark, as the law requires. In this case, no cross mark was used anywhere with reference to any of the candidates for the particular office in question, and the ballots ought not to have been counted."

Under a similar statute requiring the voter to make a cross designating his choice of candidates, it has been held that a failure to comply with this requirement invalidates the ballot. (Vallier *v.* Brakke (S. Dak.), 64 N. W. 180, at 184.)

"The law has prescribed the manner in which an elector may arrange his ticket, and what act he may do to designate the candidates for whom he desires to vote. His act must correspond with his intention, and unless it does the vote can not be counted. The system devised is so simple that a man of sufficient intelligence to know what a circle is, how to make a cross, and left from right, can find no difficulty in making up the ticket he desires to vote. He can have no difficulty in expressing his intention in the manner the law has prescribed. It is not necessary, therefore, to impose upon judges of election or courts the duty of ascertaining the intention of the voter, except in the manner pointed out by the statute, namely, by the marks he has placed upon the ballot in the manner prescribed by law."

Following this construction of the law, there can be no other conclusion but that Contestant Britt was elected and is entitled to his seat.

The minority reported resolutions declaring Mr. Weaver not entitled to the seat, and seating contestant, while the majority reported resolutions declaring the contestant not elected and confirming the title of the sitting Member.

The case was fully debated in the House on March 1.[1]

At the conclusion of the debate Mr. Dowell offered as a substitute for the resolution reported by the majority the resolutions recommended in the minority views. The substitute was agreed to, yeas 182, nays 177, but the usual motion to reconsider offered by Mr. Dowell was carried by a vote of 180 yeas to 177 nays. The question recurring on the substitute it was the second time agreed to, yeas 185, nays 183. The original resolutions as amended by the substitute were then agreed to, yeas 185, nays 182.

Thereupon Mr. Britt appeared and took the oath.

96. The Massachusetts election case of Tague v. Fitzgerald in the Sixty-sixth Congress.

The affixing of a sticker bearing a candidate's name was held to sufficiently indicate the intent of the voter and the House declined to reject ballots so prepared because not marked with a cross thereafter as required by the State ballot law.

Discussion as to domicile of voters.

The House declined to count the vote of precincts wherein by fraudulent registration many disqualified persons had been put on the voting lists.

The returned Member being unseated by the rejection of fraudulent ballots, the House seated the contestant.

On October 13, 1919,[2] Mr. Louis B. Goodall, of Maine, from the Committee on Elections No. 2, submitted the report of the majority of the committee in the Massachusetts case of Peter F. Tague *v.* John F. Fitzgerald.

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[1] Journal, p. 272; Record, p. 4777.

[2] First session Sixty-sixth Congress; House Report No. 375; Record, p. 6828.

The facts in the case are sufficiently embodied in the following excerpt from the majority report:

Contestant and contestee were candidates for the Democratic nomination for Member of Congress in the primaries in the September preceding the election. Contestee, on the face of the returns, was declared to have received the nomination, whereupon contestant instituted proceedings to have this result reversed, first before the board of election commissioners of the city of Boston and subsequently before the ballot-law commission of the State of Massachusetts. The validity of contestee's nomination was eventually upheld, but the decision was rendered a few days before election day, too late for contestant to file an independent petition whereby his name could be printed upon the ballots to be used in the general election. The method of voting in Massachusetts is by the voter making a cross after the name of the candidate of his choice where it appears on the ballot. Where the name of the voter's choice is not printed on the ballot, he is permitted to write the name thereon or affix thereto a sticker bearing the name of his choice and then marking a cross after the name thus written or affixed. All votes cast for contestant in the election necessarily were of this character. On the face of the returns contestee was declared elected by a plurality of 238 votes in a total number of 15,293 votes cast for Member of Congress in the entire congressional district.

An incidental question related to the validity of ballots to which stickers had been affixed, but which the voters had failed to mark with a cross, as required by the common law and the statutes of the State of Massachusetts. All members of the committee agreed that the intent of the voter was sufficiently indicated in the application of the sticker, notwithstanding the act of voting had not been completed by the making of a cross thereafter, and all ballots so prepared were counted for the candidate whose name appeared on the sticker.

Various charges of fraud and irregularities were made by the contestant which the committee did not consider necessary to discuss, but the principal question at issue concerned the allegation of colonization and illegal registration in the fourth, eighth, and ninth precincts of the fifth ward of the city of Boston.

The laws of the State of Massachusetts did not provide for an annual personal registration of voters. Names appearing on the registry list were carried subject to the check of a canvass made by police officers on the 1st day of April of each year. Information not under oath furnished the police on this occasion by a member of a household or by an employee of a hotel or lodging house was sufficient to retain a name on the registry list.

From the evidence it appeared that lists were sometimes supplied to the police by clerks of such hotels or lodging houses bearing names of persons as being domiciled there, who, in fact, were not such residents and of whom, subsequently, no trace could be found. After an investigation the majority of the committee reported that fully one-third of the total number of votes cast in the three precincts at this election were fraudulent.

The majority cite the rule established by the House in similar cases to the effect that where precincts or districts are so tainted with fraud and irregularity that a true count of the votes honestly cast is impossible, such precincts or districts must be rejected and the parties to the contest may prove aliunde and receive the benefit of the votes honestly cast for them.

In conformity with this rule the majority find:

Rejecting these three precincts, your committee finds that the contestant, Peter F. Tague, on the face of the returns, without considering the changes made by the committee in its recount of the ballots, received a plurality of 316 votes over the contestee, John F. Fitzgerald. Giving effect to the revision of the count of ballots, your committee finds that contestant had a plurality of 525.

For the reasons assigned, your committee recommends to the House the adoption of the following resolutions:

1. That John F. Fitzgerald was not elected a Member of the House of Representatives from the tenth congressional district of the State of Massachusetts in this Congress and is not entitled to retain a seat herein.

2. That Peter F. Tague was duly elected a Member of the House of Representatives from the tenth congressional district of the State of Massachusetts in this Congress and is entitled to a seat herein.

This conclusion is combatted vigorously in both minority views submitted in the case.

Minority views, signed by Messrs. James W. Overstreet, of Georgia, and John B. Johnston, of New York, submit:

The action of the committee is indefensible for the reason that hundreds of honest voters are disfranchised on insufficient evidence of illegal registration, whereas if only a few cases were proven conclusively the same result could be obtained.

The contestant in his brief practically admitted that he had not proved his allegation of illegal registration. He claims, however, that because his unsubstantiated allegations were not answered by the persons involved he is excused from proving them. This position is unsound for the reasons:

First. The burden of proof is on the contestant.

Second. There is a presumption that the certified voting lists are correct and in compliance with the law.

Contestant attacks the right of many persons to vote where listed and registered in this district, claiming that they have no legal domicile there.

Every man must have a domicile. It is undisputed that he has a right to choose his domicile. In the case of men having several homes, they have the right to choose any one of them as their domicile. In the case of men moving from place to place, it is clearly their right to choose their domicile, and the question of domicile is a question of intent.

Ward 5 comprises nearly the entire business section of Boston, with its great hotels, docks, and wharves, great banks and warehouses, the two great railroad terminals of Boston, the statehouse, post office, customhouse, city hall, and the county courts. It has a highly diversified population in which are represented all of the European countries, as well as the native Yankee. There are many small hotels and lodging houses. There are a great many places where men only live for a short while, and move from place to place. There are many unfortunate men who are compelled by force of circumstances to live in these cheap places, but who have the right to a domicile and the right to vote. These men can not be disfranchised because they happen to live in a different house or on a different street at election time than they did at the time they were listed by the police.

In Boston, men, in order to vote at election, must be listed where they reside the first week of April. If they are so listed they have the right to vote from such residence if qualified and later registered. (See see. 14, chap. 835, acts of 1914.)

All of the witnesses stated that they were listed and registered in ward 5 where they lived and nowhere else. Now, if these men live there intending that it shall be their domicile, they cannot be listed elsewhere, and without listing they would not be entitled to vote elsewhere, and would therefore be disfranchised.

Here is the law on this matter:

"SEC. 69. In Boston there shall be a listing board composed of the police commissioner of said city and one member of the board of election commissioners.

"SEC. 70. The listing board shall, within the first seven week days of April in each year, by itself or by police officers subject to the jurisdiction of the police commissioner, visit every building in said city, and after diligent inquiry make true lists, arranged by streets, wards, and voting precincts, and containing as nearly as the board can ascertain, the name, age, occupation, and residence on the first day of April in the current year, and the residence on the first day of April in the preceding year, of every male person twenty years of age or upwards, who is not a pauper in a public institution, residing in said city. Said board shall designate in such lists all buildings used as residences by such male persons in their order on the street where they are located, by giving the number or other definite description of every such building so that it can be readily identified, and shall place opposite the number or other description of every such building the name, age, and occupation of every such male person residing therein on the first day of April in the current year, and his residence on the first day of April in the preceding year.

"The board shall place in the lists made by it, opposite the name of every such male person or woman voter, the name of the inmate, owner or occupant of the building, or the name and residence of any other person, who gives the information relating to such male person or woman voter."

(Chap. 835. Listing and Registration of Voters in Boston.)

As shown above in the statute the name of the informant must be given to the police, so that this evidence was available to show whether or not these men were bona fide residents.

After quoting authorities in support of this position, the minority continue:

In order to decide that there was illegal registration so as to invalidate any of the contestee's votes, it must be shown either that the men charged were acting in conjunction with the contestee or his friends in fraudulent registration or that the informant or landlord were doing the same. This was not shown in any case.

In conclusion the views submitted the following for the action of the House in lieu of the resolutions offered by the majority of the committee:

In conclusion, we submit that the whole case of the contestant rests on allegations and assertions with no substantial proof and that the misstatements made by him in connection with the ballots justifies us in rejecting his uncorroborated testimony about illegal registration.

We therefore submit for the action of the House the following resolution in lieu of the resolution offered by the majority of the committee:

Resolved, That John F. Fitzgerald was duly elected a Member of the House of Representatives from the tenth congressional district of the State of Massachusetts in this Congress, and is entitled to a seat therein.

Mr. Robert Luce, of Massachusetts, in separate views submitted, concurs in opposition to the proposal of the majority to reject the poll of the three precincts, and gives an historical résumé of the action of the House in similar cases:

The question rose in the second contested election case coming before the House. It was in the Second Congress that Gen. James Jackson contested the seat of Gen. Anthony Wayne because of gross frauds in a Georgia district. The House did not hesitate to vote unanimously to unseat Wayne, but when Jackson urged that the seat should be given to him by rejecting the returns of certain counties, the House refused. To be sure it was by a tie vote, the Speaker deciding, and it seems to have been feared that if new evidence were admitted, it might put the House in an awkward position by showing Wayne to have been elected, so that the precedent is not clear, but at any rate the proposal to reject certain polls did not prevail.

In the next Congress, in the case of Van Rensselaer *v.* Van Allen, the committee reported that according to the law of the State of New York the fact that more votes were cast for the petitioner in a town than were returned for him could not, if proved, suffice to set aside the vote of the town, and the decision was in favor of the setting Member.

In the case of McFarland *v.* Culpepper, in 1807, irregularities were proved in three out of five counties, and if the returns from these were thrown out the seat would go to the contestant.

Culpepper alleged that if he had time he could prove irregularities in the other two. The report is directly in point here:

"The committee are of opinion that, even presuming the vote in Moore and Cumberland to have been legally taken, it would be improper to deprive the other three counties of a representation for the fault of their election officers, etc., therefore think it most proper to give the citizens of that district an opportunity to have another election."

So the seat was vacated.

Ten years later, in the case of Easton *v.* Scott, the committee by throwing out the poll of one township, where 24 votes were east, would have given the seat to Easton, but the House recommitted the report with instructions to the committee to take evidence. At this the committee balked, partly because of the remoteness of the district, which was in the Territory of Missouri, and the expense of collecting testimony. In the end a motion to discharge the committee was amended by a substitute vacating the seat.

Although there were two or three cases where a committee showed itself not averse to rejecting the entire vote of certain precincts, towns, or counties, yet for nearly 70 years after Congress first sat in no instance was the result of an election changed by such a rejection.

Partisanship inflicted the pernicious doctrine on Congress. That may not have been the case with the first instance, where the result was changed by throwing out a precinct, Otero *v.* Gallegos, Thirty-fourth Congress (1856), but this was a Territory of New Mexico case of relatively slight consequence. With Howard *v.* Cooper in the Thirty-seventh Congress (1860), a political use of the expedient clearly began. Brightly characterizes this case as notoriously partisan and entitled to little credit, yet it was to serve as a precedent supposed to justify many questionable findings. At the same session Blair *v.* Barrett was decided by throwing out three precincts; in 1864, in Knox *v.* Blair, the committee rejected a precinct; and in Washburn *v.* Voorhees, in 1866, the committee rejected two precincts.

The device lent itself peculiarly to partisan needs and by this time contested-election cases had become political questions. During a long period after the Civil War the chief reliance of the partisan was the throwing out of entire polls. In one instance the whole city of Charleston was disfranchised; in another the whole city of Norfolk. Now that the fires of partisanship have somewhat died down, it may be admitted that the application of the principle had much to do with determining the Hayes-Tilden contest.

Possibly in many of these instances a just result was reached, even though by dubious means. Yet it is the age-long experience of mankind that it is better to keep within the lines of ordered justice than to disregard its canons for temporary ends.

Mr. Luce then submits that when an election is tainted with fraud the proper remedy is a new election, and urges that the seat be declared vacant.

In the course of the debate on the case in the House on October 23,[1] Mr. Goodall, the Member in charge of the time allotted to the minority, yielded time to Mr. Tague, the contestant.

At the close of the debate Mr. Overstreet withdrew the substitute resolution offered by him, and Mr. Luce offered in lieu thereof the following:

Resolved, That neither Peter F. Tague nor John F. Fitzgerald was duly elected a Member of this House from the tenth congressional district of Massachusetts on the 5th day of November, 1918, and that the seat now occupied by the said John F. Fitzgerald be declared vacant.

The substitute was rejected by the House, yeas 46, nays 167. The majority resolutions were then agreed to without division.

Thereupon Mr. Tague appeared and took the oath.

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[1] Journal, p. 528; Record, p. 7381.

Chapter CLXIII.[1]

PLEADINGS IN CONTESTED ELECTIONS.

97. The North Carolina election case of Smith v. Webb in the Sixty-first Congress.

As to time within which notice was served.

Specifying particulars in which notice of contest was deficient.

On June 23, 1910,[2] Mr. James M. Miller, of Kansas, from the Committee on Elections No. 2, submitted the report of the committee in the North Carolina case of John A. Smith *v.* Edwin Y. Webb.

The charges made by the contestant were general in character, alleging that, votes were cast illegally and by those not qualified as electors, and that in some parts of the district the election laws were practically suspended.

Little evidence was submitted in support of contestant's contentions and the committee were unanimous in declaring that there was nothing in the evidence to justify any of the charges.

There was some question as to whether the notice of contest was served on contestee within 30 days from the date of the determination of the result of the election by the board of State canvassers as required by law, but the committee decided that, while the evidence presented was inconclusive, in their opinion the notice was within the time required.

The committee held, however, that even if in time the notice was deficient in that it failed to allege that claimant was a candidate for Congress, that he was a voter in the district, or that he had any interest in the result of the election.

Accordingly the committee recommended the following resolutions:

Resolved, That John A. Smith was not elected to membership in the House of Representatives of the United States from the Ninth Congressional District of North Carolina in the Sixty-first Congress, and is not entitled to a seat therein.

Resolved, That Edwin Y. Webb was elected to membership in the House of Representatives of the United States from the Ninth Congressional District of North Carolina in the Sixty-first Congress, and is entitled to retain his seat therein.

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[1] Supplementary to Chapter XXII.

[2] Second session Sixty-first Congress, House Report No. 1702; Journal, p. 827; Record, p. 8833; Moores' Digest, p. 50.

The resolutions were ageed to without debate or division.

98. The Pennsylvania election case of McLean v. Bowman in the Sixty-second Congress.

The statute limiting the time within which notice of contest of election may be served is merely directory and may be disregarded for cause.

No statute can interfere with the provision of the Constitution making each House of Congress the judge of the qualification and election of its own Members.

Having permitted without objection the reference of a contest to a committee of the House, and having taken testimony and presented argument on the merits of the contest, the sitting Member was held to have waived thereby any right to object to irregularities in the filing of the notice of contest.

While failure of a contestant to comply with statutory requirements in the filing of a notice of contest does not necessarily preclude consideration by the House, such contestant may not become the beneficiary of his own negligence by succeeding to the seat so vacated.

Questions relating to the legality of a nomination are properly tested under the laws and in the courts of the State rather than in the House.

Interpretation of the corrupt practices act of Pennsylvania.

On August 13, 1912,[1] Mr. Timothy T. Ansberry, of Ohio, from the Committee on Elections No. 1, submitted the report in the Pennsylvania case of George R. McLean *v.* Charles C. Bowman.

The returning board of the district reported on November 12, 1910, that Bowman had received 13,662 votes on the Republican ticket and McLean had received 13,844 votes on the Democratic ticket, but Bowman had also received 722 votes on the Prohibition ticket, giving him on the face of the returns a majority of 550 votes.

At the outset a question was raised as to the regularity of the notice of contest.

Section 105 of the Revised Statutes of the State of Pennsylvania provided:

> When any person intends to contest an election of any Member of the House of Representatives of the United States he shall within thirty days after the result of such election shall have been determined by the officers or board of officers authorized by law to determine the same, give notice in writing to the Member whose seat he designs to contest of his intention to contest the same, and in such notice shall specify particularly the grounds on which he relies in the contest.

The notice of contest which was served on January 11, 1911, closes with this statement:

> This notice would have been given at an earlier date had I not been ill and prevented by the advice and compulsion of my physician from taking part in any professional business or political affairs from the 31st of October, 1910, until the 2d day of January, 1911.

The minority views, submitted, by Mr. S. F. Prouty, of Iowa, say:

> The result of this election was legally and officially determined November 12, 1910, and the contestant was advised of the result at that time. According to law, therefore, he should have given

[1] Second session Sixty-second Congress, House Report No. 1182; Journal, p. 955; Record, p. 10850.

notice of this contest on or before the 12th day of December, 1910. The notice was, in fact, given on the 14th day of January, 1911. It will thus be observed that the notice was not served on contestee until 32 days after the time provided by law for the instituting of contest proceedings.

This statute above quoted is expressly made a rule of the Committee on Elections and is and should be binding upon the committee. It is, therefore, the contention of the minority that the giving of this notice is jurisdictional and that the committee has no jurisdiction to determine any question unless this notice has been given.

The minority further say:

There are very many cases cited in Hinds' Precedents confirming the doctrine that where the rule established by the law of 1851 was not applicable or grossly inequitable, the House had the power to prescribe different rules and regulations for the penalty. There are several cases where the parties have failed to give notice within the tame prescribed by the statutes where the House, for equitable reasons, has fixed another time or mode in which notice might be given, but we believe that there is not a ewe cited in the precedents where a committee had reported the unseating of the Member where the notice was not given within the tame provided by the statutes. We can see that if the contestant had been for any good reason prevented from giving notice in this case, he might have applied to the House for permission to give notice and that the House had the power to grant additional or different time, but no such request as that has been made of the House. The contestant filed his notice 32 days too late and took his testimony out of order, all under protest by the contestee, and we insist that under the precedents the committee had no power or authority to consider the case. The laws of Congress are certainly binding upon Congress until set aside by Congress its&, but the minority contends that even though the contestant was now presenting to the House the question as to whether or not he was entitled to further and additional time in which to give notice his showing does not entitle him to the application of the equitable rule. There is no showing in this record that would excuse the contestant from giving the notice within the time prescribed by the statutes. Certainly the House would not wish to establish a precedent that would warrant anyone in coming in any time he pleased and filing a contest. This would be unfair. No one would know when his seat was secure. Failure to file a notice might lull the sitting Member into such indifference as would allow the testimony by which he could defend his ease to be lost or destroyed. The rule established by the statute is a just one, and this House ought to be slow in establishing another rule.

The minority therefore contend:

Our contention on this phase of the case is simply this:

First, that the contestant did not give notice, as prescribed by the statutes; second, that he did not make application to the House for another or different rule for the conduct of his contest; third, that he had no equitable or just ground on which he could have appealed to the House for the right to institute a contest after the expiration of the time provided by the statute. We do not contend that the House has not the power to expel its Members for any or no reason, but the power to expel must not be confused with the right of a party to contest the mat of a sitting Member. They are based upon entirely different provisions of the Constitution and require entirely different procedure. To expel a Member requires I's concurrence of two-thirds" (see sec. 5, Art. 1), but to determine a contested-election case only requires a majority. While we concede that the House might now, if it saw fit, expel Mr. Bowman for any reason it pleased, or for no reason, if a two-thirds vote could be commanded, we insist that there is no contested-election caw pending before it, and therefore we think that the case should be dismissed, and we so recommend.

The majority, however, hold:

Under a strict construction of this section of the statute the committee would have dismissed the case, but the statute is in fact merely directory, and was intended to promote the prompt institution of contests and to establish a wholesome rule not to be departed from except for cause.

Moreover, no statute can interfere with the provision of the United States Constitution making each House of Congress the judge of the qualification and election of its own Members. In this case the contestee permitted without objection in the House the reference of the matter of this contest to this committee for hearing, and after having taken testimony and presented argument on the merits he is in no position to object to such a consideration of the record as will determine in the public interest whether or not he is entitled to a seat in this House.

But the majority also hold:

The committee is not, however, satisfied that the reasons alleged by the contestant are sufficient entirely to excuse him from serving upon the contestee his notice of contest within 30 days from the 12th day of November, 1910, and not believing that he should be a beneficiary of his own negligence under the findings of the committee, they have not considered the case from the viewpoint of reporting a resolution to seat the contestant.

The first point urged by the contestant is that the nomination of the contestee as a candidate of the Prohibition Party, by the substitution.of his name for that of the regularly nominated Prohibition candidate, was brought about in contravention of the rules of the Prohibition Party and of the laws of the State of Pennsylvania.

The point is thus disposed of:

With regard to the legality of the substituted nomination of the contestee by the Prohibition Party the committee has felt much doubt. The testimony shows much maneuvering by the contestee to get one Robinson, the original Prohibition candidate, off the ticket. The legality of the substitution should, however, have been tested by filing objections to the nomination papers with the proper official under the laws of Pennsylvania and the contest carried, if necessary, to the courts of that State. That the object of the contestee in securing the Prohibition nomination was to advance that party's interest is nowhere shown. The presence of his name in two columns on the ballot gave opportunity for illegal counting of votes for him beyond doubt, and the fact that Larkin, Prohibition candidate for governor of Pennsylvania received but 242 votes in the district while contestee received 720 is a very suspicious circumstance, but with the legality of the nomination unassailed in the proper tribunal, and in the absence of specific proof of fraudulent counting of these votes, they can not be rejected.

As to allegations of fraud:

Independently of the right of the contestant to claim a seat in this House, the testimony in the case does show such fraud and corruption on the part of the contestee, or his agents, at the election on November 8, 1910, as to compel the statement that there was no such free and untrammeled choice by the voters as is required to constitute a fair and legal election.

The corrupt-practices act of Pennsylvania, approved March 5, 1906, requires the candidate to file a statement of moneys expended by him in the campaign, and if he had a campaign manager that manager is compelled to file a detailed report with the proper officer of the county. The act specifically sets forth all the legal purposes for which money may be spent by a candidate or his manager or a party organization.

The majority report finds:

The expense account filed by the contestee under this act on the 3d day of December, 1910, shows expenditures of $7,194.40 for the general election, and among other things contains the statement that said Bowman had paid no money to anyone else save Jonathan R. Davis, chairman, and that said moneys were paid to the said Jonathan R. Davis between October and November, or approximately within that period.

This Jonathan R. Davis was the chairman of the Republican county committee in 1910, as well as the manager of the campaign of the contestee. and his statement of receipts and expendi-

tures filed immediately after the election recites that he received and expended the sum of $8,984.84. The examination of both Davis and the contestee of contested election case, as shown by the record, demonstrates that both of their filed statements of expenses were false, and it is conclusively proved by the testimony of the contestee himself that instead of expending $7,194.40 in the election he, as a matter of fact, expended $9,272.70.

That one might find it impossible to make an absolutely accurate statement of campaign expenditures to the extent of $9,000 is possibly true, but there are items which the contestee failed to include in his statement, so large in amount that when considered in connection with the fact that the expenditures of these sums were sought to be concealed by erasures on check stubs and alteration of memoranda, lead irresistibly to the conclusion that the contestee in making out his statement of expenses designedly sought to conceal the use of large sum of money which he had spent in connection with his campaign.

The majority accordingly recommended the adoption of the resolution:

Resolved, That Charles C. Bowman was not elected a Representative in the Sixty-second Congress from the eleventh district of Pennsylvania, and is not entitled to a seat therein.

On August 17, 1912,[1] the report was called up in the House, but at the request of the contestee, after brief debate, was by unanimous consent postponed until the following session.

It was debated at length on December 10 and 12, 1912.[2] On the latter day the following resolution offered by Mr. Prouty was disagreed to, yeas 125, nays 147:

Resolved, That the case of George B. McLean against Charles C. Bowman, from the eleventh congressional district of Pennsylvania, be dismissed for want of jurisdiction because said alleged contestant gave no notice of contest within the time or in the manner prescribed by law, and because he has not asked or secured the consent of this House or of the committee for proceeding in any other manner than that prescribed by law and has not shown any equitable excuse for his failure to give the notice prescribed by section 105 of the Revised Statutes.

The question then recurred on the committee resolution, which was agreed to, yeas 153, nays 118.

Mr. A. Mitchell Palmer, of Pennsylvania, then offered the following resolution, which was rejected, yeas 88, nays 183:

Resolved, That George R. McLean, the contestant, was elected a Representative in the Sixty-second Congress from the eleventh district of Pennsylvania and is entitled to a seat therein.

99. The Pennsylvania election case of Wise v. Crago in the Sixty-second Congress.

Where contestant had failed to serve notice on contestee within time required by law the House declined to extend time because of lack of diligence.

Where allegations of fraud, even if sustained, would not affect sufficient votes to change the result, the House refused to entertain a proposed contest.

On August 20, 1912,[3] Mr. Thomas G. Patten, of New York, from the Committee on Elections No. 2, submitted the report in the Pennsylvania case of Jesse H. Wise *v.* Thomas S. Crago.

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[1] Record, p. 11193.

[2] Third session Sixty-second Congress, Journal, p. 52; Record, p. 541; Moores' Digest, p. 54.

[3] Second session Sixty-second Congress, House Report No. 1230; Journal, p. 994; Record, p. 1139; Moores' Digest, p. 59.

The election was held on November 8, 1910, and the canvassing board duly made its return within 10 days thereafter.

In April, 1911, the contestant filed a notice of contest with the Clerk of the House of Representatives, but failed to serve a copy of the notice on the contestee.

On December 4, 1911,[1] Mr. A. Mitchell Palmer, of Pennsylvania, introduced the following resolution which was referred to the Committee on Elections No. 1:

Resolved, That Jesse H. Wise, contesting the right of the Honorable Thomas S. Crago to a seat in this House as a representative from the twenty-third district of Pennsylvania, be, and he is hereby, required to serve upon the said Crago, within eight days after the passage of this resolution, a particular statement of the grounds of said contest; and that the said Crago be, and he is hereby, required to serve upon said Wise his answer thereto in eight days thereafter; and that both parties be allowed such time for the taking of testimony in support of their several allegations and denials as is provided by the act of February nineteenth, eighteen hundred and fifty-one.

The committee reported:

Contestant claimed that bribery and intimidation had been employed by the contestee to encompass the defeat of the contestant, naming the precincts affected by these violations of the election laws. The vote in the various precincts so affected was Crago, 5,666; Wise, 2,661; so that if the contestant was permitted to serve notice of contest on the said contestee under the terms of the resolution and could prove to the satisfaction of the committee the truth of his allegations, the purging of the vote that would follow under the application of the ordinary rule would still leave the contestee a majority of 1,766 votes.

The committee, however, reached the conclusion that the charges made by the contestant in support of his position were too general, vague, and indefinite, upon which to predicate a contest, particularly since the contestant, without any very strong reason, had permitted so long a time to elapse before starting his contest. The committee therefore recommends that the resolution be not agreed to.

The recommendation of the committee was Weed to without debate or record vote.

100. The Missouri case of Reeves v. Bland in the Sixty-sixth Congress.

The contestant having failed to serve notice of contest within the time required by law, the committee deemed it unnecessary to take action thereon.

Instance wherein a Federal court issued a temporary restraining order enjoining contestant from further proceeding in an election case.

A report on an election case with no recommendation for action was not considered by the House.

On November 7, 1919,[2] Mr. Frederick W. Dallinger, of Massachusetts, from the Committee on Elections No. 1, submitted the report of the committee on the memorial of Albert L. Reeves, charging fraud in the election of William T. Bland from the fifth congressional district of Missouri.

William T. Bland had received a vote of 31,571 according to the returns, and Albert L. Reeves a vote of 18,550. The result of the election was duly certified by the secretary of State on November 18, 1918, but notice of contest was not filed until January 6, 1919, 18 days after the expiration of the 30-day period prescribed by law.

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[1] Journal, p. 10; Record, p. 13.

[2] First session Sixty-sixth Congress; House Report No. 119; Journal, p. 567, Record, P. 8111.

Upon receipt of the notice the sitting Member filed a petition in the circuit court of Jackson County, Mo., praying for an order enjoining Albert L. Reeves from taking any steps as contestant pursuant to this notice. The case was transferred to the United States District Court for the Western District of Missouri, which, on February 6, 1919, denied the injunction.

An appeal was taken to the United States Circuit Court of Appeals of the Eighth Circuit, which, on February 10, 1919, granted a temporary restraining order enjoining further proceeding in the contest.

The memorialist asserts that delay in service of notice was due to the studied absence of the sitting Member from the district and State during—

practically the entire 30-day period immediately following the issuance of the certificate of election; that he had caused his office to be closed and his whereabouts concealed from the contestant until after the time prescribed by law within which to serve such notice had expired and until 18 days thereafter, to wit, January 6, 1919, upon which day the contestant, his attorneys and agents, located the said William T. Bland at San Diego, Calif., and then and there served upon him a copy of said notice of contest and complaint.

The committee after investigation reported:

William T. Bland remained at his home in Kansas City from November 5, 1918, until November 27, when he went to Memphis, Tenn., to visit his son who was a pilot in the Aviation Service of the Government. On December 3 he went to Washington, D. C., and from there returned to Kansas City by way of Memphis, reaching home on December 13, where he remained until December 23, when he left for California on account of his wife's health. During all the time he was away from home he was in constant touch with his office, No. 608 Ridge Arcade, and all important mail was forwarded to him from there. There was no evidence of any attempt on his part to conceal his whereabouts or to prevent the service upon him of any legal paper. Moreover, during the entire period from November 19, 1918, to December 19, 1918, he had no intimation that his election was to be contested.

In view of this finding the committee were unanimously of the opinion that the delay in serving notice of contest was without excuse, and reported as follows:

A mass of ex parte testimony was before your committee indicating extensive and widespread frauds in many of the wards in Kansas City at the last State election and your committee has been strongly urged by the newspaper press, by various nonpartisan civic bodies and by numerous citizens of Kansas City of both political parties to report a resolution providing for an investigation *de novo* of the election in the fifth Missouri district. If the facts alleged in the memorial were true and the petitioner, Albert L. Reeves, had been prevented from serving the notice required by law by the action of the sitting Member, Mr. Bland, your committee might have seen its way clear to report a resolution for an investigation of the conduct of this election.

It is to be regretted that the plain provisions of the statute regulating the election contests were not complied with by the petitioner in this case. The committee is earnestly desirous of preventing so far as it is possible for it to do, the existence and repetition of any such fraud and wanton disregard of law as the ex parte testimony in this case indicates was practiced in some of the Kansas City wards at the election on November 5, 1918.

When brought before the committee, within the time and in the manner provided by law, the committee will always endeavor to prevent any one from enjoying the fruits of such wrong. Under the circumstances, however, although viewing with the deepest concern the charges of wholesale frauds practiced at the last election in Kansas City, we do not feel justified in granting the prayer in the memorial and therefore report that no action is necessary thereon.

On November 11, 1919,[1] the Speaker[2] said:

There is on the calendar by accident a report from the investigation of the election in the fifth Missouri district that contains a report that required no action. The Chair thinks it is improperly on the calendar, and, without objection, it will be stricken from the calendar and laid on the table.

There was no objection.

The report was accordingly stricken from the calendar, Mr. Bland, of course, retaining the seat.

101. The Tennessee election case of Smith v. Massey in the Sixty-first Congress.

Contestant having failed to serve proper notice of contest upon contestee, the case was dismissed.

No evidence having been produced to justify a contest, the committee recommended that no fees be allowed.

On December 6, 1910, the following communication was laid before the House by the Speaker and referred to the Committee on Elections No. 2.

BRISTOL, TENN., *November 28, 1910.*

THE CLERK OF UNITED STATES HOUSE OF REPRESENTATIVES,

Washington, D.C.

DEAR SIR: I hereby very respectfully beg to inform you of my intention to contest the congressional election held on November 8 for the purpose of electing a Representative in Congress from the first Tennessee congressional district, and in which it is claimed that Dr. Z. D. Massey and the Ron. Sam R. Sells were elected, the former for the "short" or "unexpired" term of the late Congressman W.P. BROWNLOW and the latter for the regular term.

On the 19th instant I sent written notice of my intention to contest said election to both the above men, in which I set forth the reasons for entering contest.

Begging to request you to take whatever action is necessary in the matter to prevent Dr. Massey from taking a seat in Congress when that body convenes next Monday, I beg to remain,

Very respectfully,

JAMES EDGAR SMITH.

On March 3, 1911,[3] Mr. James M. Miller, of Kansas, from the committee submitted a report in the case.

The election was for an unexpired term and to fill a vacancy caused by the death of Hon. Walter P. Brownlow.

The contestant claimed to have sent a notice of contest to the sitting Member, alleging use of money to influence voters, unfair treatment by boards of election commissioners, the omission of contestant's name from official ballots, and misrepresentations misleading to voters.

The committee found no evidence that any notice of contest had been received by the contestee, and held that even had it been served in form as alleged, it was neither legal nor proper notice as required by the statutes governing contested election cases, in that it failed to comply with the provisions of sections 105, 106, and 107 of the Revised Statutes of the United States.

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[1] Record, p. 8350.

[2] Frederick H. Gillett, of Massachusetts, Speaker.

[3] Third session Sixty-first Congress, House Report No. 2290; Record, p. 4215; Moores' Digest, p. 50.

The report further shows that no evidence of any kind was submitted to the committee in support of any of the allegations in the alleged notice of contest.

In conclusion the report says:

While the committee does not care to render any opinion upon the merits of this case in view of the fact that no proper notice of contest was given, yet the committee feels that this is a case where it ought to express its disapproval of the institution of a contest where on the face of the entire record there were no grounds for the same. The committee, therefore, recommends that this case be dismissed for want of proper notice, and at the same time expresses the opinion that in a case such as this there ought not to be any fees allowed.

The House, without debate, unanimously agreed to the report.

102. The New York election case of Cantor v. Siegel in the Sixty-fourth Congress.

Contestant may not impeach the title of sitting Member by general averments of error, fraud, bribery, or coercion, but must specifically set forth in notice of contest the grounds upon which the contest is brought.

The committee have entire jurisdiction over questions of pleading and may admit amendments if occasion requires.

A recount of any part of the ballots will not be ordered unless all ballots cast in the election are available for recount if desired.

On January 22, 1917,[1] Mr. Lewis L. Morgan, of Louisiana, from the Committee on Elections No. 3, submitted the report in the New York case of Jacob A. Cantor *v.* Isaac Siegel.

The sitting Member had been returned by an official majority of 80 votes. The contestant in his notice of contest made general averments of error, fraud, bribery and coercion, and contestee submitted that the notice was so general and insufficient that it was impossible to surmise the nature of the issues sought to be raised.

The committee sustained the contention of the contestee:

Your committee are of the opinion that under no circumstances should the contestant be permitted to impeach the title of the returned Member by general averments of error, fraud, bribery, and coercion. The grounds upon which a contestant relies in any given case must be specifically set forth in the notice of contest. If the returned Member is not sufficiently apprised of the nature of the case he is to meet, he can not be expected to intelligently prepare his defense. We are perfectly willing to liberally construe the law; nevertheless, we think it is always unwise and inadvisable to encourage flagnant violations of its requirements.

Your committee were clearly of the opinion that the notice in this case was insufficient and might have been justified in refusing to consider the evidence introduced in support of allegations so general; but feeling that the question of pleading was entirely within the committee's control, and that the notice could be amended, if the real merits of the case should so require, the committee concluded to examine the testimony disclosed by the record.

The contestant did, however, specially charge the counting of void ballots and the rejection of legal ballots in certain districts and requested an inspection of the ballots in those precincts.

[1] Second session Sixty-fourth Congress, House Report No. 1325; Journal, p. 146; Record, p. 1756; Moores' Digest, p. 92.

The committee found:

Unfortunately, 7 of the 41 boxes were destroyed, because there was no effort made by any of the interested parties for their preservation. However, the committee do not impute to either contestant or the contestee responsibility therefor. But inasmuch as the contestant has vigorously attacked and undertaken to disparage the correctness as well as the reliability of the returns made by the precinct officials, your committee feel that they can not, in good conscience, accept as true the returns relating to the 7 boxes and wholly disregard and discredit the official returns of the other 34 boxes. To hold that the ballots in the 7 boxes were correctly counted and returned and that the ballots in the remaining 34 boxes were incorrectly canvassed, would be untenable, indefensible, and unprecedented under the peculiar circumstances of the ease, and your committee are reluctant to take any such anomalous position.

Your committee, after having examined the facts and the law applicable thereto, with care and attention are of opinion that the destruction of a material portion of the official ballots voted at this election would make it now impossible for them to reach a just and satisfactory conclusion as to the result of the election even if they were to undertake to inspect and review the ballots in controversy, and they do therefore recommend the adoption of the following resolutions:

"Resolved, That Jacob A. Cantor was not elected a Representative to the Sixty-fourth Congress from the twentieth congressional district of New York.

"Resolved, That Isaac Siegel was elected a Representative to the Sixty-fourth Congress from the twentieth congressional district of New York, and he is entitled to retain his seat therein."

The resolutions recommended by the committee were unanimously agreed to without division.

103. The Illinois election case of Golombiewsk v. Rainey in the Sixty-seventh Congress.

Contestant failing to comply with rules adopted by committee and ignoring inquiries propounded by the committee, was held not to have sustained charges made in notice of contest.

Reaffirmation of findings in other cases submitted simultaneously to the Committee on Elections.

On February 1, 1923,[1] Mr. Robert Luce, of Massachusetts, from the Committee on Elections No. 2, submitted the report in the Illinois case of John Golombiewski *v.* John W. Rainey.

The official return in this case was:

John W. Rainey	23,230
John Golombiewski	21,546
Charles Beranek	2,753

By a recount ordered on application of the contestant, under the laws of the State of Illinois, the contestant gained 321 votes while the sitting Member lost 1,008 votes, reducing the latter's majority to 676 votes.

The contestant rested his case upon the allegation that in 16 specified precincts the fraudulent marking of ballots after they had been cast indicated a degree of corruption warranting the exclusion of all the ballots cast in those precincts.

He failed, however, to comply with the rules adopted by the committee in that his abstract of testimony did not cite specific testimony relied upon in support of his contention. A tabulation was submitted listing 179 ballots challenged, but

[1] Fourth session Sixty-seventh Congress, House Report No. 1500.

the committee held the percentage of ballots so challenged was too small to indicate a degree of corruption sufficient, even if conceded, to warrant total exclusion of a poll.

In stating their conclusions the committee refer to two other cases, submitted simultaneously, as follows:

This is one of three cases from the city of Chicago which were referred respectively to your three committees on elections. The issues involved and the circumstances are much the same in all three case. The report of the Committee on Elections No. 3 in the case of Gartenstein *v.* Sabath, submitted December 20, last, and the report of the Committee on Elections No. 1 in the case of Partillo *v.* Kunz, submitted January 15 last, contain discussion of the effect of violating statutory requirements, of incomplete recounts, and of the evidence that should be offered under conditions such as here prevailed, together with analysis of testimony and citation of precedents, all of which apply as well to the present case, and to them rehearse here would be needless repetition. It should, however, be added that in this counsel for the contestant has failed to proceed beyond the filing of the required documents, repeated inquiries from your committee as to whether he desired a hearing having been wholly ignored.

The committee accordingly recommend the adoption of the usual resolutions.

On March 4, 1923,[1] the resolutions were agreed to by the House without debate or division.

104. The Senate case of William Lorimer, of Illinois, in the Sixty-first Congress.

A quorum of each house being present at joint meeting of legislature for election of Senator, a majority of those in attendance elects, and a majority of all members of the legislature is not required.

In order to invalidate election of Senator on charge of bribery, it must be shown: (1) That the person elected participated in the bribery or sanctioned it. (2) That by such bribery enough votes were obtained to change the result of the election.

On June 18, 1909,[2] in the Senate, William Lorimer, elected a Senator by the legislature of Illinois, took the oath of office without objection.

More than a year thereafter, on May 28, 1910,[3] Mr. Lorimer rose to a question of personal privilege and said in part:

On the 30th day of April last (1910) the Chicago Tribune published a story over the signature of Charles A. White, a member of the Illinois Legislature, in which it was alleged that I secured my seat in the United States Senate through bribery and corruption. I have made this statement because I feel it my duty to acquaint the Senate with the facts and because I would not feel justified in participating in the deliberations of this body unless I had laid before it the facts concerning this conspiracy.

Therefore, Mr. President, I offer the following resolution and ask unanimous consent for its immediate consideration:

"Resolved, That the Committee on Privileges and Elections be directed to examine the allegations recently made in the public press charging that bribery and corruption were practiced in the election of William Lorimer to a seat in the United States Senate and to ascertain the facts in connection with these charges, and report as early as possible; and for that purpose the committee shall have authority to send for persons and papers, to employ a stenographer and such other

[1] Journal, p. 2; Record, p. 5473.

[2] First session Sixiy-first Congress, Record, p. 3437.

[3] Second session Sixty-first Congress, Record, p. 7019.

additional help as it shall deem necessary; and the committee is authorized to act through a subcommittee; and its expense shall be paid from the contingent fund of the Senate."

The resolution was referred to the Committee on Privileges and Elections.

Subsequently, and on June 7, 1910, there was presented to the Senate a memorial signed by Clifford W. Barnes, in which the memorialist set forth in substance that he was president of the Legislative Voters' League of Illinois; that on May 2, 1910, pursuant to an order entered in the criminal court of Cook County, a special grand jury was duly convened to investigate and consider, among other things, certain alleged charges of legislative bribery in the Forty-sixth General Assembly of the State of Illinois; that prior to said 2d day of May one Charles A. White, a member of said general assembly, submitted to the Chicago Tribune a confession in which there were contained and embodied certain alleged facts and circumstances relating to said legislative bribery; that such confession was, in substance, printed, published, and circulated in the Chicago Tribune on April 30, 1910; that on May 2, 1910, the grand jury heard the testimony of White, as well as the testimony of H. J. C. Beckemeyer and Michael S. Link, members of the general assembly, from which testimony it was charged that each had received $1,000 for casting his vote on May 26, 1909, for William Lorimer for United States Senator, and that based upon this testimony the grand jury, on May 6, 1910, returned an indictment against one Lee O'Neil Browne, the minority leader of the House of Representatives of Illinois, which indictment is set forth in the record, and that the statement of Mr. Barnes was made upon his best knowledge, information, and belief.

On June 20 [1] the Senate agreed to the following resolution reported by the Committee on Privileges and Elections:

Resolved, That the Committee on Privileges and Elections of the Senate, or any subcommittee thereof, be authorized and directed to investigate certain charges against William Lorimer, a Senator from the State of Illinois, and to report to the Senate whether in the election of said William Lorimer as a Senator of the United States from said State of Illinois there were used or employed corrupt methods or practices; that said committee or subcommittee be authorized to sit during the sessions of the Senate and during any recess of the Senate or of Congress, to hold its sessions at such place or places as it shall deem most convenient for the purposes of the investigation, to employ a stenographer, to send for persons and papers, and to administer oaths; and that the expenses of the inquiry shall be paid from the contingent fund of the Senate upon vouchers to be approved by the chairman of the committee.

On December 21, 1910,[2] Mr. Julius C. Burrows, of Michigan, from the Committee on Privileges and Elections, submitted the report of the majority of the committee.

A preliminary question as to whether a majority of all members elected to each house of the State legislature is required to elect a Senator or whether a majority of all votes cast in the joint assembly is sufficient to elect, is thus desposed of:

It appears from the evidence that Mr. Lorimer was elected a Senator from the State of Illinois on the 26th day of May 1909, by a joint assembly of the two houses of the general assembly of the

[1] Record, p. 8501.

[2] Third session, Sixty-first Congress, Record, p. 547.

State of Illinois, receiving 108 votes out of 202 that were cast for the several candidates for that office, as follows:

Albert J. Hopkins	70
William Lorimer	108
Lawrence B. Stringer	24

VOTES REQUIRED TO ELECT.

The question is raised by counsel whether the language of the statute regulating the election of United States Senators requires that in order to elect a Senator the person elected must receive a majority of the votes of all the members elected to each house of the legislature, or whether it is sufficient if one person receives a majority of all the votes cast in the joint assembly, "a majority of all the members elected to both houses being present and voting." This question seems to have been decided by the Senate in the case of Lapham, and Miller (Senate Election Cases, 697). In that case it was held that a majority of a quorum of each house is sufficient to elect, and in that decision the committee concur.

When this proposition was debated in the Senate, Mr. Theodore E. Burton, of Ohio, said.[1]

The requirements of the act of 1866 are perfectly clear.

Each house of the legislature must meet separately on the second Tuesday after convening and organization, and vote for a Senator. The statute is silent as to what constitutes a quorum in the respective houses.

It is conceivable, and even probable, that the law or constitution of a State might provide that more or less than half, that two-thirds or one-third, for example might be regarded as a quorum for the transaction of business and that a majority of such quorum, made up of a less number or a greater number than a majority of the respective houses, could elect a Senator; that is, if both houses concur in the election. There is, however, no such uncertainty as regards the joint assembly. If no one has received a majority in both houses, or, if either house has failed to take proceedings as required by law, the joint assembly shall on the following day proceed to choose by a viva voce vote of each member present a person for Senator. The person who receives a majority of all the votes of the joint assembly, *a majority of all the members elected to both houses being present and voting*, shall be declared duly elected.

It is absolutely unnecessary to engage in refinements in regard to this statute. It means that a majority of the members elect to both houses must be present and it means also that the successful candidate must receive a majority of those present and voting.

Recurring to the main question at issue, the majority summarize Senate precedents in such cases in the following rule:

In a number of cases that have been before the Senate of the United States it has been held that to invalidate the election of a Senator on account of bribery it must be made to appear either—

(1) That the person elected participated in one or more acts of bribery or attempted bribery, or sanctioned or encouraged the same; or

(2) That by bribery or corrupt practices enough votes were obtained for him to change the result of the election.

From this ruling Mr. Albert B. Cummins, of Iowa, in debate in the Senate, dissented, saying:

The decision of this particular case is of great moment to the Senate and to the people, but the question whether Mr. Lorimer shall be permitted to retain his seat in the Senate of the United States shrinks into insignificance when compared with the consequences of the rule relating to bribery, first

[1] Record, p. 1892.

announced in the debate by the senior Senator from South Dakota, approved at once by the junior Senator from Texas, and insisted upon yesterday by the senior Senator from Kentucky. They ask the Senate to solemnly declare that the law of the land is that if it is shown that a certain number of bribed votes were given to the successful candidate in a senatorial election and the persons who cast these votes are identified with the bribed votes, the bribed votes must not only be deducted from the number received by the successful candidate, but also from the total number of votes cast, and that if, upon such a readjustment the candidate has a majority of the remaining votes, he is under all circumstances duly and legally elected.

To apply the rule so announced to the present case means this, that conceding that William Lorimer received seven corrupted votes, his election, was nevertheless, legal and valid. To apply it more analytically to the controversy before us, it appears thus: There were 202 votes cast in the Joint Assembly of the Illinois Legislature. To elect a senator it was necessary that one person should receive 102 votes. Mr. Lorimer, in fact, received 108 votes. Deducting the seven corrupted votes from his total leaves him 101; less than a majority of the total number of votes cast. The rule contended for by these Senators requires that these seven votes shall be also deducted from the total number leaving 195 votes. Inasmuch as 101 votes are a majority of 195 votes, the conclusion of these Senators is that Mr. Lorimer would be fairly and legally elected to the office.

This is the most alarming and dangerous proposition ever made in the Senate of the United States. If it were adopted it would be the most cordial invitation ever extended to dishonesty, crime, and corruption. If it were established it would be the most effective weapon ever forged for the use of the wrongdoer. If we assent to it we proclaim to the world that the Senate of the United States welcomes to its membership men whose friends have bought their title to a seat in this body.

These consequences, Mr. President, which I have now pointed out, are so grave and so serious that no matter what the precedents are, no matter what the rulings have been, it would be impossible for us to declare that this rule shall in the future govern the Senate of the United States.

If it is adopted it means that if bribery is skillfully done, if bribery is committed by those who have the rule in view, it can always effect its purpose if there be anything like an even division in the general assembly. It means that bribery, carried on by some other person than the candidate himself will be permitted to seat a Member in the Senate of the United States. It means that you can bribe members sufficient in number without any consequence at all, so far as the validity of the title is concerned, provided you bribe just enough to reduce the total number to the point where the honest votes of the candidate will be a majority. It is an unthinkable proposition to me. It is in conflict with the fundamental rule which we have always acknowledged and which every tribunal has acknowledged wherever it has had occasion to deal with the question at all.

The rule is that no man shall be permitted to enjoy the fruits of bribery. No man shall be permitted to hold a seat in this body that he could not have obtained had it not been for the bribery. The rule contended for by these Senators will permit a Member to hold a seat here which is the direct result of and which has been won through the grossest corruption.

105. The case of William Lorimer, of Illinois, continued.

Bribery sufficient to change the result of the election not being shown and no personal participation in corrupt practices being proved, the Senate declined to invalidate the election.

Under its constitutional right to judge elections, returns, and qualifications, the Senate may inquire into the personal fitness of a man elected by a State; the manner of his election; and whether votes cast for him by members of the legislature were procured through bribery; but may not inquire into the personal character of the legislators themselves.

The majority relate:

Four members of the General Assembly which elected Mr. Lorimer testified to receiving money as a consideration for their votes. The members who thus confessed their own infamy were Charles A. White, Michael Link, H. J. C. Beckemeyer and Daniel W. Holstlaw.

CHARLES A. WHITE.

The chief of these self-accusers and the one on whose testimony the whole fabric of the accusation largely depends was Charles A. White, a member of the lower house of the Illinois General Assembly. White seems to have developed early in his legislative career an insatiable desire to secure a pecuniary compensation for his official acts, and he also appears to have suspected his fellow members of the general assembly of being as corrupt as himself. He endeavored to induce the chairman of an important committee to defer reporting a bill, in order to extort money from those who were interested in its passage. After Mr. Lorimer had been elected to the Senate, White tried to obtain information from another member of the house whether money had not been used to promote Senator Lorimer's election. This inquiry not only shows his corrupt character, but also casts suspicion upon the truth of his story that he had been bribed to vote for the successful candidate for Senator.

White's account of the alleged bribery of himself is given circumstantially and in detail, but in this he has been shown to have falsified in several important particulars concerning which he could not have been mistaken had his narrative been true. Among other things, he stated that Browne came to his room shortly before the election of Senator Lorimer and that two men named Yarborough were then in the room. But it was proved by two reputable and credible witnesses that on the evening in question one of these men was in Chicago.

Without further reference to the details of White's testimony, it may be said that after seeing, observing, and hearing this witness it was the opinion of a majority of the subcommittee that no credence ought to be given to any part of his testimony tending to establish the fact of bribery. And after carefully reading the testimony given by White in the investigation, a majority of the committee concur in the opinion of the subcommittee in that regard.

Discussing this conclusion during debate in the Senate, Mr. Elihu Root, of New York, said [1] in dissent:

It appears by the testimony of Mr. White, testimony that must be accepted, because it is corroborated by this great array of indisputable facts.

Mr. President, I say we are bound to accept that testimony, because it accords with what every one of us knows to be true. Every one of us knows that with bribery, attempted upon seven independent members of a legislature, effective as to four, failing as to three, but evidence of it produced, never in this world did it happen, or could it happen, that there were not others.

So difficult is it to secure evidence of this kind of crime, so almost insuperable are the obstacles to confession and to testimony, that universal experience has established to the knowledge of us all that but a trifling, occasional, incidental portion of the corruption that exists, wherever it exists at all, is ever brought to light. So well is this understood that in England, in order that corruption might not continue to do its demoralizing work in their body politic, they have made by law the proof of the bribery of one voter fatal to an election, and they have made by law the oral admission, not under oath, of a voter that his vote was bought evidence of the truth of the admission.

The difficulties in the way of making proof where, in the vast majority of cases, both parties are guilty and neither can give evidence without stamping himself with infamy, are so great that we are bound to act upon the universal knowledge that the facts brought out here in evidence must have been accompanied by other similar facts; had here you have proof, here you have legal proof. I say, Mr. President, no Senator is at liberty to reject that proof which corresponds with his own belief.

The testimony of other members of the legislature charged with accepting bribes is thus analyzed in the majority report:

MICHAEL LINK.

According to the testimony of this witness, he was paid the sum of $1,000 by Lee O'Neil Browne some time after Mr. Lorimer had been elected to the Senate. He further testified that

[1] Third session Sixty-first Congress, Record, p. 1891.

no money was paid or promised him before he voted for Mr. Lorimer; that he made up his mind as early as in the month of March, 1909, to vote for Mr. Lorimer if an opportunity for so doing should occur, and promised Mr. Lorimer his vote some time in advance of the election of a Senator. When accused of having received money for voting for Mr. Lorimer, he denied it. When Summoned before a grand jury, he stated, under oath that he had not received any money as a consideration for his vote for Senator. Following this statement he was compelled, by means fully set forth in his testimony, to retract his former statement and testify to having received money for his vote for Mr. Lorimer.

H. J. BECKEMEYER.

This witness also testified before the subcommittee that he had received money from Lee O'Neil Browne as a reward for his vote for Senator Lorimer, but he also testifies that no money or other compensation was promised him before he voted for Mr. Lorimer. His experience before the grand jury was similar to that of the witness Michael Link, and as against his declaration last made before the grand jury and repeated to the subcommittee we have his statement to Michael Link denying the use of money in the senatorial election, and also to Robert E. Wilson that he did not get any money for voting for Mr. Lorimer, and if anyone said so he was a liar.

D. W. HOLSTLAW.

This witness testified that in a conversation with Senator Broderick he told Broderick that he intended to vote for Mr. Lorimer for Senator, to which Broderick replied, "Well, there is $2,500 for you," and that some time afterwards Broderick paid him $2,500. This witness was also driven to making this statement by certain proceedings taken before a grand jury of Sangamon County, Ill., and in many respects the story told by this witness seemed to the subcommittee to be a highly improbable one.

The circumstances before referred to and many others which might be instanced tended to render the testimony of each and all the witnesses who have been named of doubtful value. And in each case in which it was claimed that some member of the Illinois General Assembly had been bribed to vote for Mr. Lorimer the accusation was positively denied by the person accused of committing the alleged act of bribery. And after a careful examination and consideration of all the evidence submitted the committee are of the opinion that even if it should be conceded that the four members of the Illinois General Assembly before referred to received money in consideration for their votes for Mr. Lorimer, there are no facts or circumstances from which it could be found or legally inferred that any other member or members of the said general assembly were bribed to vote for Mr. Lorimer.

The majority for Senator Lorimer in the joint assembly of the two houses of the general assembly of the State of Illinois was 14. Unless, therefore, a sufficient number of these votes were obtained by corrupt means to deprive him of this majority, Mr. Lorimer has a good title to the seat he occupies in the Senate. If it were admitted that four of the members of the general assembly who voted for Mr. Lorimer were bribed to do so, he still bad a majority of the votes cast in the general assembly and his election was valid.

CASE OF BROWNE, BRODERICK, AND WILSON.

It is, however, declared that if the four witnesses before named were bribed to vote for Mr. Lorimer, those who bribed them were equally guilty and that the votes of Browne, Broderick, and Wilson should also be excluded. But the committee can find no warrant in the testimony for believing that either one of said legislators was moved by any corrupt influence. Browne's reasons for voting as he did are clearly set forth in his testimony. He was the leader of a faction of the minority of the house, and for certain political reasons he thought it good policy to aid in the election, of some member of the majority party other than those who had received a considerable number of votes in the general assembly.

After discussing the testimony in detail the majority conclude:

Much of the testimony taken upon the investigation related to the alleged payment of money to members of the general assembly of Illinois by one Robert E. Wilson. This was denied by Wilson and by others, and after considering all the evidence on that subject, the committee are not prepared to find that the fact is established. But whether the sums of money claimed to have been paid were or were not paid, that fact has no relevancy to the matter which the committee was appointed to investigate. If any money was disbursed by Wilson, it is evident that it was from a fund which was neither raised nor expended to promote the election of Mr. Lorimer as a Senator nor to reward those who voted for him for that office. It was therefore no part of the duty of the subcommittee to inquire into either the origin of the fund or the purpose for which it was used. That matter was and is one for the proper officials of the State of Illinois to take cognizance of and one with which the Senate of the United States has no concern.

The committee submit to the Senate the testimony taken in the investigation, with their report that in their opinion, the title of Mr. Lorimer to a seat in the Senate has not been shown to be invalid by the use or employment of corrupt methods or practices, and requests that they be discharged from further consideration of Senate resolution No. 264.

Mr. W. B. Heyburn, of Idaho, concurred fully in the report of the majority of the committee and signed the report but submitted individual views giving additional reasons for his conclusions as follows:

It is not claimed nor was any attempt made to show that Mr. Lorimer was in any way connected with the alleged bribery or that he knew of any bribery or corrupt practice in connection with his election.

The committee is not charged with the investigation of the personal character of the members of the Illinois Legislature, nor should it report upon the same.

The right to investigate the character of the legislative body of a State or any member thereof belongs exclusively to the State and the people thereof.

In the Senate every presumption is in favor of the integrity of the State as certified to it by the chief executive of the State, and no presumption can be indulged that the State acted corruptly in the election of a Senator.

When a question as to the right of an incumbent to sit arises in the Senate which is based upon charges made by persons acting in their individual capacity, the burden of sustaining such charges rests on the charging party, and such party should be held to strict proof of the charges made, and such charges may not be made the basis of a dragnet investigation into the personal conduct or morals of the members of the legislature who participated in the election. The State must stand responsible for the character of its officers, and that responsibility is to its own people and not to any branch of the General Government.

The Senate may inquire into the personal fitness of a man elected by a State to sit as a Senator and may determine such question within the exercise of its exclusive powers, but in doing so it may not inquire into the personal character of the officers through whom the State acts. That question belongs to the people of the State exclusively.

The Senate may, however, inquire into the manner of the election of a Member of its body to the extent, and for the purpose of ascertaining whether such election was an honest one, representing the will of the members of the legislative body which certifies his election to the Senate, and in doing this we may inquire whether the votes cast by members of the legislature were procured by bribery of such members, by the person for whom they voted or by anyone on behalf of such person with the knowledge or consent of such person, and in case we should find that such bribery existed we should find that his election was procured in violation of the law, and the person so selected should not be permitted to hold the office of Senator.

In this case Mr. Lorimer is neither charged nor shown to have bribed or corrupted any member of the legislature who voted for him, or to have furnished any money to any person for such purpose, neither has it been shown that he had any knowledge of any bribery or corrupt practice in connection with his election. We do not have to weight testimony to arrive at this

conclusion, for them was no attempt to establish such conduct or knowledge on the part of Senator Lorimer.

106. The case of William Lorimer, of Illinois, continued.

Discussion of reason for requiring two-thirds vote rather than majority vote for expulsion from the Senate.

Charges that the election of a Senator was secured through corrupt practices, investigated and held not to be sustained by evidence.

Instance wherein a Senator requested elimination from appropriation bill of item reimbursing him for expenses incurred in defense of his seat.

Mr. Albert J. Beveridge, of Indiana, did not concur in the opinion of the majority but filed minority views in which he attacked precedents approved by the majority to the effect that in order to invalidate an election it must be shown that a sufficient number of voters were bribed to change the result. After discussing the inequity of these precedents the views say:

I propose that we overthrow such unsound precedents and establish a new Senate precedent, that one act of bribery in the election of a Senator makes such an election void—makes an election foul.

The public welfare, the theory of free and fair elections, which it is our sole business to safeguard, and which is the reason and origin of the power we are now exercising, requires the establishment of this new Senate precedent.

We should in this case establish the law of the Senate in conformity with the ancient common law. We should declare that one act of bribery makes a whole election foul.

This pronouncement by the Senate of the United States would prevent an ambitious and wealthy candidate from perpetrating bribery to make his election sure and doing it in such a way as to cover up his tracks. It would give a needed pause to corrupt interests that undertake to make the election of their favorite certain by corrupt practices. It absolutely would prevent overzealous friends, inspired by nothing but the heat of battle and devotion to their favorite, from undertaking to secure his success by infamous methods.

If we make a new Senate precedent that one act of bribery makes a whole election foul, we shall have an end of the amusing and overworked argument of the improper activities of too enthusiastic friends bribing voters for their favorite without any other motive than their fanatical and money-sacrificing devotion to him.

The time has arrived when we had much better take to heart the people's unsullied and uninfluenced representation than that we should continue to bemoan the possible fate of a virtuous candidate in whose behalf the heinous crime of bribery has been practiced, whether by venal interests or by well-intentioned but overzealous and financially affluent friends.

But waive this point. The evidence shows it is not necessary to a decision of this case. I advance it only because this body ought to establish now that one act of bribery invalidates an election.

In agreement with this doctrine Mr. Burton in debate in the Senate also declared: [1]

The Senate is not bound by any precedent created by a legal decision or even by a report of a committee of Congress. Most of the reports to Congress in contested-election cases have been characterized by a fair disposition and an evident desire to render a decision in accordance with justice. They have also been characterized in many cases by exceptional ability. But a great question of public policy is presented to the Senate in any contested-election case. The country looks here for an example. The State from which the Senator is accredited has a right to demand that exact justice be done.

[1] Third session Sixty-first Congress, Record, p. 1980.

Thus we may brush aside precedents if they do not accord with justice and the highest moral standards.

In this connection the minority views discuss the reason for requiring a two-thirds vote for expulsion, as follows:

And this suggests another untenable view heretofore suggested in election cases and which we should now decisively negative. This view is that a single act of bribery perpetrated or countenanced by a person elected to the Senate of the United States does not void the election, but only so taints such a person that he must be expelled. That is, if the sitting Senator personally perpetrated or countenanced bribery to secure his election his seat can not be vacated by a majority vote, but he must be expelled by a two-thirds vote.

I think it clear that this view is wrong. The argument for it is that the bribing Senator is guilty only of a moral defect which renders him unfit to be a Member of this body.

It is as if such a Senator had a contagious disease such as smallpox, or that he was dangerously insane, or that he had committed treason, and yet, in any of these cases, insisted upon sitting among us. In any of these cases or others that may suggest themselves such a Member may be expelled, but only by a two-thirds vote.

The reason a two-thirds vote was provided in the Constitution to expel a member was that the mental, moral, or physical defect should be so unquestionable that two-thirds of this body would be impelled to vote for expulsion.

And yet it is upon these grounds and these only that the argument is made that a Senator guilty or knowing of bribery in his election must be expelled by a two-thirds vote rather than his election invalidated by a majority vote.

This position is so dangerous to the public welfare, so contrary to public policy, so abhorrent to reason and repugnant to justice that I repudiate and challenge it.

For conceding that an elected Senator had a majority of perfectly honest votes, would they have so cast their votes if they had known that the candidate was bribing other votes?

Let me put an illustration personally to each Senator here. Suppose that we are electing some man to some office within our gift. Suppose that all but one of us were honest and earnest in our intended votes for this man. But suppose that just before our vote we discovered that he had bribed or countenanced the bribery of one of our number. Would a single one of us with such knowledge vote for the man for whom until that moment we had intended to vote? Of course not.

So it is that one act of bribery perpetrated or countenanced by any Senator to secure his election vitiates the same. It does not necessitate an act of expulsion requiring a two-thirds vote, but a resolution requiring a majority vote invalidating the election.

As to whether knowledge of bribery by its beneficiary is a requisite to invalidation the views say:

Was Mr. Lorimer informed of what was going on in his behalf? While not necessary to a decision of this case, the evidence and circumstances require the Senate to consider this point.

From his speech on this case in this body it appears that Mr. Lorimer is a seasoned politician of nearly 30 years' experience in practical politics in one of the greatest cities of the country and of the world—a superb organizer who gives attention to the very smallest details of any election.

In law Mr. Lorimer must be held to have knowledge of these transactions in his behalf.

If so, I contend that his election is invalid upon this ground. If Senators believe that he knew and countenanced a single act of bribery we need not conclude that we must expel him by a two-thirds vote. We need only to conclude that his election was invalid and so declare by a majority vote.

But for the purpose of this particular case it is not necessary to raise the question of Mr. Lorimer's knowledge of any bribery in his behalf. I raise it only because personally I want to go on record against the proposition hitherto advanced, that an act of bribery by a successful candidate does not invalidate his election, but only taints the successful candidate himself.

I conclude that this election was invalid under any possible view of the law. If the Senate so concludes, it is our duty to so declare.

In consonance with his views Mr. Beveridge offered the following:

Resolved, That William Lorimer was not duly and legally elected to a seat in the Senate of the United States by the Legislature of the State of Illinois.

Mr. James B. Frazier, of Tennessee, from the committee, also submitted individual views dissenting from the majority report as follows:

As I understand the precedents as established by the Senate and the other branch of Congress and now recognized as the law governing such cases, they are:

First. If the proof establishes the fact that the Member whose seat is in question because of alleged bribery or corrupt practices resorted to in his election has himself been guilty of bribery or corrupt practices, or knew of or sanctioned such corrupt practices, he may be unseated without reference to the number of votes thus corruptly influenced.

Second. If the proof fails to show that the Member knew of or participated in or sanctioned such corrupt practices, then, in order to justify unseating him, the proof must show that enough members of the legislature voting for him were bribed or influenced by corrupt practices that deducting their votes from the total vote received by him would reduce his vote below the constitutional majority required for his election.

The testimony taken by the committee satisfies me that four members of the legislature were paid money for voting for, or in consequence of having voted for, Senator Lorimer. One senator and three representatives admitted under oath before the committee that they were paid money, and their admissions and the facts and circumstances surrounding the transactions satisfy me that they received it as a bribe for or in consequence of their votes for Senator Lorimer.

The four self-confessed bribe takers implicate three other members of the legislature who voted for Senator Lorimer as the persons who bribed them. The testimony satisfies me that the three alleged bribe givers were guilty of that offense. To my mind the man who bribes another is as corrupt as the one who is bribed, and by his corrupt act of bribery he demonstrated the fact that he is none too honest to receive a bribe if offered him.

While the proof is not clear or conclusive that these three bribe givers were themselves bribed or corruptly influenced to vote for Senator Lorimer, when I take into consideration their corrupt conduct as bribers of others, together with all the facts and circumstances surrounding this case, I can not bring myself to agree with the majority of the subcommittee that their votes are free from taint or corruption. These three votes added to the four confessedly bribed would make seven tainted votes. Eliminate them, and the vote received by Senator Lorimer was less than a majority of the votes cast.

Mr. Frazier then concurs in the resolution offered by Mr. Beveridge.

The report of the committee was debated at length in the Senate on January 18, 23, 25, 26, 27; February 3, 6, 7, 9, 10, 13, 14, 21, 23, 24, 27, 28, and March 1, 1911. On March 1,[1] the minority resolution submitted by Mr. Beveridge was disagreed to—yeas 40, nays 46.

Two days later, on March 3,[2] during consideration by the Senate of the deficiency appropriation bill, Mr. Lorimer requested that an item granting him $25,000 for expenses incurred in defense of his title to his seat be rejected. After some debate the item was disagreed to.

107. The Senate case of William, Lorimer, of Illinois, in the Sixty–second Congress.

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[1] Record, p. 3760.

[2] Record p. 1113.

Instance wherein the Senate appointed, to investigate an election, a special committee made up of members of the Committee on Privileges and Elections.

Instance wherein a special committee was appointed with instructions to investigate and report to the Senate upon the sources and use of a fund alleged to have affected the election of a Senator.

A former decision by the Senate on a contested election does not preclude reopening the case if additional evidence is discovered.

In passing on an election case the Senate exercises a judicial function, and its decisions must be based upon legal principles and be in accordance with the evidence.

On May 20, 1912,[1] in the Senate, Mr. William P. Dillingham, of Vermont, from the Committee on Privileges and Elections, submitted the report of the majority of the committee in the second investigation of the election of William Lorimer, of Illinois.

A prior investigation of the same election had been concluded by a vote in the Senate confirming the Senator's title to his seat.

The following chronological statement of the first investigation is thus set out in the report:

The Forty-sixth General Assembly of Illinois met and organized January 6, 1909. On that day the house elected Edward D. Shurtleff speaker.

The first vote for United States Senator in the separate houses of the legislature was taken January 19, 1909. The first joint ballot for United States Senator was taken January 20, 1909. There were 95 joint ballots for United States Senator. More than 150 different men were voted for, for United States Senator, by that legislature.

The first vote for William Lorimer for United States Senator was cast May 13, 1909. William Lorimer was elected Senator on the ninety-fifth joint ballot, taken on the 26th day of May, 1909.

There were 202 members of the legislature present and voting on the ninety-fifth ballot, May 26, 1909. On that ballot William Lorimer received 108 votes for United States Senator, Albert J. Hopkins received 70 votes, and Lawrence B. Stringer received 24 votes. Senator Lorimer had a majority of 14 votes.

Two hundred and four members had been elected to the Forty-sixth General Assembly of Illinois. Paul Zaable, a member of the house, died in January, and the vacancy was not filled at that session. Frank P. Schmidt, a member of the senate, was not present at the taking of the ninety-fifth ballot.

The total number of Republicans elected to the house was 89; the total number of Democrats elected to the house was 64. The total number of Republicans in the senate was 38; the total number of Democrats in the senate was 13. The total number of Republican elected to both houses of the legislature was 127; the total number of Democrats elected to both houses of the legislature was 77.

On the ninety-fifth ballot 55 Republican votes and 53 Democratic votes were cast for Mr. Lorimer.

William Lorimer was commissioned United States Senator by Gov. Deneen on May 27, 1909.

Senator Lorimer was sworn in and took his seat in the United States Senate June 18, 1909.

On April 30, 1910, the Chicago Tribune published the White story.

April 29, 1910, State's Attorney Wayman filed a petition for and obtained an order calling a special grand jury in Cook County.

May 2, 1910, the special grand jury convened and was sworn in.

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[1] Second session Sixty-second Congress, Senate Report No. 769; Record, p. 6790.

Lee O'Neil Browne was indicted on the 6th day of May, 1910, on a charge of bribing Charles A. White to vote for Senator Lorimer.

May 28, 1910, Senator Lorimer made a speech in the United States Senate and demanded an investigation of the charges made by the Chicago Tribune April 30, 1910.

On June 7, 1910, Clifford W. Barnes filed charges in the Senate of the United States against Senator Lorimer.

June 20, 1910, the United States Senate adopted a resolution providing for an investigation.

A subcommittee of the Committee on Privileges and Elections of the Senate of the United States, of which Senator Burrows was chairman, was appointed to investigate the charges against Senator Lorimer.

September 20, 1910, the subcommittee of the Committee on Privileges and Elections of the Senate of the United States convened in Chicago to hear testimony. September 22, 1910, the subcommittee of the Senate held its first public hearing.

The subcommittee of the Senate concluded the hearing of testimony in Chicago October 8, 1910.

December 7, 1910, the subcommittee of the United States Senate took further testimony in Washington, D. C., and on that day concluded the public hearings.

December 21, 1910, the Committee on Privileges and Elections of the Senate presented its report to the Senate of the United States. The report exonerated Senator Lorimer and found:

"In our opinion the title of Mr. Lorimer to a seat in the Senate has not been shown to be invalid by the use or employment of corrupt methods or practices."

On January 9, 1911, Senator Beveridge submitted his views to the Senate of the United States, dissenting from the report of the Committee on Privileges and Elections, and offered the following resolution:

"Resolved, That William Lorimer was not duly and legally elected to a seat in the Senate of the United States by the Legislature of the State of Illinois."

On January 30, 1911, Senator Frazier, a member of the Committee on Privileges and Elections, submitted his views to the Senate, concurring in the resolution offered by Senator Beveridge.

The report of the Committee on Privileges and Elections and the resolution of Senator Beveridge were discussed and debated on the floor of the Senate at intervals until March 1, 1911.

On the 1st of March, 1911, the resolution of Senator Beveridge was determined in the negative by the Senate; a roll call thereon resulted in a vote—nays 46, yeas 40.

The Sixty-first Congress adjourned sine die at noon March 4, 1911.

While the first investigation was still in progress, the senate of the Illinois Legislature also appointed a committee to investigate the election. During the investigation by the Illinois Senate the Record-Herald, a Chicago newspaper, published an editorial in which the following language was used:

Do we know all there is to be known concerning the $100,000 fund that was raised to pay for Lorimer's votes?

The editorial attracted wide attention, and Herman H. Kohlsaat, the editor of the paper, was summoned before the Illinois committee and gave the following testimony:

Q. What is your full name?—A. Herman H. Kohlsaat.

Q. You are the editor and proprietor of the Chicago Record-Herald?—A. Yes.

Q. In February of this year, Mr. Kohlsaat, there was published in the Chicago Record-Herald an editorial in reference to the senatorial action at Springfield. I will show you a copy of that editorial, or what purports to be a substantial copy [handing document to witness].—A. (Examining document). I think that is practically correct, because that is the way I felt and feel.

Q. That editorial, then, was written by you?—A. Dictated.

Q. You had information upon which that editorial was based?—A. Yes.

Q. Have you an objection to giving the committee that information?—A. Yes.

Q. Well, do you object to giving the committee the information which you had, without at this time, perhaps, identifying the individual or individuals who gave you the information?—A. Yes; because if I did that it would naturally lead up to the main party in the controversy, and it would undo just what I do not want to do.

Q. There were a number of editorials written along that same line, were there not?—A. Yes.

Q. About that time?—A. Yes. Shall I just tell this in my own way?

Q. Just tell it in your own way, yes.—A. Shortly after the Chicago Tribune published Representative White's story last spring I met a friend of mine, a man of the highest character, intelligence, and a man who does not make reckless statements, and he gave me a detailed account of the raising of $100,000 to bring about the election of Mr. Lorimer. He gave it to me in confidence. I told him that the confidence would not be betrayed. With that feeling of perfect security that this man's information that he gave me was absolutely reliable, I took the position that the election should be investigated and came out editorially and backed the Tribune in its fight. The natural inclination in cases of that kind, where there are two great papers striving in the same field for circulation, advertising, and influence, is to, in the language of the street, knock the other paper's story. But I was so impressed with the truth of this that I came out editorially next day after this and backed the Tribune in their story, and have done it ever since.

As I say, this was given to me in confidence. The cardinal principle of an honorable, upright newspaper man is confidence.

Q. Did he inform you that a fund of $100,000 had been raised to induce the election of Senator Lorimer in the State of Illinois?—A. He did.

Q. Did he also tell you that the man or men who had raised that $100,000 fund desired to reimburse themselves, or solicit 10 other men, residents of Chicago, to make that amount good?—A. I must decline to answer.

Q. And did he tell you that he was one of the men so approached?—A. I decline to answer.

Q. Did he give you the name or names of men who approached him, and what they said to him in connection with the matter?—A. I must decline to answer.

(Whereupon the committee went into executive session, at the conclusion of which the open session was resumed and the following proceedings had:)

Chairman HELM. Mr. Kohlsaat, the committee has agreed that we will have to require you to answer, and if you refuse that we will report the matter to the senate and request you to appear back here next Wednesday to see what the senate desires to do in the matter. Will you still persist in refusing to answer?—A. Yes.

Q. You decline to make any further disclosure?—A. Yes.

The witness persisted in refusing to divulge the name of his informant, until April 5, 1911, when Clarence A. Funk, of Chicago, voluntarily appeared before the committee as the informant referred to, and testified as follows:

Q. What is your full name, Mr. Funk?—A. Clarence S. Funk.

Q. Where do you live?—A. In Oak Park, Chicago.

Q. And what is your business?—A. I am general manager of the International Harvester Co.

Q. I direct your attention to a conversation that you had with Edward Hines, of the Edward Hines Lumber Co., in the latter part of the month of May, 1909, or the early part of the month of June, 1909. Did such a conversation take place?—A. Well, I can not identify the month. I had a conversation with Edward Hines shortly after Lorimer was elected United States Senator by the legislature.

Q. Well, it is in the record here that the election of Senator Lorimer was on the 26th of May, 1909. Directing your mind to that time, or about that time, when was it that this conversation occurred?—A. It was shortly after that. I could not say whether it was 5 days or 10, but it was within a short time afterwards.

Q. Where did that conversation take place?—A. Union League Club, Chicago.

Q. And with whom was the conversation?—A. Edward Hines.

Q. Was the conference arranged in any way or was it more or less accidental?—A. I met Mr. Hines accidentally, and he said he had been trying to get a chance to see me or get time to see me.

Q. Now, will you tell the committee, Mr. Funk, what occurred and what was said at that conversation by Mr. Hines and by yourself?—A. Do you want me to undertake to repeat verbatim?

Q. As near as you can remember; otherwise the substance of the conversation.—A. Well, he said I was just the fellow he had been looking for, or trying to see, and said he wanted to talk to me a minute. So we went and sat down on one of the leather couches there on the side of the room, and without any preliminaries, and quite as a matter of course, he said, "Well, we put Lorimer over down at Springfield, but it cost us about a hundred thousand dollars to do it." Then he went on to say that they had had to act quickly when the time came; that they had had no chance to consult anyone beforehand. I think his words were these "We had to act quickly when the time came, so we put up the money." Then he said "We—now we are seeing some of our friends so as to get it fixed up." He says they had advanced the money; that they were now seeing several people whom they thought would be interested to get them to reimburse them. I asked him why he came to us. I said "Why do you come to us?"—meaning the harvester company. He said, "Well, you people are just as much interested as any of us in having the right kind of a man at Washington." Well, I said—I think I replied, and said, "We won't have anything to do with that matter at all." He said, "Why not?" I sad, "Simply because we are not in that sort of business." And we had some aimless discussion back and forth, and I remember I asked him how much he was getting from his different friends. He said, "Well, of course we can only go to a few big people; but if about 10 of us will put up $10,000 apiece that will clean it up." That is the substance of the conversation. I am repeating it verbatim just as far as I can, Mr. Chairman. I do not undertake to say that is absolutely exact.

I left him then in just a moment. As I left he asked me to think it over. I made no reply to that. I just walked away.

This testimony was given wide publicity through the public press and on the following day, April 6,[1] in the Senate, Mr. Robert M. La Follette, of Wisconsin, presented as privileged the following resolution with the request that it lie on the table subject to call:

Whereas the Senate by resolution adopted on the 20th day of June, 1910, authorized and directed the Committee on Privileges and Elections to investigate certain charges against William Lorimer, a Senator from the State of Illinois and to report to the Senate whether in the election of said Lorimer as a Senator of the United States from said State of Illinois there were used and employed corrupt methods and practices; and

Whereas said committee, pursuant to said resolution, took the testimony of a large number of witnesses, reduced the testimony to printed form, and reported the same to the Senate, which was thereafter considered and acted upon by the Senate; and

Whereas the Illinois State Senate thereafter appointed a committee to investigate like charges against William Lorimer and to report to said State senate whether in the election of said Lorimer to the United States Senate corrupt methods and practices were employed and used; and

Whereas as it appears from the published reports of the proceedings of the said Illinois State Senate committee that witnesses who were not called and sworn by the committee of this Senate appointed to investigate said charges have appeared before the said committee of the Illinois State Senate, and upon being interrogated have given important material testimony tending to prove that $100,000 was corruptly expended to secure the election of William Lorimer to the United States Senate:

Resolved, That Senators John D. Works, Charles E. Townsend, George P. McLean, John W. Kern, and Atlee Pomerene be, and they are hereby, appointed a special committee, and as such committee be, and are hereby, authorized and directed to investigate and report to the Senate whether in the election of William Lorimer, as a Senator of the United States from the State of Illinois, there were used and employed corrupt methods and practices; that said committee be

[1] First session Sixty-second Congress, Record, p. 101.

authorized to sit during the sessions of the Senate and during any recess of the Senate or of Congress, to hold sessions at such place or places as it shall deem most convenient for the purposes of the investigation, to employ stenographers, to send for persons and papers, to administer oaths, and to report the results of its investigation, including all testimony taken by it; and that the expenses of the inquiry shall be paid from the contingent fund of the Senate upon vouchers to be approved by the chairman of the committee.

108. The Senate case of William Lorimer in the Sixty-second Congress, continued.

Decision by committee that defense of res adjudicata could be invoked against reconsideration of election case once passed upon was rejected by the Senate.

Decision by committee that payment to members of legislature of money not shown to have been paid for specific purpose of electing Senator did not invalidate election, overruled by Senate.

The Senate invalidated an election procured by corrupt practices without holding the Senator cognizant of the corrupt practices on which invalidated.

On June 7, 1911,[1] the Senate agreed to the following resolution:

Resolved, That a committee of the United States Senate consisting of the following members of the Committee on Privileges and Elections: Senators Dillingham, Gamble, Jones, Kenyon, Johnston, Fletcher, Kern, and Lea, be, and are hereby, authorized, empowered, and directed forthwith to investigate whether in the election of William Lorimer as a Senator of the United States from the State of Illinois there were used and employed corrupt methods and practices.

That said committee be authorized to sit during the sessions of the Senate and during any recess of the Senate or of Congress; to hold sessions at such place or places as it shall deem most convenient for the purpose of the investigation; to employ stenographers, counsel, accountants, and such other assistants as it may deem necessary; to send for persons, books, records, and papers; to administer oaths; and as early as practicable to report to the Senate the results of its investigation, including all testimony taken by it; and that the expenses of the inquiry shall be paid from the contingent fund of the Senate upon vouchers to be approved by the chairman of the committee.

The committee is further and specially instructed to inquire fully into and report upon the sources and use of the alleged "jack-pot" fund, or any other fund, in its relation to and effect, if any, upon the election of William Lorimer to the Senate.

At the outset of the investigation, counsel for Mr. Lorimer raised the issue of res adjudicata, contending that the case had been fully investigated and finally determined by the Senate and such action was a bar to further proceedings questioning the validity of the election.

In support of this doctrine Mr. D. Upshaw Fletcher, of Florida, said[2] in the Senate:

This case has been adjudicated; the action taken March 3, 1911, was final and forever settled the question involved, certainly in the absence of new evidence of such a nature that, had it been introduced before, would or might have produced a different result.

This case was passed upon by the Senate of the Sixty-first Congress, the term expiring March 4, 1911. Some 30 changes had taken place in the membership of the Senate by the time the Sixty-second Congress convened. Owing to these changes this case was ordered retried—the alleged grounds being, however, that new evidence had been discovered, which, if presented and considered,

[1] First session Sixty-second Congress, Record, p. 1732.

[2] Second session Sixty-second Congress, Record, p. 8725.

would make a different case. Many Senators believed additional and newly discovered evidence existed, and in view of the charges made it would be advisable to make another investigation and ascertain what new facts could be uncovered. This action will likely serve as a precedent—although the Senate treats each case, apparently, from the standpoint of power and might—that is liable to plague us in future. In similar cases the Senate adopted the doctrine of res adjudicata, as far back as 1858.

The change of the personnel of the Senate should not prompt a change of decision reached as judges acting in a judicial capacity any more than a change in the individual justices on the bench should of itself give grounds for the rehearing of a cause. Unless a different case is presented involving different facts or additional, material facts not known before, clearly it must be recognized as an unjust interference, wrongfully imposing expense and trouble, to repeatedly bring to the bar a Senator and require him time after time to defend his right to his seat in this body. If, in the Sixty-first Congress, he is tried, and again in the Sixty-second, can he not be in the Sixty-third and Sixty-fourth, and yearly to the end of his term? When is the judgment of the Senate to be conclusive, and forever bar any further proceedings to adjudicate the same question? The authorities uniformly hold that the rule of res adjudicata applies in this case, and is a complete answer to the resolution offered and now pending. The report of the committee sets forth a number of authorities, and I will not elaborate upon them. The Senate has the *power* to force a reexamination of the questions and a new vote by a new Senate on a resolution to the same effect as the one previously voted on, but that is not the same thing as having the legal or moral *right* to do so.

In opposition to this view Mr. Luke Lea, of Tennessee, said: [1]

The question of law presented is whether the Senate has a right now to consider this case, since, on March 1, 1911, by a vote of 46 to 40, a resolution was adopted declaring the election of Senator Lorimer valid. The second question, one of fact, is whether this record now before the Senate establishes the election of Senator Lorimer to have been obtained by corrupt methods and practices.

Considering the question of law first, the plea of res adjudicata was pleaded after the conclusion of all the testimony and immediately prior to the conclusion of the hearings by the special investigating committee. It presents to the Senate the question of whether the plea of res adjudicata, as known to court practice, can prevent a reconsideration by the Senate of this case upon its merits.

The judicial functions of the Senate in passing upon the election and qualifications of its Members are purely incidental and subsidiary to its principal functions, which are legislative. The distinction between the functions of a legislative body and a judicial tribunal is that those of the legislative body are necessarily never final, while those of the judicial tribunal must necessarily be final. It is conceded that the plea of res adjudicata, can never be properly invoked in court until there is a final judgment, and as there never can be a final judgment in a legislative body, whose judicial functions are merely incidental to its legislative functions, the plea of res adjudicata, can never be properly plead.

The true doctrine is that the Senate should never reopen an election case for the purpose of permitting a changed political complexion to reverse a former verdict, but that the Members of the Senate should never hide behind a technical plea to avoid correcting a former erroneous decision; that an election case is never finally decided until it is decided right upon the fullest and fairest investigation and consideration of all the facts that can possibly be obtained. The reason for such a rule is apparent. If a changed political complexion would justify the reversal of the former verdict, then election cases would be decided, not according to their merits or justice to the parties, but according to the dominant political opinion of the Senate. On the other hand, the reason is equally strong that the Senate should reopen an election case wherever there is new or material evidence or where, on the whole record, from an equitable standpoint, it should reconsider its former verdict either for or against the Member whose seat is contested.

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[1] Record, p. 8884.

The report says:

One of the most elementary doctrines of the law, perhaps the one most universally accepted, is the doctrine of *res adjudicata*.

The rule of res adjudicata, is in force in every American court and in every governmental body or organization that performs, even though but incidentally, judicial functions. The Cyclopedia of Law and Procedure cites the following bodies, boards, and officers whose judgments have been held to constitute res adjudicata, (vol. 23, pp. 1219–1221):

Courts-martial; church judicatories; Commissioner of Patents; Comptroller of the Currency; collector of customs; Board of Land Commissioners; road commissioners in adjudicating upon the necessity of a road and in locating and making assessments for it; the common council of a city in canvassing election returns; board of city police commissioners acting as a court for the trial of members of the police force. An these subordinate and merely quasi judicial agencies, and many others of similar character, are bound by the law of res adjudicata when they seek to review their former decisions in a matter involving the exercise of a judicial function.

The Senate has held that the doctrine of res adjudicata, is applicable to election cases and in numerous instances has enforced and applied that doctrine.

The majority then cite numerous authorities and precedents and continue:

Counsel for Senator Lorimer might well have withheld filing the plea until some resolution was offered declaring the election invalid. The resolution appointing this committee directed an investigation of the election. If, as a result of that investigation or otherwise, any resolution should be hereafter offered to the Senate declaring that the election of William Lorimer as a Senator from Illinois was illegal and invalid, when such a resolution is offered it would be in order for Senator Lorimer to invoke the defense of res adjudicata. Until such a resolution is offered and under consideration in the Senate there would be no occasion, measured by the analogies of a pleading in a court of law or in equity, for a Senator formally to present his defense. The Senate by the adoption of the resolution appointing this committee did not vacate or attempt to vacate the former judgment. Neither Senator Lorimer nor anyone else could know what the Senate meditated doing when the investigation was concluded—could not know whether or not any resolution would even be offered assailing the validity of the election in question. But the plea serves to call to the attention of this committee the question of res adjudicata; and this committee deems it its duty to present to the Senate the facts and the contentions bearing on that question so that the Senate may, as the defense of res adjudicata is made, understand that any resolution which may be offered would be subject to the defense of res adjudicata.

In the argument submitted in behalf of Senator Lorimer the case is thus analyzed:

There was in the case at bar (A) a final judgment (B) by a competent tribunal invested with complete jurisdiction to try the issue; (C) the parties to the former judgment are the same parties as are now in controversy, and (D) the issues and causes of action were precisely the same. When these elements are present the former judgment is a bar not only to what was actually litigated in the former suit, but to all matters that might have been litigated under the issues thereof.

The majority agree that each of the enumerated elements is present in the case, and that a resolution declaring against the validity of the election would be subject to the defense of res adjudicata.

The majority say as to the first item:

(A) The adjudication by the Senate, by its action of March 1, 1911, on the resolution, was final. By that action the Senate finally adjudged that Senator Lorimer was duly and legally elected to a seat in the Senate of the United States. As pointed out by counsel for Senator Lorimer, "If the resolution had been adopted Senator Lorimer would have been unseated, and he could not have asked the Senate at the Sixty-second Congress to rehear him and change its judgment." Manifestly, the judgment, if against him, would have been final, and equally plain

is the fact that the judgment for him was also final. No contention can be made that the form of the resolution prevents its being considered a final judgment.

The sentence or decision of the Senate is all contested election cases and in all expulsion cases has been made by resolution. Counsel cites many cases in the Senate by some of which the title of a Senator to his seat has been confirmed and by others of which expulsion has been defeated, where the judgment of the Senate was expressed by the determination of a resolution in the negative. We deem it unnecessary to review these cases.

The courts have decided that the determination of a matter of election by the adoption of a resolution in a legislative body constitutes a final adjudication. (State of Maryland *v.* Jarrett & Harwood, 17 Md., 309; Opinion of the Justices, 56 N.H., 570.)

As to the second item:

(B) The Senate was a tribunal competent to render the judgment.

The numerous decisions of the courts and of the Senate itself cited of this report establish that the Senate, in passing upon an election case, is a court exercising purely judicial functions. Moreover, the jurisdiction of the Senate in such a matter is exclusive.

Herman on Estoppel says (see. 131, p. 143):

"A much more conclusive effect is given to judgments of courts of exclusive jurisdiction than to judgments of courts which have only concurrent jurisdiction."

The fact that the judgment was rendered by a divided court does not detract from its conclusiveness as res adjudicata. It has been held by the Supreme Court of the United States, and by many other courts, that the fact the former judgment was pronounced by a divided court, or even a court equally divided, as sometimes happens in cases of affirmance by operation of law in courts of appellate review, makes the judgment none the less binding. (Durant *v.* Essex County, 7 Wall., 107; McAllister *v.* Hamilton, 61 S. C., 6; 39 S. E., 182; Kolb *v.* Swann, 68 Md., 516; 13 Atl., 379.)

As to the third item:

(C) The parties to the proceeding are the same.

In cases of judgments in rem identity of parties is not an element essential to the application of the doctrine of res adjudicata because in such a case the former judgment includes not only the parties, but the whole world. In the Fitch and Bright case the Senate treated the former judgment as a judgment in rem. When the judgment is in personam, the law requires that the parties in the second proceeding be the same as the parties in the proceeding leading to the former judgment. In any proceeding against the validity of the election of William Lorimer the plaintiff would be the Senate itself in its inquisitorial or prosecuting capacity and the defendant would be, of course, William Lorimer. Much of the law of res adjudicata has been borrowed by modern jurisdictions from the civil law of Rome. In the Roman law the respective parties were known as the actor and the reus. In legal contemplation the judgment pronounced by the Senate, March 1, 1911, was in the action of the United States Senate, actor, *v.* William Lorimer, reus. The Government and its branches and agencies are subject to the operation of the law of res adjudicata the mine as individuals. (See the decision of the Supreme Court of the United States in United States *v.* California & Oregon Land Co., 192 U.S., 355.)

As to the fourth item:

(D) If, as a result of this investigation, there should be presented to the Senate a resolution that the election of William Lorimer was invalid, then the issue raised by that resolution would be precisely the same as that in the proceeding leading to the judgment of March 1, 1911, whereby the Senate adjudicated that the election of William Lorimer was valid and legal. Beyond all question, complete identity of issue is shown by the record.

The majority therefore conclude:

Your committee, therefore, concludes that both on principle and by authority the action of the Senate March 1, 1911, deciding that the election of William Lorimer was valid and legal, con-

stitutes res adjudicata as against any subsequent attempt to have the Senate decide that the election was not valid and legal.

In this connection it is well to direct attention to the fact that the principle of res adjudicata embraces not only what was actually determined, but extends also to every matter which, under the issues, the parties might have litigated. As pointed out in the briefs submitted, there is some misunderstanding as to the law of res adjudicata, due to attempts to cover the whole subject by definite rules intended to be applicable to all cases. Where the issues are the same the bar of the former judgment extends not only to points actually decided but to all the points and questions which could have been litigated under the issues in the former proceeding. Where the issues are not the same and where a former judgment is relied on simply as an estoppel on some limited issue that is common to both proceedings, then the law is that the former judgment is conclusive only as to what was actually decided. But the latter principle has no possible application here because, beyond all question, the issue would be the same as it was in the former proceeding in the Senate, namely, whether the election of William Lorimer as a Senator from Illinois was valid and legal. The rule that where the former judgment was upon the same issues it is a bar not only as to what was actually litigated and decided, but as to everything that might have been litigated under the issues in the former proceeding, has, as said by Herman on Estoppel (sec. 125, pp. 133, 134), "not only gone unchallenged for more than a half century, but a uniform and unbroken line of cases has given it approval."

Everything that has been brought forward in the present investigation could have been presented and litigated in the former proceeding under the issues thereof. The existence of the evidence with the taking of which the present hearing was begun, namely, the testimony of Clarence S. Funk, was known to some Senators at the time of the former hearing of this matter before the Senate. Mr. Kohlsaat, the editor of the Chicago Record-Herald, sent telegrams and letters to a number of Senators advising them of the existence of that evidence during the pendency of the question before the Senate and before its final action. The former committee permitted the Tribune to be represented before it by counsel. The editor of the Tribune knew from Mr. Kohlsaat of the existence of that evidence while the subcommittee was sitting in Chicago engaged in taking the testimony. (Record, 2001–2003.) No effort was ever made by those who undertook to present all the evidence and who knew of the Funk story to present in that proceeding any phase of the subject covered by the testimony of Mr. Funk. Manifestly no judicial tribunal should encourage the trying of a case by piecemeal. The very object of courts is to put an end to controversy. And no court would permit a party who has knowledge of his evidence to withhold it at the first trial for the purpose of getting a second trial if defeated in the first.

As an application of the principle established by the authorities last referred to, the law is clearly to the effect that newly discovered evidence furnishes no ground for avoiding the bar of a former final judgment. Some of the laity may have the impression that a former judgment can be nullified by bringing forth at a second hearing newly discovered evidence. No law author and no court recognizes any such exception to the doctrine of res adjudicata.

The authorities make it plain that the Senate is barred by the rule of res adjudicata from reopening and rehearing this case on the ground of newly discovered evidence.

But the newly discovered evidence question is not one of great importance in this matter, for the reason that even if the doctrine of res adjudicata were not in the way no case whatever has been made out that would warrant the granting of a new trial on the ground of newly discovered evidence. In that class of cases where the courts set aside verdicts and grant new trials for newly discovered evidence, there are certain well-defined limitations upon granting new trials on that ground. The granting of new trials on the ground of newly discovered evidence is a power cautiously exercised by the courts, and the strictest rules are applied in examining an application on such a ground.

In the first place, the evidence newly discovered must be "of such a character and strength that it is reasonably certain that it would have produced an opposite result if produced at the trial"; the new evidence must be incontrovertible and conclusive. (29 Cyclopedia of Law and Procedure, 900–902, and several hundred decisions cited in notes; 23 Cyclopedia of Law and Procedure, 1031.) "The evidence must not be merely cumulative or corroborative or merely intended to impeach some

of the witnesses at the former trial." (Same authorities, and 29 Cyclopedia of Law and Procedure, 907–918.)

In the next place, the evidence must actually have been discovered after the time of the former trial, and the party seeking the new trial must excuse his failure to produce the new evidence by showing that he failed to discover it, notwithstanding the exercise of due diligence by him. Of course, if the party knows of the new evidence at the time of the former trial, such knowledge is a complete bar to the granting of a new trial on this ground. (29 Cyclopedia of Law and Procedure, 885, 886, et seq.; 23 Cyclopedia of Law and Procedure, 103.)

The record clearly shows in the present proceeding that the existence of the principal new evidence which it may be claimed was the occasion for making the new inquiry was known to some Senators at the time of the former hearing before the Senate.

Moreover, the granting of new trials on the ground of newly discovered evidence is usually to the party defendant. (6 Pomeroy's Equity Jurisprudence, edition of 1905, sec. 661; 23 Cyclopedia of Law and Procedure, 1030.) Few, if any, cases can be found where such relief was granted to one who occupied the position of plaintiff in the former trial. The reason for this is that it generally lies within the power of the party plaintiff to dismiss his proceedings and to start them anew if he deems his evidence insufficient, especially if he had any intimation that additional evidence could be produced.

The new evidence introduced on this hearing was mainly of these three classes: (1) Rumor, gossip, and opinion about various members of the Illinois Legislature; (2) evidence such as the testimony of Clarence S. Funk as to talk of a fund in connection with the senatorial election, which we show elsewhere was known by those urging this reinvestigation while the former one was in progress; (3) evidence favorable to Senator Lorimer, contradicting certain testimony adverse to him, and explaining many circumstances not explained on the first investigation.

Of course, the evidence of the third class furnishes no newly discovered evidence to overturn the former judgment.

No one could say that the evidence of the first class was conclusive. It was not even evidence in any legal sense. Thousands of pages of the record contain testimony of this kind, which would not have been competent under any rules governing the admissibility of evidence, but which was received by this committee in order to obtain every possible matter of information bearing on the situation. For example, there was evidence that some members of the Illinois Legislature, several months after the senatorial election, were seen in possession of a number of $100 bills. The possession of such money was no evidence that it was acquired corruptly, for it is at least as reasonable to infer that it was obtained honestly. But if it appeared the member was unable to account clearly for the possession of the money, and if there were anything to indicate a possibility that the money was obtained as a result of corrupt practices, there is no reason whatever for inferring from the fact of possession of the money by such a member that the money was received as a payment for voting for Senator Lorimer. Such a member voted on several hundred measures in the session. One of the laws enacted at that session limited the hours of work for women in factories to 10 hours. It would be absurd to say that the possession of the money was proof that a member who voted for that law was paid for so doing. It is equally absurd to contend that the mere fact that some member of the legislature not in any way otherwise subject to any imputation of corruption in voting for Mr. Lorimer, was in possession of money several months after the election, was evidence that he had received that money for voting for Senator Lorimer. All the evidence of this class was lacking in that conclusiveness essential to the granting of new trials on the ground of newly discovered evidence.

So, even if it were proper to vacate the former judgment on the ground of newly discovered evidence, there is no newly discovered evidence to which attaches conclusiveness and the other elements uniformly recognized by the courts as necessary to be present in order to warrant granting a new trial on the ground of newly discovered evidence.

If a tribunal will not respect its own judgments it can not expect others to do so. This committee submits the enforcement of the doctrine of res adjudicata is essential to uphold the dignity of the court pronouncing the judgment in this case. The reasons which call for the enforcement of the doctrine of res adjudicata by the courts apply even more strongly to the Senate.

Our conclusion is the doctrine of res adjudicata applies here and the former judgment of the Senate rendered March 1, 1911, herein is conclusive.

109. The Senate case of William Lorimer in the Sixty-second Congress, continued.

Instance wherein the Senate, after investigating an election and declaring it valid, again investigated and reversed its decision.

Report of committee minority declaring that Senate in ordering a second investigation thereby passed upon question of res adjudicata was sustained by the Senate.

Instance wherein minority views, holding a Senator elected by corrupt practices and therefore not entitled to his seat, were sustained by the Senate.

The Senate recognizes no precedents save those established by itself in analogous cases.

The Senate having invalidated the election of a Senator, no action was taken on a proposition to reimburse him for expenses incurred in defense of title to his seat.

Minority view submitted by Mr. Lea, signed also by Mr. William S. Kenyon, of Iowa, and Mr. John W. Kern, of Indiana, join issue on the question of res adjudicata as follows:

An effort was made, as is shown by the report of the action of the committee on March 27, 1912, to rest the action of the committee in this case upon the plea of res adjudicata. We do not believe that such a plea is applicable or tenable in this case.

As we understand the procedure, the resolution relative to the second investigation of the election of Senator Lorimer was referred to the Committee on Privileges and Elections to report whether a new investigation was warranted, and that the committee in reporting the resolution ordering another investigation in fact reported that there was sufficient grounds for another investigation, and the Senate, in adopting this report of the Committee on Privileges and Elections and the resolution presented creating this committee, on June 7, 1911, ordered a new trial, and in ordering a new trial acted upon the question of res adjudicata—the plea of res adjudicata being such as can be made on the motion of the court or the tribunal acting as a court at any time—and that the committee appointed under the resolution adopted on June 7, 1912, should not, under the authority of its appointment, make any report upon the law involving the right of the Senate to reopen the case, but that said committee had only authority to make a report responsive to the resolution appointing and instructing the committee.

In election cases before the Senate a mistake is frequently made in drawing a comparison between such a trial and a criminal trial in court. Analogies are frequently misleading, and an analogy between the trial of an election case by the Senate and a criminal case is most misleading. The comparison, if drawn, should be between the trial of a Senate election case and a civil case before a court.

Subsection 1 of section 5 of Article I of the Constitution of the United States provides:

"Each House shall be the judge of the election, returns and qualifications of its own Members."

So that no precedents or decisions of courts or other legislative bodies can have any but argumentative weight in the determination of an election case in either House of Congress.

The Senate is not bound by any precedents, and the only ones that are of any value in the determination of such a question are those which have been made by the Senate in determining similar cases heretofore.

It is submitted that there is no precedent of the Senate of the United States holding that a contested-election case may not be reopened, and at least there are dicta to the contrary.

After discussing cases referred to by the majority the minority say:

Summarizing these cases we find not a single one that has held that the Senate could not reopen a contested-election case on the ground of newly discovered evidence; but, on the contrary, we find statements in support of a report against reopening a case, from which the inference can be fairly and logically drawn that if there had been newly discovered evidence the case should have been reopened, and an unacted upon report by the Committee on Privileges and Elections in favor of reopening on the ground of newly discovered evidence a contested-election case that had been finally decided.

The instructions to the committee to report upon the sources and uses of an alleged jack-pot fund is thus complied with by the majority:

This committee was specially instructed to inquire fully into and report upon the sources and use of the alleged jack-pot fund, or any other fund, in its relation to and effect, if any, upon the election of William Lorimer to the Senate.

The committee has hereinbefore specifically reported its inability to find any evidence of the existence of a jack pot or any other fund raised or used for the purpose of affecting such election.

After discussing exhaustively the evidence submitted in the case the majority conclude:

The Senate has once solemnly and deliberately passed upon the charges made against him. Its judgment, after a full investigation and extensive argument, was in his favor, and should stand unless new and convincing evidence is produced establishing corruption in his election. This rule is more liberal toward the Senate and the people than toward Mr. Lorimer, because if the judgment had been against him he would have been bound by it, and no amount of proof showing the injustice of the decision against him would secure its reversal and his reinstatement as a member of this body.

Absolutely no new and substantial evidence has been produced or discovered on this reinvestigation showing that he was elected by corruption, and we believe that all the rules of law, judicial procedure, and justice require that the former judgment of the Senate should be held to be conclusive and final.

There is absolutely no evidence in all the testimony submitted intimating, suggesting, or charging that William Lorimer was personally guilty of any corrupt practices in securing his election, or that he had any knowledge of any such corrupt practices, or that he authorized anyone to employ corrupt practices in his election.

We are convinced that no vote was secured for him by bribery; that whatever money White, Beckemeyer, Link, Holstlaw, or any other person received was not paid to him or them by anyone on Mr. Lorimer's behalf or in consideration of or to secure such vote or votes for him; that neither Edward Hines nor anyone else raised or contributed to a fund to be used to secure his election; that his election was the logical result of existing political conditions in the State of Illinois, and was free from any corrupt practice, and therefore we must find, and we do find, that William Lorimer's election was not brought about or influenced by corrupt methods and practices.

From this conclusion the minority dissent and after commenting on the evidence say:

In considering the evidence presented in this case, it must be borne in mind that the crime of bribery is distinct from nearly every other crime, in that both parties to it have the same incentive and desire, springing from the instinct of self-preservation, to conceal the crime. In nearly every other crime the person wronged or injured is influenced by motives of revenge or desire for reparation or satisfaction to assist the State in securing the facts and punishing the offender. But in bribery both the bribe giver and the bribe taker are equally guilty and equally desirous of concealing the truth and cheating justice. In nearly every case of bribery proof thereof must rest solely upon circumstantial evidence.

But in this case there are confessions by four men that their votes were secured by bribery, and their confessions are corroborated by strong circumstantial evidence.

If bribery can not be proved in the Senate by confessions of the bribe takers, corroborated by strong circumstantial evidence, then the conclusion is irresistible that only express contracts of bribery, duly authenticated by witnesses, can establish that crime to the satisfaction of the Senate of the United States.

We are of the opinion that the evidence in this investigation shows conclusively that the following votes for William Lorimer were obtained by corrupt methods: Charles A. White, H. J. C. Beckemeyer, Michael Link, Joseph S. Clark, Henry A. Shepherd, Charles Luke, D. W. Holstlaw.

As the vote of the bribe giver is equally corrupt as that of the bribe taker, we include the following votes: Lee O'Neil Browne, Robert E. Wilson, John Broderick.

In view of the proof showing that the 10 votes of the members set out above were obtained by corruption, circumstantial and other evidence show that the following votes were also obtained by corrupt methods and practices: W. C. Blair, Thomas Tippitt, Henry L. Wheelan, John H. DeWolf, Cyril R. Jandus.

Believing that the confessions of the members of the legislature, strengthened by corroborating circumstances and by other evidence relating to the members of the legislature who did not confess, establish conclusively not only that at least 10 votes were purchased for the purpose of electing William Lorimer to the Senate, but that the record reeks and teems with evidence of a general scheme of corruption, we have no hesitancy in stating that the investigation establishes, beyond contradiction, that the election of William Lorimer was obtained by corrupt means and was therefore invalid.

In accordance with these findings the minority recommend the following resolution:

Resolved, That corrupt methods and practices were employed in the election of William Lorimer to the Senate of the United States from the State of Illinois, and that his election was therefore invalid.

The report of the committee and the resolution offered by the minority were exhaustively debated in the Senate on June 4, 5, 7, 8, July 6, 8, 9, 10, 11, 12, and 13.

On June 13,[1] the minority resolution was agreed to, yeas 55, nays 28.

On August 10,[2] Mr. Joseph F. Johnston, of Alabama, from the special committee appointed to investigate the election of William Lorimer, submitted an amendment to the deficiency appropriation bill proposing to pay Mr. Lorimer $35,000 as reimbursement for expenses incurred in defense of his title to his seat. The proposed amendment was referred to the Committee on Appropriations, which took no further action thereon.

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[1] Second session Sixty-second Congress, Record, p. 10643.

[2] Record, p. 10643.

Chapter CLXIV.[1]

TESTIMONY IN CONTESTED ELECTIONS.

110. Rules of the elections committees for hearing a contested election case.—Committees on Elections in the House of Representatives have adopted rules to govern the hearing of a contested case. The rules, as amended in 1923, are as follows:

1. All proceedings of the committee shall be recorded in the journal, which shall be signed by the clerk.

2. No paper shall be removed from the committee room without the permission of the committee, except for the purpose of being printed or used in the House.

3. Each contestant shall file with his brief an abstract of the record and testimony in the case. Said abstract shall, in every instance, cite the page of the printed testimony on which each piece of evidence referred to in his abstract is contained. If the contestee questions the correctness of the contestant's abstract, he may file with his brief a statement setting forth the particulars in which he takes issue with the contestant's abstract; and may file an amended abstract setting forth the correct record and testimony.

4. The time allowed for argument before the committee, unless otherwise ordered, shall be divided as follows: The contestant or his counsel shall be limited to one hour in opening; the contestee or his counsel shall follow for a period not exceeding one hour and a half; and the contestant or his counsel shall be entitled to half an hour in closing.

5. No persons shall be present during any executive session of the committee except members of the committee and the clerk.

6. All papers referred to the committee shall be entered on the House docket by the House docket clerk according to the number of the packages, and they shall be identified upon the docket.

7. Nothing contained in these rules shall prevent the committee, when Congress is in session, from ordering briefs to be filed and a case to be heard at any time the committee may determine.

8. The words "and without unnecessary delay" in the third line of section 127 of the Revised Statutes, as amended by the act of March 2, 1887, shall be construed to mean that all officers; taking testimony to be used in a contested-election case shall forward the same to the clerk of the House of Representatives within 30 days of the completion of the taking of said testimony.

9. The foregoing rules shall not be altered or amended except by a vote of a majority of all the members of the committee.

111. The Pennsylvania election case of Hawkins v. McCreary in the Sixty-second Congress.

[1] Supplementary to Chapter XXIII.

Although the contestant delayed the filing of testimony and briefs beyond the statutory time, the House, in view of the seriousness of the charges, consented to hear the case.

Irregularities insufficient to change the result of the election do not justify a contest.

Where it appeared that even if contestant's contentions were conceded the contestee would still have a majority of the votes cast, the House confirmed the title of sitting Member.

Although it appeared that fraud and illegal practices were prevalent in the general election, yet in the absence of legal proof that the fraud and illegal methods complained of entered into the particular election under consideration the House declined to vacate the seat.

On February 15, 1913,[1] Mr. Henry M. Goldfogle, of New York, from the Committee on Elections No. 3, submitted the report in the Pennsylvania case of Frank H. Hawkins *v.* George D. McCreary.

The filing of testimony in this case was delayed beyond the time provided by law, and the report explains:

> The contestant delayed the filing of the testimony in the case until some time during the second session of the Sixty-second Congress. The contestant's brief was not filed or submitted until after the third session began. According to the request of the counsel for the contestant, a hearing of the case was not held until the third session. In view of the serious charges of fraud and corruption and of illegal registration and illegal voting at the congressional election in said congressional district in 1910, your committee, notwithstanding the delay referred to, concluded to hear the case.

Upon hearing the evidence in the case the committee found:

> Allowing the contestant the votes which he claims should have been counted for him and deducting them from the number credited on the returns to the contestee, and entirely eliminating from the returns the votes in the districts wherein it was shown irregularities either in registration or voting occurred, it would still appear that the contestee, Mr. McCreary, had a majority of the remaining votes.

As to charges of fraud:

> While it was charged and from the evidence it appeared that at the time of the election in 1910 and for years prior to that time, gross evasion of law, illegal registration, fraudulent voting, and corrupt conduct had occurred in Philadelphia, yet legal proof was lacking to establish the fact that the fraud and corruption and illegal methods complained of entered into the election in the congressional district under consideration such as would justify a finding that the election of the member from the sixth congressional district of Pennsylvania was violated, and that in consequence his seat in this House ought to be declared vacant.

The committee therefore recommended the following resolutions:

Resolved, That Frank H. Hawkins, the contestant, was not elected a Member of the House of Representatives in the Sixty-second Congress, and is not entitled to a seat therein.

Resolved, That the Hon. George D. McCreary was duly elected a Member of the House of Representatives in the Sixty-second Congress, and is entitled to a seat therein.

The resolutions were agreed to by the House without debate or record vote.

[1] Third session Sixty-second Congress, House Report No. 1525; Journal, p. 262; Record, p. 3214; Moores' Digest, p. 61

112. The Illinois election case of Davis v. Williams in the Sixty-fourth Congress.

Specification of particulars wherein a petition for extension of time for taking testimony was deficient.

Instance wherein the application of contestant for additional time in which to take testimony was refused.

A recount of a part of the ballots will not be ordered at the instance of one party when impossible to grant a recount of the remaining ballots if requested by the other party.

A contestant having failed to show reasonable diligence, the request for time to take further testimony was denied.

The contestant having died, the committee did not recommend to the House a resolution delaring he had not been elected.

On July 21, 1916,[1] Mr. Hubert A Stephens, of Mississippi, from the Committee on Elections No. 1, submitted the report in the Illinois case of J. McCan Davis *v.* Wm. Elza Williams.

The official return in this case gave the contestee 375,465 votes and the contestant 373,682, a majority of 1,783 votes in favor of the sitting Member.

The notice of contest alleged general irregularities and informalities.

The election commissioners when subpoenaed as witnesses refused to produce the ballots for inspection, and on application of the contestant the district court entered an order directing the production of the ballots.

On March 10, 1916, the contestant filed with the committee a prayer for a recount and recanvass, as follows:

> Wherefore contestant prays that the House of Representatives authorize and direct a complete recount of ballots and a complete recanvass of precinct returns in the city of Chicago of the election November 3, 1914, for the office of Representative in Congress at large, said recount and recanvass to be conducted as expeditiously as possible under the direction of Elections Committee No. 1.

The contestant urged favorable consideration of his application on the ground that it was impossible to recount the ballots in the city of Chicago in the 40 days allowed by law.

The committee, however considered the application deficient in form:

> Contestant does not accompany his petition with affidavits showing what he expects to prove if this extension was granted, or the name of any person that he expects to call as a witness. His petition is not sworn to. Neither is there anything in the original record to show that he has proven anything on which to base his contest.
>
> In fact, the record brings nothing before the committee except notice of contest and answer thereto. The record contains many pages of what purports to be testimony in the case. It is stated that certain witnesses testified and what purports to be their testimony is set out, but no witness attested his statement, although attestation by the witnesses is required by statute. The witnesses were examined, as the record shows, before two notaries public, but the record is only certified by one notary.

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[1] First session Sixty-fourth Congress, House Report No. 1003; Journal, p. 890; Record, p. 11401; Moores' Digest, p. 89.

Therefore there is nothing legally before the committee to show anything in regard to the matter in controversy.

The notice of contest and what was attempted to be proven show that the contestant had no actual knowledge of any evidence that will prove his right to the seat in the House, nor had he knowledge of any witness or witnesses by whom he could make such proof. No effort was made to prove fraud in the election, the basis of the contest being the hope that a recount of 400,000 ballots cast in the city of Chicago would show that errors were made in the original count and tabulation of the votes, and that a correction of these errors would seat him.

An additional objection is also pointed out:

Under a provision of the Illinois statute all ballots cast in an election shall be preserved for six months. After that time they are to be destroyed unless an order is obtained to have them preserved for use in a contest. The parties to this contest were candidates at an election held November 3, 1914, and on May 3, 1915, the contestant applied to the court for an order requiring the preservation of the ballots in the city of Chicago. This was a proceeding against the election commissioners. On May 11, 1915, the following order was entered by the court:

"On motion of attorney for plaintiff it is ordered that the ballots now in the custody of the election commissioners of the city of Chicago, cast at the election on November 3, A. D. 1913, be impounded, to be used as evidence in a contest now pending between J. McCan Davis and Wm. Elza Williams for the office of Representative at large for the State of Illinois.

"It is further ordered that the election commissioners for the city of Chicago be the custodians of the same, and they are ordered to keep the same in a safe place and guard the same, in order to preserve the inviolability of the same until the further order of this court."

It will be observed that the order of the court shows that only the ballots of the city of Chicago were to be preserved. It was stated to the committee at a hearing that there were about 1,100,000 votes cast in Illinois, of which number about 400,000 votes were cast in Chicago, and that all ballots except those in Chicago were destroyed. Therefore, there are about 700,000 ballots that cannot be recounted. The committee does not think that it would be justified in recommending a recount of part of the ballots at the instance of one party, when it would be absolutely impossible for a recount of the remainder of the ballots to be had by the other party. Especially is this true in this case where there is no charge or proof of fraud, and the committee is asked simply to set out on a "fishing expedition," the only reason for which being the mere hope that errors in the count may be found.

As has been stated, the statements that purport to be the testimony of certain witnesses are unattested and the record is not certified properly; but brief reference will be made to the recount of ballots. The ballots in 61 precincts were recounted. Contestant gained in 25 precincts and contestee gained in 21. In several precincts the count was found to be correct. In several precincts each would gain and in others each would lose. Generally the gain or loss was very small. It does not appear that any fraud was committed, but that any mistakes were the result of error in the count. In this state of case it would be unfair to have one-third of the ballots recounted and let that count determine the result of this contest.

As a further reason:

Contestant used only 8 of the 40 days allowed by law in taking testimony and recounting ballots he did not file the record with the Clerk of the House until eight months after time for taking testimony had closed; and his petition for a recount of ballots was not filed for more than three months after Congress had convened.

Such a lack of diligence was shown on the part of contestant that the committee did not feel that an extension of time for the purpose of taking proof should be granted.

As the contestant died immediately following the consideration of the case by the committee, and before the report was submitted to the House, it was not considered necessary to submit a resolution declaring the contestant had not been elected, and the following resolution only was recommended for adoption:

Resolved, That Wm. Elza Williams was elected a Member of the Sixty-fourth Congress from the State of Illinois at large, and is entitled to a seat therein.

113. The Alaska election case of Wickersham v. Sulzer and Grigsby in the Sixty-sixth Congress.

Upon the death of the Member-elect the House provided by resolution for method of taking of testimony and service of notices.

Instance wherein the House by resolution extended time for taking testimony in a contested-election case.

Ex parte evidence is not admissible in a contested-election case even where death of Member-elect prevents service of notice that testimony is to be taken.

A Territorial legislature is without power to change provisions embodied by Congress in the legislative act creating the Territory.

The vote of a qualified elector prevented from voting through error or misconduct of election officials will be counted upon presentation of proof.

Votes cast before the hour provided by law for opening of polling places should not be counted.

Discussion as to distinction between laws mandatory and directory.

On February 12, 1921,[1] Mr. Cassius C. Dowell, of Iowa, from the Committee on Elections No. 3, submitted the report of the majority of the committee in the Alaska case of Wickersham *v.* Sulzer and Grigsby.

The report says:

From the official count as reported by the canvassing board, Francis Connolly received 329 votes, Charles A. Sulzer 4,487 votes, James Wickersham 4,454 votes. Sulzer's plurality 33.

Before the canvassing board had completed the canvass and announced the result, and on April 15, 1919, Charles A. Sulzer died. The canvassing board completed the canvass and declared the result on April 17, 1919, and issued a certificate of election certifying the election of Charles A. Sulzer, which certificate was duly filed with the Clerk of the House of Representatives.

The Legislature of Alaska passed an act providing for a special election to fill the vacancy caused by the death of Mr. Sulzer. This act was approved on April 28, 1919. Under this act the governor called a special election, which was held on June 3, 1919, at which special election James Wickersham was not a candidate, and George B. Grigsby received a majority of the votes cast, and the canvassing board on June 14, 1919, issued a certificate of election to George B. Grigsby, the contestee herein, which certificate was filed on July 1, 1919, and he was sworn in and took his seat in the House of Representatives as such Delegate from Alaska on said date.

After the death of Charles A. Sulzer, and after the certificate of election had been issued to him, James Wickersham, the contestant, on May 3, 1919, filed notice of contest with the Clerk of the House, and under this notice took some ex parte testimony in the case. Contestant also about June 23, 1919, served notice of contest on Mr. Grigsby, notifying him of his intention to contest the special election of June 3 and also the election of Sulzer on November 5, 1918.

The contestant being unable on account of the death of the Member-elect to comply with the statute in giving of notice and taking of testimony, proceeded to take ex parte testimony.

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[1] Third session Sixty-sixth Congress; House Report No. 1319; Record, p. 3074.

The committee, however, held:

The Committee on Elections, finding the testimony taken by contestant was ex parte, it therefore could not consider such evidence in the case.

To meet this emergency the House on July 28, 1919,[1] agreed to the following resolution:

Resolved, (1) That the time for taking testimony in the contested-election case from Alaska, James Wickersham, contestant, wherein the contestee, Charles A. Sulzer, died on April 15, 1919, two days before the issuance of the certificate of election to said Sulzer, be, and the same is hereby, extended for 90 days from the date of the passage of this resolution; (2) that contestant, Wickersham, shall have the first 40 days thereof in which to take his testimony, which shall be taken in the manner provided by the present statutes governing the taking of testimony in contested-election cases by notice served on George B. Grigsby, the successful candidate in the special Alaska election of June 3, 1919; (3) said George B. Grigsby shall have the next 40 days in which to take testimony in opposition to contestant's claim to the election of November 5, 1918, and in support of his own right shall be seated by virtue of said special election; (4) the contestant, Wickersham, to have the final 10 days in which to introduce rebuttal testimony in both elections; (5) that the governor of Alaska and the custodian of the election returns and attached ballots of the election of November 5, 1918, be, and he is hereby, commanded and required forthwith to forward by registered mail to the Clerk of the House of Representatives the whole of the election returns and all attached papers and ballots of the election of November 5, 1918, for inspection and consideration as evidence by the House of Representatives in said contested-election case; (6) and if either the contestant or the successful candidate, said George B. Grigsby, at said special election of June 3, 1919, desires the returns of that election introduced in evidence, it shall be done under the same authority and in the same manner as is provided by this resolution for securing the returns of the election of November 5, 1918; (7) that any notice which contestant would be required to serve on said Sulzer if living, to take testimony of any witness mentioned herein, or to be called to sustain any allegation in contestant's case or any other notice which contestant might be required to serve on contestee, if living, shall be served with the same legal effect on the successful candidate, said George B. Grigsby, at the said special election; (8) and any notice which the successful candidate at said special election might find necessary to serve to present his case under either of said elections may be served on contestant; (9) that the Secretary of War be, and he is hereby, requested to order by telegraph immediately on the passage of this resolution that the 40 soldiers named and whose Army status is described in the certified list, dated June 11, 1919, signed by the War Department officials, and which list is attached to the application of contestant for the passage of this resolution, be assembled at the office of the commanding officer of the United States military cable and telegraph in the towns of Valdez, Sitka, and Fairbanks, Alaska, within the 40 days' period for taking testimony by the contestant, then to be examined under oath by contestant or his attorney or agent touching the matters and things alleged in the notice and statement of contest on file in this House and in this cause, each to state specifically which candidate he voted for, and (10) the testimony of all witnesses shall be reduced to writing, signed by the witness, verified, and returned to the Clerk of the House of Representatives for use in these causes in the manner provided in the laws of the United States relating to contested elections as modified by this resolution.

Under this resolution George B. Grisgby was substituted for Charles A. Sulzer in all necessary respects in the service of notice and taking of testimony.

Pursuant to this resolution the parties took testimony which was submitted to the committee, which then analyzed the issues presented by the case as follows:

The questions in this case are, first, the election on November 5, 1918, as between James Wickersham, contestant, and Charles A. Sulzer; second, the election of George B. Grigsby at the

[1] First session Sixty-Sixth Congress, Journal, P. 338, Record, p. 3252.

special election of June 3, 1919. The special election was to fill the vacancy caused by the death of Charles A. Sulzer, and in the event Sulzer was duly elected on the 5th of November, 1918, the question then turns to the objections contestant makes to the special election on June 3, 1919. In the event James Wickersham was elected on November 5, 1918, and not Charles A. Sulzer, there was no vacancy created by the death of Charles A. Sulzer and therefore no vacancy could be filled at the special election on June 3, 1919.

The first question considered by the report relates to the qualifications of electors and is thus discussed:

In 1906, on May 7, Congress passed an act *governing elections in Alaska.* Section 3 of this act, being section 394, Compiled Laws of Alaska 1913, reads as follows:

"SEC. 394. All male (or female) citizens of the United States 21 years of age and over who are actual and bona fide residents of Alaska, and who have been such residents continuously during the entire year immediately preceding the election, and who have been such residents continuously for thirty days next preceding the election in the precinct in which they vote, shall be qualified to vote for the election of a Delegate from Alaska."

Under this act it is clear that no one can lawfully vote in Alaska for Delegate who is not (1) a citizen of the United States and 21 years of age; (2) an actual and bona fide resident of Alaska, and has been such resident continuously during the entire year immediately preceding the election and continuously for 30 days next preceding the election in the precinct in which they vote.

On August 24, 1912, Congress passed an act creating a legislative assembly in Alaska, and in this act changed the time of election for Delegate to Congress from August to November, and provided that "all of the provisions of the aforesaid act shall continue to be in full force and effect, and shall apply to the said election in every respect, as is now provided for the election to be held in the month of August therein."

Mr. Grigsby, as attorney general of Alaska, rendered an opinion to the Territorial governor, a member of the canvassing board, on February 12, 1919, in the following language:

"I have to advise you that the legislature in attempting to change the qualifications of voters by this act exceeded its power, the qualifications having been fixed by the act of May 7, 1906, and continued in full force and effect by the organic act or constitution of Alaska. The organic act expressly authorized the legislature to extend the elective franchise to women, but in no other way authorized the changing of the qualifications of electors by the legislature.

"Respectfully submitted.

"GEORGE B. GRIGSBY, *Attorney General."*

This, we think, is the correct interpretation of this law. The Territorial Legislature of Alaska attempted to modify this law by the enactment of a provision permitting electors to vote in any precinct in the judicial division of the Territory, thus ignoring the provisions of the congressional act which requires the actual and bonafide residence in Alaska for one year and such residence continuously for 30 days next preceding the election in the precinct in which they vote. In this respect the Territorial law is in direct conflict with the Federal statute. The Federal statute is incorporated into the organic law of the Territory and, as stated by Mr. Grigsby as attorney general, can not be set aside by an act of the Legislature of Alaska.

As it appeared from the evidence that 21 nonresidents had voted for Charles A. Sulzer and 11 for James Wickersham the majority deducted these votes from the total number case for them respectively.

The minority views, submitted by Messrs. C. B. Hudspeth, of Texas, and James O'Connor, of Louisiana, dissent from this decision but without discussing the merits of the question.

The majority also count the vote of an elector alleging denial by election officials of his request to be allowed to vote:

At the Chickaloon precinct in the third division one John Probst, a legal voter in the precinct presented himself at the poles and offered to vote, but was informed that the election officers

had taken the ballot box and books up the creek and he could not vote. If permitted to vote he would have voted for James Wickersham. The committee finds that this vote should be added to the aggregate vote for James Wickersham.

This decision is criticized by the minority:

The majority of the committee counts the vote of one John Probst at the Chickaloon precinct for said Wickersham upon the ground that he was denied a right to vote at said box. The evidence shows that said Probst appeared at said voting place about 2 o'clock in the day and was informed that the poll list was somewhere up the creek. He went back to his place of business and at 4 o'clock on that day was notified by one Manning that he could go and vote; that the polls were open. This he declined to do. He had every opportunity to cast his ballot, but did not do so. The minority of your committee feel that the pretended effort on his part to vote was a mere subterfuge; that he had ample opportunity to vote and he did not; and that vote should not be counted for said Wickersham.

In Catch Creek precinct it was charged that ballots were cast before the time fixed by statute for opening the polling places.

A section of the organic act establishing the Territorial government provides:

SEC. 9. That the election boards herein provided for shall keep the several polling places open for the reception of votes from 8 o'clock antemeridian until 7 o'clock postmeridian on the day of election.

According to the majority report the testimony indicated that all votes at this precinct were cast about 5 o'clock in the morning.

The minority concede that the voting probably took place before 8 o'clock, the time fixed by the statute for opening the polling places, but take the position that as no one was deprived of the right to vote and there was no taint of fraud, the vote should be counted as cast. The majority find a parallel in the Kentucky case of Verney *v.* Justice and quotes from the opinion in that case:

The section under consideration uses the word "shall"; it is mandatory and excludes the right to hold the election earlier than 6 o'clock in the morning and later than 7 o'clock in the evening. If the language was construed as directory merely, the election might not only be continued until 9 or 10 o'clock at night but all next day and the day after, and on and on, unless the courts in the exercise of a discretion should limit it and thus make a constitutional provision in disregard of the one made by the people for the government of election.

For these reasons it is clear that the votes cast after 7 o'clock in the evening for the appellant were illegal, and that the circuit court did right in excluding them.

Under this precedent the entire vote of the precinct is rejected.

114. The election case of Wickersham v. Sulzer and Grigsby, continued.

Votes cast at precincts established in violation of election laws are illegal and should be rejected.

Reaffirmation of former decision of the House relating to votes cast by native Indians.

Discussion as to domicile and validity of votes cast by soldiers.

Where impossible to show for whom illegal votes were cast they will be deducted from the vote of both candidates in proportion to the total votes received by each.

As to Forty Mile district:

The contestant charges that in the Forty Mile district there was an official suppression of the election in certain precincts in the district in the interest of Mr. Sulzer, whereby the contestant

lost some 20 votes. The testimony discloses that prior to the election in 1918 there were five voting precincts in this district, known as the Jack Wade precinct, Steel Creek precinct, Franklin precinct, Chicken precinct, and Moose Creek precinct. That about October 1, 1918, Commissioner Donovan, of the district, made an order redistricting the district into three voting precincts, to wit, Franklin, Chicken, and Moose Creek, thereby abolishing the Jack Wade and Steel Creek voting precincts in the district, or rather merging these precincts into the other three precincts, and it is charged that this was done for the purpose and that it had the effect of placing the voting precincts at such great distances from the voters that the voters in the Jack Wade and Steel Creek precincts, by reason of the great distance, were unable to reach the polls and to cast their ballots at the election.

The authority of the commissioner in providing voting precincts in the various election districts as defined in the act of May 7, 1906, is as follows:

SEC. 5. That all of the territory in each recording district now existing or hereafter created situate outside of an incorporated town shall, for the purpose of this act, constitute one election district; that in each year in which a Delegate is to be elected the commissioner in each of said election districts shall, at least thirty days before the date of said first election and at least sixty days before the date of each subsequent election, issue an order and notice, signed by him and entered in his records in a book to be kept by him for that purpose, in which said order and notice he shall—

First. Divide his election district into such number of voting precincts as may in his judgment be necessary or convenient, defining the boundaries of each precinct by natural objects and permanent monuments or landmarks, as far as practicable, and in such manner that the boundaries of each can be readily determined and become generally known from such description, specifying a polling place in each of said precincts, and give to each voting precinct an appropriate name by which the same shall thereafter be designated: *Provided, however,* That no such voting precinct shall be established with less than thirty qualified voters resident therein; that the precincts established as aforesaid shall remain as permanent precincts for all subsequent elections, unless discontinued or changed by order of the commissioner of that district.

Second. Give notice of said election, specifying in said notice, among other things, the date of such election, the boundary of the voting precincts as established, the location of the polling place in the precinct, and the hours between which said polling places will be open. Said order and notice shall be given publicity by said commissioner by posting copies of the same at least twenty days before the date of said first election, and at least thirty days before the date of each subsequent election, etc.

The majority report quotes the order of the commissioner establishing three precincts in lieu of the original five, and holds:

This order, fixing the precincts in this district, is not in compliance with the law above set forth. It was not issued and entered in his records 60 days before the date of the election and does not specify a polling place in each precinct as required by law, and does not give the location of the polling places in each precinct as provided by law. The abolishing of the Jack Wade and Steel Creek precincts, the largest centers in this division, both of them having post offices where the residents for miles around went for their mail, and including the territory of these precincts in other precincts, and the placing of the voting precincts at Franklin, Chicken, and Moose Creek, the latter place having only two residents, the committee believes was for the purpose of depriving the voters of Jack Wade and Steel Creek precincts from having an opportunity to cast their votes. This action of the commissioner, as shown by the record, was in violation of law and did deprive 20 legal voters from casting their votes at the election.

However, the committee finds that the whole action of the commissioner in the Forty Mile district in redistricting said district on the 1st day of October, 1918, was in violation of the law and this action of the commissioner did deprive at least 20 legal voters from casting their ballots at said election, and said action was without authority or jurisdiction.

It is the judgment of the committee that the votes cast in said entire district, which includes the precincts of Chicken, Franklin, and Moose Creek, were illegal and should be rejected.

The contention over the vote cast by Indians at various precincts is briefly disposed of by the majority:

It is contended by both parties that in certain precincts the votes of a number of Indians should not have been counted. The contestant claims, and with much force, that in a number of precincts where Indians voted and the majorities were for the contestee, the Indians were not entitled to vote, because they had not severed their tribal relations and were not citizens in the sense that they were qualified electors. The contestee claims that at certain other precincts, where the majorities were for the contestant, a portion of the vote being that of Indians was not legal for like reasons.

This identical question arose in the former case in the Sixty-fifth Congress, and the House, following the report of the committee, disposed of this question and did not exclude the Indian vote. Your committee believes it should follow the ruling of the House in the former case, and not disturb this vote.

The question of the soldier vote is also decided according to recent precedent. After quoting from the report of the committee in the case of Wickersham *v.* Sulzer in the Sixty-fifth Congress the majority continue:

The question of the soldier vote in Alaska was determined by the committee and afterwards by the House in the Sixty-fifth Congress in the case of Wickersham *v.* Sulzer. This case having been so carefully investigated and so well considered, having the unanimous endorsement of the former committee and a large majority of the House, this committee has considered the question settled, and in view of the fact that this case was determined so recently, we have used that decision as the law in this case, and have followed it.

Of the soldier vote in the 1918 election, Wickersham received 5 votes, Sulzer received 24 votes, and 16 of them refused to testify for whom they voted, or evidence was not presented to show for whom they voted. Of the votes of the ones where the testimony shows for whom they voted, there should be deducted from the total vote of Wickersham 5 votes, and from the total vote of Sulzer 24 votes, a net loss to Sulzer of 19 votes.

As it was not possible to show for whom these 16 votes were cast they were deducted proportionately from the vote of both candidates under the rule laid down in the case of Wickersham *v.* Sulzer, as follows:

In purging the polls of illegal votes the general rule is that unless it be shown for which candidate they were cast they are to be deducted from the whole vote of the election division and not from the candidate having the largest number. Of course, in the application of this rule such illegal votes should be deducted proportionately from both candidates, according to the entire vote for each.

Readjusting the entire vote in accordance with these findings, the result reached by the majority is:

Wickersham	4,422
Sulzer	4,385
Wickersham's plurality	37

The following resolutions are therefore recommended:

Resolved, That Charles A. Sulzer was not elected a Delegate to the House of Representatives from the Territory of Alaska in this Congress, and George B. Grigsby, who is now occupying the seat made vacant by the death of said Sulzer, is not entitled to a seat herein.

Resolved, That James Wickersham was duly elected a Delegate from the Territory of Alaska in this Congress, and is entitled to a seat herein.

The minority dissenting from each conclusion reached by the majority, offer the following resolutions in lieu of those recommended by the majority.

Resolved, That James Wickersham was not elected a Delegate to the Sixty-sixth Congress from the Territory of Alaska, and is not entitled to a seat in said Congress.

Resolved, That Charles A. Sulzer was duly elected a Delegate from the Territory of Alaska to the Sixty-sixth Congress, and that said Charles A. Sulzer having died, and George B. Grigsby having been elected at a special election as a Delegate from the Territory of Alaska, and having been sworn in as a Member of the House of Representatives on July 1, 1920, that the said Grigsby is entitled to retain his seat therein.

The case was debated at length in the House on February 28, and March 1.[1] On the latter day Mr. Finis J. Garrett, of Tennessee, moved to recommit the report and resolutions. The motion was rejected—yeas 169, nays, 188. The substitute resolutions proposed by the minority were then separately disagreed to—yeas 169, nays 179, and yeas 163, nays 179, respectively. The question recurring upon the original resolutions they were separately agreed to, the first declaring the contestee not elected—yeas 183, nays 162; and the second declaring contestant elected and entitled to the seat—yeas 177, nays 163.

Mr. Wickersham then came forward and took the oath of office.

115. The Illinois election case of Gartenstein v. Sabath in the Sixty-seventh Congress.

While the statute limiting the time for taking testimony in a contested-election case has been held to be directory and is not binding on the House, if further time is required it must be granted by the House and will be granted only upon the showing of good and sufficient reason therefor.

Parties to a contested-election case may not by stipulation nullify rules of pleading or usurp prerogatives of the committee or the House.

Before a recount of ballots may be had, proof must be made of the inviolability of the ballot boxes and their contents.

Before resort can be had to ballots as evidence, absolute proof must be made that they are the identical ballots cast at the election; that they have been kept as required by law; that there has been no opportunity to tamper with them; and that they are in the same condition as when cast. The burden of such preliminary proof rests upon the party offering the ballots as evidence.

The ballots themselves constitute the best evidence and the count of election officials should not be set aside by testimony of a witness who merely looked at the ballots and testified to the results.

The House will not set aside the official returns except upon positive proof that the official count was incorrect.

A recount should include all ballots cast at the election and the House declines to order recount if any portion of the ballots have not been preserved.

Official papers and lists of voters are the best and only evidence of their contents, and statements of witnesses assuming to detail contents of such papers are not admissible.

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[1] Third session Sixty-sixth Congress; Journal, p. 276, Record, p. 4189.

On December 20, 1922,[1] Mr. Cassius C. Dowell, of Iowa, from the Committee on Elections No. 3, submitted the report of the committee in the Illinois case of Jacob Gartenstein *v.* Adolph J. Sabath.

The sitting Member had been returned by an official majority of 298 votes. The contestant attacked this majority, charging frauds, irregularities, errors, and mistakes, and alleging that a true and correct tabulation of the votes would show that contestant had been elected by a plurality of more than 1,500 votes.

A preliminary question presented for the consideration of the committee related to compliance with the statute limiting the time within which testimony in such cases may be taken.

This statute provides:

SEC. 107. In all contested-election cases the time allowed for taking testimony shall be 90 days, and the testimony shall be taken in the following order: The contestant shall take testimony during the first 40 days, the returned Member during the second 40 days, and the contestant may take testimony in rebuttal only during the remaining 10 days of said period. This shall be construed as requiring all testimony in cases of contested elections to be taken within 90 days from the date on which the answer of the returned Member is served upon the contestant.

It appears from the evidence presented that the contestant did not begin the taking of testimony until 25 days after the time prescribed by the statute had expired.

The committee accordingly held:

While this statute has been held to be directory, and is not binding upon the House, yet under ordinary circumstances the contestant has been required to commence and complete his evidence within the 40 days allowed by statute, and if further time is required it must be granted by the House, and may be granted only after showing a good and sufficient reason therefor.

In the case under consideration the contestant not only does not show diligence but the record clearly shows without reason or excuse by numerous stipulations undertook to set aside the operation of the statute and practically took no testimony in the 40 days allowed him by statute. Had the contestant come before the House asking for an extension of time to take testimony after the expiration of the 40 days there can be no question this would not have been granted to him, for the record discloses that he had no good reason to ask for extension of time for taking testimony. However, at each date to which extension had been made he stipulated with the contestee for further continuances and extensions, and without asking leave of the House, undertook to set aside the statute limiting time for taking the evidence.

Your committee finds in this case that contestant was not diligent in prosecuting his case, and did not present his proofs within the time prescribed by statute.

As the decision in the case turns largely on the question of the correctness of the official count of the ballots, the committee discuss at length the admissibility of evidence in attacking official returns, and the conditions governing a recount.

At the outset the committee agree:

Before a recount of the ballots may be had in an election contest proof of inviolability of the ballot boxes and their contents is necessary.

After quoting testimony showing the manner in which the ballots had been preserved and produced for inspection in this case, the report continues:

The proofs in this case show that the judges of election, after counting and canvassing the ballots, placed them in boxes and delivered them to the election commissioners' office. The

[1] Fourth session Sixty-seventh Congress, House Report No. 1308.

delivery of these ballots began at 8 or 9 o'clock on the evening of the election and continued until the afternoon of the following day. The evidence discloses that the ballot boxes in some instances were not of sufficient size to hold all the ballots cast in the precinct, and when this happened the ballots were folded and tied with a rope and the bundle was delivered with the ballot box to the commissioners' office. The evidence shows these ballots remained in the office of the election commissioners for some time and that a number of employees were designated to handle the ballots and store them in the vault on the floor above. A number of these were temporary employees.

The law of the State of Illinois relative to the canvass of votes was as follows:

Immediately after making such proclamation and before separating, the judges shall fold in two folds and string closely upon a single piece of flexible wire all ballots which have been counted by them, except those marked "Objected to," unite the ends of such wire in a firm knot, seal the knot in such manner that it can not be untied without breaking the seal, inclose the ballots so strung in a secure canvas covering and securely tie and seal such canvas covering with official wax impression seals to be provided by the judges, in such manner that it can not be opened without breaking the seals, and return said ballots, with the package containing the ballots marked "Defective" or "Objected to" in such sealed canvas covering to the proper clerk or to the board of election commissioners, as the case may be, etc.

Under this law the committee, after considering the evidence, decide:

The record in this case not only does not show that the ballots were folded, wired, and sealed when presented to the commissioner taking testimony, as required by law, but the proofs affirmatively show that in a number of the precincts the ballot boxes were not tied and sealed as required by the Illinois statute. In some instances at least the evidence clearly shows that the ballot boxes were not at all sealed when taken from the vault, but were tied and bundled together in such manner that the boxes could be opened and closed without disturbing the appearance of the ballot boxes.

With the ballots and ballot boxes in this condition, and with the evidence of Mr. Curran that people were in and out of the vault where these ballots were kept. it seems to your committee that the proofs of the integrity of the ballots have not been established. Therefore your committee holds that proofs of the proper and legal preservation of the ballots have not been established in this case.

In reaching this conclusion the committee quote with approval the following:

It is well settled that before resort can be had to the ballots as means of proof, absolute proof must be made that the ballots offered am the identical ballots cast at the election; that they had not been safely kept as required by law; that they are in the same condition they were when cast; that they had not been tampered with, and that no opportunity had been had to tamper with them. The burden of making this preliminary proof rests upon the party who seeks to use the ballots as evidence. (English *v.* Hilborn, 53d Cong., Rowell, p. 486.)

In order to command confidence in a recount "it is necessary for the contestant first to establish the identity of the ballot boxes, and, secondly, show that these boxes had been so kept as to rebut any presumption that they had been tampered with." (Butler *v.* Layman, 37th Cong.) In this case the minority report was adopted by the House.

The law regards with jealousy and suspicion recounts of ballots and is slow to sanction any change from results originally declared to results effected by such recounts. The rules of law governing recounts of ballots are plain and positive. Before courts or legislative bodies will give weight to results of recounts of ballots, it must be shown absolutely that the ballot boxes containing such ballots had been safely kept; that the ballots were undoubtedly the identical ballots cast at the election; and when these facts are established beyond all reasonable doubt, then full force and effect are given to the developments of the recount. In this case the committee found the evidence sufficient and accepted the results of recounts. (Acklen *v.* Darrall, 45th Cong.)

The temptation to tamper with and change the ballots after an election is so great, especially when the election is close and a slight change will elect the one and defeat the other candidate,

that courts and the House have uniformly required the party offering the ballots to overcome the official count made at the time of the election to show that the ballots have been kept strictly as required by law. Upon the person offering the ballots is cast the burden of showing that the ballots offered for recount are the identical ones cast at the election and have been in no way tampered with or changed. (Wallace *v.* McKinley, 48th Cong.)

The returns of election officers are prima facie correct, and a recount showing a differing result can not be regarded unless it affirmatively appears that the ballots recounted are the as those originally counted and in the same condition.

The contestant produced evidence attacking the returns but did not follow the above rulings in developing his case, and the committee hold:

Contestant, in order to establish his claim of error and miscount, called certain witnesses, who were clerks in the election commissioner's office. These witnesses were called upon by contestant to go through the ballots in a number of the precincts in the fifth congressional district and announce to another witness, who kept tally of the votes announced for Member of Congress in the precinct, which witness afterwards read the results of the tally to the commissioner taking depositions. In this manner the contestant went through a number of the precincts in said fifth congressional district. By the count in this manner the vote of the contestant increased in the various precincts over that of contestee until by this count contestant had increased his vote in the precincts thus counted to overcome the plurality designated by the contestee in the official count. Something like half of the precincts, by this method, were recounted.

The ballots in these various precincts were before the commissioner, but contestant did not have them identified, nor were they offered in evidence. But, over the objection of contestee, the witnesses were directed to count the ballots in the above manner and report the result of the count to the commissioner taking testimony.

The election board, under the law, is presumed to have made correct returns in this election.

Your committee is of the opinion that the primary evidence of the votes cast for the candidates for Representative in the Congress of the United States in this district was the poll books and ballots themselves, and that the official count by the election officers should not be set aside by the testimony of a witness who merely looked at the ballots and testified to the results.

Upon a proper showing and upon the production of the ballots properly protected and preserved, contestant was entitled to a recount of these ballots. But this proof should be established by the best evidence, and the ballots being present should have been offered in evidence as the best evidence in the case. The House will not set aside the official count except upon positive proof that the official count was incorrect.

In order to secure such a recount and warrant the substitution of the results in lieu of the official returns, the committee further hold:

In this case the witness who went through the ballots examined only those in perhaps half of the voting precincts in the district. It has been held that a recount, if had, should include the ballots in all of the precincts in the district.

If it is reasonable to suppose that there was error in counting ballots in certain precincts, it would be equally reasonable to assume that there were errors in counting in the remaining precincts. If any recount is ordered it should be of all of the ballots cast in the district. (Galvin *v.* O'Connell, 61st Cong., Supplement Election Cases, p. 39.)

Where some of the ballots had not been preserved, the committee denied recounting the balance of the ballots. (Murphy *v.* Haugen, 53d Cong., p. 58, Supplement; Cantor *v.* Siegel, 64th Cong., p. 92, Supplement; Brown *v.* Hicks, 64th Cong., p. 93, Supplement.)

The committee can only report cases on the evidence furnished by the parties. We can neither make the evidence nor improve the quality nor supply the deficiency of that furnished. (See Goode *v.* Epps, 53d Cong., Rowell, p. 469.) In this case contestee had a majority of 868 on the returns and received the certificate.

In the case under consideration the ballots were the best evidence of the votes cast for each candidate for Member of Congress. The ballots are not in evidence and are not therefore before the committee. No attempt was made by contestant to offer these ballots to be canvassed by the

committee, but contestant seeks in this case to overthrow the official canvass of the votes by the legally constituted election boards by calling a witness to go through the ballots and report the tally to the commissioner selected by contestant to take testimony.

Where a witness testified that he compared the poll lists, entry lists, or lists of persons struck from the registry list of a county, and presented a list of names which he said were found on the poll list but not on either of the other lists, the committee held that "these statements made by the witness are inadmissible. The papers themselves are the best and only evidence of what they contain if they are admissible for any purpose. The committee must make the comparison and can not take the statements of the witness as to the result of his comparison." (Finley *v.* Bisbee, 45th Cong., Rowell, p. 326.)

Where votes were proved to have been illegal but the evidence that they were cast for contestee was the testimony of persons who had compared the numbered ballots with the poll list, the ballots themselves not being produced in evidence, the evidence was considered insufficient to justify the deduction of the votes from the vote of the contestee. (See Gooding *v.* Wilson, 42d Cong., Rowell, p. 276.)

The recount in this case should have included all of the ballots in all of the precincts in the fifth congressional district. The ballots not having been offered in evidence by contestant, your committee thinks the evidence in this case is not sufficient to set aside the official returns.

There being no grounds under the finding of the committee for setting aside the official count, the usual resolutions, declaring the contestant not elected and confirming the title of the sitting Member to his seat, are recommended.

On March 4, 1923,[1] the resolutions were agreed to without debate or division.

116. The Illinois election case of Parillo v. Kunz in the Sixty-seventh Congress.

Contestant having ignored, without reason or excuse, the plain mandate of the law relative to time of taking testimony, was held to have no standing as a contestant before the House.

Testimony taken in contravention of law can not legally be considered by the House.

Parties to contested election case may not by stipulation set aside explicit provisions of statutes relating thereto.

While the House may for cause extend the statutory time within which testimony may be taken, such extension will be made for good and sufficient reasons only.

On January 14, 1923,[2] Mr. Frederick W. Dallinger, of Massachusetts, from the Committee on Elections No. 1, submitted the report of the committee in the Illinois case of Dan Parillo *v.* Stanley H. Kunz.

According to the official returns in this case, the sitting Member had received 15,432 votes and the contestant 14,627 votes, a plurality of 805 votes in favor of the sitting Member. The contestant, however, served notice of contest alleging mistakes in the count in 44 of the 107 precincts of the district.

A recount made under stipulations entered into by contestant and contestee revised the return, giving the sitting Member 14,733 votes and the contestant 14,487 votes, a plurality for the former of 246 votes. This recount was attacked by counsel for contestant on the strength of evidence by a handwriting expert,

[1] Journal, p. 346, Record, p. 5469.

[2] Fourth session Sixty-seventh Congress, House Report No. 1115.

who testified that, in his opinion, some of the pencil crosses on certain ballots were made by persons other than the voters who cast them. The committee did not consider the evidence sufficient to sustain the contention and found no reason for rejecting the vote from the precincts in question.

The principal question raised by the case, however, was occasioned by the failure of contestant to take testimony within the time prescribed by law.

While the statute provided that all testimony should be taken within 90 days, contestant did not begin taking testimony until six months thereafter. Under the law all testimony should have been concluded by April 12, 1921. The parties, however, entered into stipulations extending the time regardless of requirements of the statute and contestant did not as a matter of fact close his case until October 10, 1921.

The committee hold that such evidence can not be considered and say:

Section 107 of the Revised Statutes of the United States as amended by the act of March 2, 1875, explicitly provides that all testimony in contested-election cases shall be taken within 90 days from the date on which the answer of the contestee is served upon the contestant. It has been the invariable practice of the House of Representatives to require the taking of the testimony within the tune required by law, except where the time has been extended for good and sufficient reasons.

In the present case the contestant not only does not show due diligence but the record clearly shows that without any reason or excuse whatever he undertook by a series of stipulations to set aside and ignore the clear and explicit provision of the statute. No testimony whatever was taken by the contestant until April 18, 1921, six months after the entire 90 days allowed by the act of Congress for the taking of all the testimony in the case had expired. In this case there is no excuse whatever for the contestant not commencing to take his testimony within 40 days from the service of the contestee's answer as required by law. If he had started to take his testimony immediately after serving his answer, and for good and sufficient reasons had been unable to complete his testimony before the expiration of the 40 days allowed him by law, and had then asked the House of Representatives for an extension of time he undoubtedly would have received an extension. In this case, however, as a matter of fact the record disclosed that he had no reason whatever for asking any extension of time and that all of his testimony might have been taken within the 40 days and that all the testimony on both sides of the case might have been taken within the 90 days required by law.

Your committee, therefore, finds that in this case the contestant deliberately ignored the plain mandate of the law without any reason or excuse, that he has offered no evidence which can legally be considered by your committee, and that he has no standing as a contestant before the House of Representatives.

The committee, therefore, conclude:

Your committee, therefore, finds that the contestant, not having complied with the provisions of the law, governing contested-election cases, has no case which can be legally considered by your committee or by the House of Representatives. Moreover, even if he had fully complied with the law, your committee finds that as a matter of fact he has failed to prove the allegations contained in his notice of contest; that there is no evidence warranting the rejection of any of the precincts of the district; and that the recount of votes, which he alleged would show that he had been elected, according to his own figures, still shows that the contestee was actually elected by a plurality of 246 votes.

For the above reasons your committee recommends the adoption of the following resolutions:

"Resolved, That Dan Parillo was not elected a Member of the House of Representatives in the Sixty-seventh Congress from the eighth congressional district of the State of Illinois, and is not entitled to a seat herein.

"Resolved, That Stanley H. Kunz was duly elected a Member of the House of Representatives in the Sixty-seventh Congress from the eighth congressional district of the State of Illinois, and is entitled to retain his seat herein."

On March 4, 1923,[1] the House agreed to the resolutions without debate or division.

117. The Missouri election case of Bogy v. Hawes in the Sixty-seventh Congress.

Parties to a contested election case may be defaulted for noncompliance with the rules of the committee on elections.

Testimony taken ex parte is properly excluded in a contested election case.

Where disputed ballots, even if counted for claimant, would not alter the result of the election the committee on elections declined to inspect the ballots.

Parties to a stipulation are estopped from questioning proceedings taken in conformity with the provisions thereof.

Contestant having agreed to abide by decision of election commissioners is precluded from disputing the result of their count.

The mere fact that candidates for other offices on the same ticket received large majorities while contestant received a minority of the votes cast, does not justify a contest.

Allowance of contestant's attorney fees is not uniform, but each case is decided on its merits.

On July 21, 1921,[2] Mr. Frederick W. Dallinger of Massachusetts, from the Committee on Elections No. 1, submitted the report in the Missouri case of Bernard P. Bogy v. Harry B. Hawes.

The contestant in this case was a candidate for nomination by his party at the primary held August 3, 1920, but was defeated by a vote of 8,296 to 1,944. After the primary and before the election the nominee died and contestant was given the nomination by the party committee.

In the election the official returns gave the contestant 33,592 votes and the contestee 35,726 votes, a majority of 2,134 votes in favor of the sitting Member.

The contestant in his notice of contest alleged numerous irregularities, and in summarizing his case claimed that 31,125 votes had been illegally counted and improperly accredited to the returned Member.

At the outset of the case a preliminary question arose, as to the compliance of parties with rules adopted by the elections committee.

Early in the history of the House the committee adopted formal rules governing procedure in contested-election cases. At the beginning of the session in which the present case was filed, the committee revised its rules and added with other amendments a new section as follows to be known as rule 3:

RULE 3. Each contestant shall file with his brief an abstract of the record and testimony in the case. Said abstract shall, in every instance, cite the page of the printed testimony on which

[1] Record, p. 5472.

[2] First session Sixty-seventh Congress, House Report No. 281; Record p. 1198.

each piece of evidence referred to in his abstract is contained. If the contestee questions the correctness of the contestant's abstract, he may file with his brief a statement setting forth the particulars in which he takes issue with the contestant's abstract, and may file an amended abstract setting forth the correct record and testimony.

The failure of the contestant to observe this rule is thus commented upon by the committee:

The contestant, entirely ignored this rule and did not file with his brief an abstract of the record and testimony in the case, although the contestee did comply with it. As a result, the committee was obliged to read the entire record, which was full of a very large amount of irrelevant matter. Under the circumstances, the committee might well have defaulted the contestant for noncompliance with the rules of the committee. Inasmuch, however, as this was the first Congress in which this rule has been in operation, the committee has been inclined to be lenient and has considered the case in all its bearings as fully as if the rule had been complied with.

The admission of ex parte testimony is also discussed incidentally as follows:

In support of this alleged wholesale illegal registration and voting, no evidence or testimony whatever was offered by the contestant at any time. At the hearing before your committee the contestant offered a sworn affidavit of a lieutenant of police of the city of St. Louis, stating that on March 26, 1921, prior to the city election, he was detailed by the board of police commissioners to investigate false registration in certain wards of St. Louis, and that he compared his canvass of certain precincts in the eleventh congressional district with the registration lists furnished by the board of election commissioners, and that he estimated that there were between 1,000 and 1,200 false registrations in the eleventh congressional district at that time. Inasmuch as this affidavit was entirely ex parte and no opportunity was given to the contestee to cross-examine the witness, your committee very properly excluded it in common with several other similar affidavits. This affidavit, like the other excluded affidavits, however, had no probative value or any bearing upon the present contest, as there was no evidence whatever that any of the alleged false registrants voted at the congressional election on November 2, 1920.

While the case was pending before the committee a stipulation was entered into by contestant and contestee providing that "the board of election commissioners should open the ballot boxes used in the eleventh congressional district at the election held on November 2, 1920, and recount the ballots for the office of Representative in the Sixty-seventh Congress for the eleventh congressional district of Missouri."

Under this stipulation the board of election commissioners recounted the ballots and announced that the contestant had received 33,337 votes and the contestee 35,404 votes, a net gain for the former of 67 votes. The contestant attacked this return on the ground that he was not given opportunity to see some of the scratched ballots for the purpose of disputing them.

Both contestant and contestee had been given the privilege of having a watcher at each table where the ballots were counted, and the committee declined to entertain the protest.

The committee held:

At the hearing before your committee, the contestant requested your committee to send for these particular ballot boxes and examine all the ballots. Even if all of the scratched ballots should prove to be in the same handwriting and should be counted for the contestant, it would not alter the result. Moreover, the fact that Republican ballots might be found in these boxes in which the contestant's name was crossed out and the name of the contestee written in, even if the handwriting were the same, would not necessarily be evidence of fraud as under the laws of Mis-

souri, the election officers are permitted to mark the ballots for illiterate voters. For these reasons your committee declined to send for the ballot boxes in question and is of the opinion that on the whole the recount was fairly conducted and that the contestant, having agreed to abide by the decision of the board of election commissioners in regard to all disputed ballots, he is precluded from now questioning the result of the official recount.

In summarizing their findings the committee say:

In this case the contestant apparently feels that because the Republican candidate for President carried the eleventh congressional district of Missouri by a plurality of 2,403 votes, while at the same time he, the Republican candidate for Congress, was defeated by his Democratic opponent by a plurality of 2,067 votes, the result must have been due to fraudulent practices. As a matter of fact, the eleventh congressional district of the State of Missouri has been a Democratic district for many years and under normal circumstances would naturally elect a Democratic Congressman. The fact that the contestee had long been a resident of the district, while the contestant had only recently moved into the district, would easily account for the fact that the former would run ahead of his ticket, while the latter would run behind.

The contestant did not even offer to prove most of the allegations contained in his notice of contest and offered no evidence whatever of any fraud or irregularities in most of the 155 precincts of the congressional district. While, as the committee has pointed out, there is some evidence of occasional violations of the election laws of the State of Missouri, there is no evidence whatever to justify the committee in throwing out the vote of any voting precinct. Your committee believes that considering the very great congestion at the polls due to the voting of women for the first time, the election held in the eleventh congressional district in the State of Missouri on November 2, 1920, was, on the whole, quiet and orderly and fairly conducted. Furthermore, in order to discover any possible discrepancies or evidence of fraud, an official recount was held by the bipartisan board of election commissioners of the city of St. Louis, under a stipulation signed by the contestant and his attorney, that all disputed ballots should be decided by the board. Your committee believes that this recount was fairly conducted and that the official result of the recount showing that Harry B. Hawes, the contestee, was elected by a plurality of 2,067 over his Republican opponent, Bernard P. Bogy, the contestant, in the absence of competent evidence to dispute it, is a fair and accurate expression of the wishes of the voters of the eleventh congressional district of Missouri.

In accordance with their conclusions, the committee unanimously recommend the following:

Resolved, That Bernard P. Bogy was not elected a Representative in this Congress from the eleventh congressional district of the State of Missouri and is not entitled to a seat herein.

Resolved, That Harry B. Hawes was duly elected a Representative in this Congress from the eleventh congressional district of the State of Missouri and is entitled to retain his seat herein.

The report of the committee was submitted on July 21, but on representations by the contestant that additional evidence had been found, consideration of the report was delayed until October 21, 1921,[1] when the following communication was addressed to the contestant:

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ELECTIONS NO. 1.
Washington, D.C., October 4, 1921.

BERNARD P. BOGY, ESQ.,
5943 Maple Avenue, St. Louis, Mo.

DEAR SIR: The evidence to which you referred and which you were going to present to this committee on the reconvening of Congress has not been received. Unless it comes to the committee by the 10th of October, I shall be obliged to call up the case in the House on October 17.

FREDERICK W. DALLINGER.

[1] Record, p. 6557.

No reply having been received from the contestant, Mr. Dallinger called up the report on October 20, 1921.[1]

During the discussion Mr. Dallinger, in response to an inquiry as to whether the contestant would receive attorney's fees, said:

Of course, that is entirely a matter for the Committee on Elections, the Committee on Appropriations, and the House to determine.

Each case is considered on its merits. Since I have been a member of the Committee on Elections No. 1, we had before us a South Carolina case where we did not allow the contestant any attorney's fee. That was a case where the contestant had brought a frivolous contest in several preceding Congresses.

We also had a case from New York in which the contention was that the use of the voting machine was unconstitutional. In that case we declined to allow the contestant any attorney's fees.

The adoption of these resolutions settling the title to the seat in Congress does not necessarily involve that, because that is a matter which is to be determined hereafter.

After brief debate the resolutions recommended by the committee were agreed to without division.

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[1] Journal, p. 494; Record, p. 6555.

Chapter CLXV.[1]

ABATEMENT OF ELECTION CONTESTS.

1. Various conditions of. Sections 118–120.

118. The Illinois election ease of Kunz v. McGavin, in the Sixtieth Congress.

Instance wherein the contestant entered into a written stipulation conceding the election of contestee.

The contestant having conceded the election of the contestee, the House confirmed the title of the sitting Member.

On May 26, 1908,[2] Mr. Michael E. Driscoll, of New York, from the Committee on Elections No. 3, submitted a report in the case of Kunz v. McGavin, from Illinois.

The official returns from the district gave the contestant 11,421 votes and the contestee 11,336 votes, a majority of 85 votes for the sitting Member.

After notice of contest had been served and an answer filed, but before the case had been passed upon by the House, the votes were recounted before the board of election commissioners of the city of Chicago, in which the district was located. On the recount the contestant was declared to have received 11,290 votes and the contestee 11,356 votes, a majority of 66 votes for the sitting Member. Thereupon the contestant, by his attorneys, entered into the following stipulation:

UNITED STATES OF AMERICA,

Eighth Congressional District of Illinois, ss.

STANLEY H. KUNZ, CONTESTANT, *v.* CHARLES MCGAVIN, CONTESTEE.

Election contest for seat of Member of House of Representatives from the Eighth Congressional district of Illinois. Election held November 6, 1906, to Sixtieth Congress

It is hereby stipulated by and between Stanley H. Kunz, contestant, and Charles McGavin, contestee, that the result of the recount of the actual ballots cast at the congressional election for Member of the House of Representatives from the Eighth Congressional district of Illinois, held on the 6th day of November, 1906, showed that said Charles McGavin received 11,356 votes, and Stanley H. Kunz received 11,290 votes; and that therefore said Charles McGavin, contestee, was duly elected from said district by a plurality of 66 votes, as shown by the tabulated vote hereto annexed.

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[1] Supplementary to Chapter XXIV.

[2] First session Sixtieth Congress, House Report No. 1777; Record, p. 7011; Moores' Digest, P. 35.

And it is further stipulated and agreed by and between said parties that they and each of them waive the printing of any of the record in said contest, in so far as such waiver does not conflict with the rules of said House of Representatives.

WILLIAM C. ASAY and
J. B. O'CONNELL,
Attorneys for Contestant.
ROBERT S. ILES,
Attorney for Contestee.

The contestant took no further action in the case, and the committee reported:

That the said contestant has not applied to this committee for a hearing or further consideration of his case.

Your committee therefore concurs in the stipulation made by the interested parties in this case and recommends its approval, and further recommends the adoption of the following resolutions, to wit:

"Resolved, That Stanley H. Kunz was not elected a Representative in the Sixtieth Congress from the Eighth Congressional district of the State of Illinois.

"Resolved, That Charles McGavin was duly elected a Representative in the Sixtieth Congress from the Eighth Congressional district of the State of Illinois and is entitled to a seat therein."

The resolutions were agreed to by the House without debate or division.

119. The Louisiana election case of Warmoth v. Estopinal, in the Sixtieth Congress.

Instance wherein an election contest was instituted by memorial.

The contestant having announced by letter the abandonment of his contest, the papers were laid on the table.

On December 9, 1908,[1] the Speaker laid before the House a memorial of Henry C. Warmoth, alleging illegality in the nomination and election of Albert Estopinal as a Member for the first congressional district, in the State of Louisiana, and praying that the said Henry C. Warmoth be declared entitled to the seat. This memorial was referred to the Committee on Elections No. 1.

On January 25, 1909, the Speaker presented a communication from the contestant addressed to the Speaker, in which the contestant stated that it would be impossible for him to take evidence and present the same to the committee before the final adjournment of the Sixtieth Congress, and he therefore withdrew his contest. This communication was also referred to the committee, and on January 29, 1909,[2] Mr. James R. Mann, of Illinois, submitted the report of the committee, as follows:

The Committee on Elections No. 1, to whom was referred the memorial of H. C. Warmoth, contesting the right of Hon. Albert Estopinal to a seat in the House of Representatives from the First Congressional district of Louisiana, and also a letter from Mr. Warmoth stating that he withdraws his contest, beg leave to respectfully report and recommend that said memorial and petition do lie on the table.

A motion by Mr. Mann that the papers lie upon the table was agreed to without debate or division.

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[1] Second session Sixtieth Congress, Journal, pp. 39, 40; Record, p. 73.

[2] Second session Sixtieth Congress, House Report No. 1993; Journal, p. 233; Record, p. 1620.

120. The Iowa election case of Hepburn v. Jamieson in the Sixty-first Congress.

Instance of abandonment of a contest by notification from contestant to the committee.

On June 18, 1910,[1] Mr. Michael E. Driscoll, from the Committee on Elections No. 3, submitted the report of the committee in the Iowa case of Hepburn *v.* Jamieson.

The official returns do not appear of record, but a stipulation between the contestant and contestee agrees that the former received 20,126 votes and the latter 20,436 votes, a majority of 310 votes for the sitting Member.

With this stipulation was filed a further written agreement arranging for the time and place of taking testimony. No other papers were submitted in the case.

The report says:

With these papers is a memorandum, apparently written in the office of the Clerk of the House of Representatives, but not signed or dated, which reads as follows:

"In the ease of William P. Hepburn against William D. Jamieson, of the eighth district of Iowa, no testimony was received, but stipulations and agreements on the part of attorneys for contestant and contestee were filed."

This comprises all of the record and all of the papers submitted for the consideration of this committee in said contest.

This committee has been notified by Hon. William P. Hepburn, contestant, that he does not intend to prosecute the contest further.

Therefore your committee respectively recommends the adoption of the following resolutions:

"Resolved, That William P. Hepburn was not elected a Member of the Sixty-first Congress from the Eighth Congressional district of the State of Iowa and is not entitled to a seat therein.

"Resolved, That William D. Jamieson was elected a Member of the Sixty-first Congress from the Eighth Congressional district of the State of Iowa and is entitled to a seat therein."

On June 23[2] the report was agreed to without debate or division.

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[1] Second session Sixty-first Congress, House Report No. 1637; Journal, p. 805; Record, p. 8498.

[2] Second session Sixty-first Congress, Journal, pp. 827, 828; Record, p. 8830; Moores' Digest, p. 42.

Chapter CLXVI.

GENERAL ELECTION CASES, 1907 TO 1910.

121. The Illinois election ease of Michalek v. Sabath, in the Sixtieth Congress.

Where contestant's contention, even if substantiated, would not operate to change the return, the committee declined to order evidence.

Form of stipulation between contestant and contestee for a recount.

On May 26, 1908,[1] Mr. Michael E. Driscoll, of New York, from the Committee on Elections No. 3, presented the report in the case of Michalek *v.* Sabath, from Illinois.

While the case was pending in the committee the contestant and contestee, by their respective attorneys, entered into a stipulation for a recount of the ballots as follows:

UNITED STATES OF AMERICA, *Northern District of Illinois, ss:*
STATE OF ILLINOIS, *County of Cook, ss:*

ANTHONY MICHALEK, CONTESTANT, *v.* A. J. SABATH, CONTESTEE.

Election contest in the Fifth Congressional district of Illinois.

It is hereby stipulated and agreed by and between Anthony Michalek, contestant, and A. J. Sabath, contestee, the parties to the above-entitled election contest, that the notices to take depositions provided for in section 108 of the Revised Statutes of the United States be, and the same are hereby, waived; and the parties hereto further agree that said depositions may be taken without such notices.

It is further agreed by and between the parties hereto that said depositions shall be taken before Joseph Pniewski, a notary public residing in the said Fifth Congressional district, and that the depositions of the members of the board of election commissioners and of the chief clerk of the board of election commissioners shall be taken in the room usually occupied by the board of election commissioners of the city of Chicago, Ill., and that the depositions of any other witnesses who may be called on the part of the contestant shall be taken at the office of Tenney, Coffeen, Harding & Wilkerson, No. 205 La Salle Street, Chicago, Ill., and the depositions of all other witnesses who may be called by the contestee shall be taken at the office of Frank L. Childs, No. 100 Washington Street, Chicago, Ill.

[1] First Session Sixtieth Congress, House Report No. 1778; Record, p. 7011; Moores' Digest, p. 36.

It is further stipulated that the contestee reserves the right to name some qualified officer to officiate with the said Joseph Pniewski in accordance with section 118 of the Revised Statutes of the United States.

It is further stipulated that proof of the official character of the officers hereinbefore referred to be, and the same is hereby, waived.

It is further stipulated and agreed that the taking of said depositions and the recounting of the ballots cast for Member of Congress in said Fifth Congressional district at said election, as herein agreed to, shall begin on Saturday, the 9th day of February, 1907, and shall continue from day to day thereafter until the ballots east in precincts 1 to 10, inclusive, of Ward 9, have been recounted, and that thereupon the taking of said depositions and the recounting of said ballots shall be continued to Monday, the 6th day of May, 1907, and shall continue from day to day thereafter until the same are completed, and that so far as the recounting of the ballots so cast in said election as aforesaid is concerned all the time necessary to properly recount the same, as above provided, may be used, irrespective of the requirements of section 107 of the Revised Statutes of the United States, and that said testimony with reference to such recounting shall be taken at such times and under such circumstances as will best suit the convenience of said board of election commissioners.

It is further stipulated that with reference to testimony in said matter other than that relating to the recounting of the ballots the same shall not be taken until after said ballots have been recounted, and that after said recount has been finished, the time Allowed for taking any such additional testimony shall be ninety days, and the testimony shall be taken in the following order: Said contestant shall take testimony during the first forty days following the completion of said recounting of the ballots, said contestee during the succeeding forty days thereafter, and said contestant may take testimony in rebuttal during the remaining ten days of said period.

ANTHONY MICHALEK,
By JAMES H. WILKERSON,
CHARLES M. THOMSON,
His Attorney.
A. J. SABATH,
By FRANK L. CHILD,
His Attorney.

On the face of the returns from the district the contestant had received 8,634 votes and the contestee 9,545 votes, a majority of 911 votes for the sitting Member. The recount under the stipulation gave the contestant 8,628 votes and the contestee 9,347 votes, a majority of 719 votes for the sitting Member.

The contestant applied to the committee for an order directing the board of election commissioners of the city of Chicago, before whom the recount had been made, to produce the ballots before the committee for reexamination.

The committee by a unanimous vote denied the application on the ground that—

If the ballots were produced and if they were just as described in the evidence they would not be considered such conclusive evidence of fraud or conspiracy as to justify the committee in rejecting and casting out of the count any precincts in said district unless such evidence contained in the ballots themselves was corroborated by some evidence of conspiracy, fraud, carelessness, or ignorance on the part of the election officers or others; and since no such evidence appears in the record in this case, your committee believes that no different result could be arrived at than that reached by the board of election commissioners of the city of Chicago if the ballots were produced before this committee and reexamined.

Having denied the application for the production of said ballots before this committee, no other conclusion can be reached except to confirm the report and count made by the board of election commissioners and find in favor of the contestee.

The committee then recommended the passage of resolutions declaring the contestant was not elected and contestee was elected, and the resolutions were agreed to by the House without debate or division.

122. The South Carolina election cases of Dantzler v. Lever, Prioleau v. Le gare, and Myers v. Patterson in the Sixtieth Congress.

The House declined to consider statements of persons alleging an illegal denial of the right to vote but failing to submit evidence.

The House will not invalidate an election because a State has disregarded reconstruction legislation as to qualifications of voters.

On January 5, 1909,[1] Mr. James R. Mann, of Illinois, from the Committee on Elections No. 1, reported on the South Carolina cases of Alexander D. Dantzler *v.* Asbury F. Lever, Aaron P. Prioleau *v.* George S. Legare, and Isaac Myers *v.* J. 0. Patterson.

The cases involved the constitutionality of the South Carolina registration and election laws, and their alleged discrimination against colored voters in violation of the fourteenth and fifteenth amendments to the Federal Constitution.

As each of the cases involved the same question, the committee heard the three cases together.

The same question had been passed upon after exhaustive argument in the Fifty-eighth Congress in the case of Dantzler *v.* Lever, and the committee confirmed the conclusion arrived at in that case, quoting the report verbatim in each case.

In the case of Prioleau *v.* Legare the contestant also offered in evidence lists of names attached to statements in the following form:

UNITED STATES OF AMERICA,

State of South Carolina:

From the First Congressional District to the Sixtieth Congress.

This is to certify that we, the undersigned, are citizens of the United States and citizens of the State of South Carolina, and residents of the counties of the first district in the aforesaid State.

That each of us is over 21 years of age and upward and duly qualified to vote under the Federal Constitution and laws and under the act of 1868.

And that we had applied to the officials of registration for the State and counties that compose the said district in the State aforesaid to be registered to vote previous to the general election held on the 6th day of November, A. D. 1906, for Representative in the Sixtieth Congress, but were deprived by the partisan administration of the election law by the officials acting under the unconstitutional election laws of the aforesaid State enacted in the year 1895 that discriminate against negro citizens and Republicans by the Democratic supervisors and managers who compose the election board absolutely. Wherefore, had we been allowed to vote as we desired so to do, we would have voted for Aaron P. Prioleau, Republican, for Representative in the Sixtieth Congress from the counties that compose the First Congressional district in the aforesaid State on the 6th day of November, 1906.

All of which we most earnestly subject our names.

These lists were certified to in the following form:

UNITED STATES OF AMERICA,

State of South Carolina:

First Congressional District to the Sixtieth Congress.

Personally appeared before me T. Bacot, agent, who, being duly sworn according to law, deposes and says that he is a colored citizen of the State of South Carolina and a resident of the

[1] Second session Sixtieth Congress, House Reports 1817, 1818, 1819; Record, p. 484.

county of the first congressional district in the aforesaid State. That he herein certifies that the record of the names of 101 voters at ward 2, first precinct, is true and correct, and that he has read the heading of the list above.

T. BACOT, *Agent.*

Agent for contestant sworn to and subscribed before me this 21st day of February, A. D. 1907.

E. F. SMITH,

Notary Public for South Carolina.

No other evidence on the subject was submitted. Similar lists were offered in the case of Myers *v.* Patterson.

The committee reported:

The attempt to show that the contestee was not elected by relying upon statements to that effect over a large number of real or imaginary names written by one person is too ridiculous to require discussion.

In each report the committee recommended resolutions declaring that the contestant was not elected and that the contestee was elected.

On January 23, 1909,[1] the House agreed to the three reports without debate or division.

It is to be noted that the decisions in these cases differ from those rendered in similar cases in the Fifty-eighth and Fifty-ninth Congresses in that they confirm the title of the sitting Member. Former decisions merely declare the contestant not elected without passing upon the title of the sitting Member.

123. The New Mexico case of Larrazola v. Andrews, in the Sixtieth Congress.

Evidence that persons whose names appeared on the poll books were no longer employed in the locality and presumably had left before election day was deemed inconclusive proof of illegal voting.

When it was impossible to determine for whom certain illegal votes were cast, they were deducted pro rata from the votes counted for contestant and contestse, respectively.

The entering of names on the poll books following those of the judges, who testified they voted last, was held to justify the rejection of such votes.

The appearance of names in alphabetical order on the poll books was held not sufficient to justify rejection of the poll in the absence of other evidence of fraud.

On February 25, 1909,[2] Mr. Marlin E. Olmsted, of Pennsylvania, from the Committee on Elections No. 2, submitted the report in the New Mexico case of Larrazola, *v.* Andrews.

The official vote had been returned as follows: For Andrews, 22,915 votes; for Larrazola, 22,649 votes; for Metcalf, 211 votes; an apparent majority for Andrews of 55 votes.

Larrazola served notice of contest, embracing 52 specifications, more or less general in character, against the regularity of the election of Andrews, who in turn filed allegations against the regularity and legality of votes cast for Larrazola.

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[1] Second session Sixtieth Congress, Record, pp. 1343, 1344.

[2] Second session Sixtieth Congress, House Report No. 2246; Record, p. 3116; Moores' Digest, p. 37.

The report made rulings in certain specific cases.

As to Yankee precinct:

The voting population consists chiefly of persons working for a coal company. Fifty-eight persons were returned as having voted in that precinct, some of whom were shown by the time sheets of the coal company to have quit work a few days and others a longer time before election. There is no positive proof that they left the precinct, but there is testimony that it is customary for men to leave the camp very soon after stopping work. These coal camps, it seems, are private property, closely guarded, and it is in evidence that persons having no business there are not allowed to remain. There is no evidence that any of the men actually did leave before election day, or that they were present anywhere else on election day.

There were also a few of them shown by the time sheets not to have commenced work within the residence period required by the statute prior to election day. There is no proof whether they were or were not within the precinct long enough before election to entitle them to vote. Considered in connection with the transfer privilege allowed by the law of the Territory, whereby a voter entitled to vote in one place may obtain the right to vote in a distant precinct, the evidence does not conclusively show that these 56 votes were illegal.

The majority of the committee agreed, however, that there was direct proof of fraud on the part of election officers which impeached 103 votes cast in this precinct, and disposed of the votes in question as follows:

There is no evidence showing, or tending to show, for which of the candidates any one of these 103 alleged illegal votes were counted, and contestant suggests, as one way of disposing of the matter without disfranchising admittedly honest voters, that they be deducted pro rata from the votes counted for Andrews and himself, respectively. This would result in deducting 85 from the vote of Andrews and 18 from the vote of Larrazola.

As to precinct No. 17, San Rafael:

From the testimony of the judges of election and others it appears that after a fair election had been held and the returns thereof duly signed the poll books were taken away by some one and 56 names fraudulently entered therein.

The evidence shows that the judges voted last and that their votes completed the 136. Subpoenas were issued for the 56 men appearing from the poll books to have voted after the 136 admittedly legal votes had been cast. Seventeen of them were found. They testified that they did not vote. This seems a sufficiently dear case of fraud to justify the deduction of 56 from the plurality of Andrews.

As to the appearance of names upon the poll book in alphabetical order, the report says:

In the precinct of Van Houten, in Colfax County, contestant attacks 95 votes upon the ground that the voters appear upon the poll book in alphabetical order; not that the entire 9,5 were so arranged all together, but that in the total list of 460 there are found various bunches aggregating 95. Thus voters Nos. 153, 154, 155, 156, and 157 each bore the surname "Vuetich." There are other cases of four or more consecutive numbers where the first letter is the same but the surnames different. Unquestionably where any considerable number of names appear on the poll book as having voted in alphabetical order the circumstance is suspicious. With other evidences of fraud such alphabetical voting would be highly corroborative.

In the case of Manzanares *v.* Luna (Rowell, 399) it appeared that many names on the poll books were obviously fictitious; that they appeared in alphabetical order, as if copied from some index or registration; that in one or two cases the whole returns were forgeries, and that in one case the election was held the day before election day. In fact, there was abundant evidence of fraud, of which the alphabetical arrangement was only one corroborative item, and a large number of votes were thrown out. But here there is no evidence of fraud whatever, except so far as the alphabetical voting itself may be deemed such evidence. Contestant has not offered to prove that any of the names appearing upon the poll book were fictitious, or that persons answering to

those names did not, in point of fact, vote. Can we throw out these votes in the absence of any positive evidence of fraud of any kind, particularly if there is any way of accounting for their alphabetical order upon any other hypothesis than that of fraud? May it not well be that the five persons of the name of Vuetich are members of one family and came together to the Polls?

The evidence shows that there is no personal registration in New Mexico. The registration lists are made up by officers elected for that purpose and are invariably arranged in alphabetical order. The registration lists are used by political workers and consulted from time to time for the purpose of noting what persons have not voted. As the day wanes they look up those persons, to some extent in the order in which they appear upon the registration list, and bring them in to vote. Can we, from the fact that two C's were followed by two E's and they by four B's upon the poll book, conclude, in the absence of any other evidence, that there was such fraud as to require all these 95 votes to be rejected? There has been no attempt made to show that any of these 95 persons did not vote or were not lawfully entitled to vote. Furthermore, there is not a particle of evidence to show for which candidate all or any of their votes were cast or counted.

In the precinct of Bibo, in Valencia County, 59 votes were returned as cast for Andrews. The sole ground on which they are contested is that the names appear upon the poll book in the same order as on the registration list. Upon the other hand, it is urged that this fact is accounted for by the fact that as a person appeared and voted his name was checked off upon the registration list, and later the poll book was made up from the names so checked upon that list. This appears entirely plausible, particularly in view of the fact that the names upon the registration list do not all appear in the poll book. It would seem that whenever a man whose name was upon the registration list failed to vote his name was not put upon the poll book. Thus, Bibo, Simon, is the eighteenth name upon the registration list and also upon the poll book. Bibo, Ivan is the nineteenth name upon the registration list, but as he apparently did not vote his name was not entered in the poll book. Ten names in all appearing in various places upon the registration list do not appear upon the poll book as having voted.

If there has been fraud attempted, would not all the names on the registration list have been used and perhaps more added? It is not pretended that the 59 persons recorded as having voted did not actually vote or were not entitled to vote. Contestant did not subpoena, one of them to testify, or attempt to prove in any other manner that they had not actually voted or that they did not cast their votes for Andrews. Had there been fraud, it could easily have been proved. In the absence of such proof, can we, from the mere coincident of the order of the names in the two books, assume that the votes as returned were all fraudulent, and that, in point of fact, no honest votes were cast in the precinct? If the votes were actually and honestly cast, and it was the duty of the election officers to record them in the poll books precisely in the order in which they were cast, can we disfranchise all the voters because the election officers, instead of recording the names of the voters in the poll book as they voted, chose to check them off on the registration list first and afterwards copy the names into the poll book?

It is a well-established principle of law that a lawful vote, honestly cast, may not be rejected because of irregularity in the conduct of an election officer. Upon the record as it stands we are clear that these votes must be counted as returned.

124. The case of Larrazola v. Andrews, continued.

A lawful vote, honestly cast, may not be rejected because of irregularity in the conduct of an election officer.

In the absence of proof to the contrary, the presumption is that the election officers performed their duties in every respect.

The burden of proving error or falsity of election returns rests upon the contestant.

Unless it is shown for whom a vote alleged to be illegal was cast, the complaint must be disregarded.

Error in the spelling of names on the poll books does not vitiate the returns.

Among the allegations of irregularity by the contestant was the counting for contestee of votes cast by persons of foreign birth who had not been naturalized.

The election laws under which the election was held provided that—

Every person who is not a native citizen of the United States or adopted citizen of this Territory who may present himself to vote at any election in this Territory shall be examined by the judges of election in whose precinct he may apply to vote, and if he prove to the satisfaction of the said judges that he has legal letters of naturalization or of citizenship he shall be allowed to vote.

No evidence was introduced showing failure upon the part of the judges of election to comply with the law in this respect, and the majority of the committee decided that:

In the absence of proof to the contrary the presumption is that the judges of election performed their duty in every respect. This complaint therefore must be disregarded.

As to the spelling of names:

It was also alleged that persons voted who were not registered.

The report says:

There are allegations that number of persons voted without having been registered. This, however, is not fully sustained by the evidence and is based mainly upon errors in spelling occasioned, possibly, by errors in transcribing from one book to another or from the fact that the officer in charge of the poll book, hearing the name of the voter, spelled the name as it sounded to him. Thus, James Hewart is recorded as voting under the name of "James Stewart." J. P. Lane appeared on the poll book as "J. R. Lane." In another case the name "Ashe" appeared upon one book and "Athe "upon the other. So, "Lewis "appeared upon one book and "Louis "upon another. "George Gerch" appeared upon one book and the name is spelled "Girst" upon the other. These, we think, were mere errors in recording, which ought not to vitiate the return.

125. The case of Larrazola v. Andrews, continued. Where the election laws prohibited the acceptance of a nomination from more than one party, the distribution of the ballots of a particular party to which were attached stickers bearing the name of a candidate not nominated by such party was held to be unlawful.

In the absence of law requiring ballots to be counted in the voting place in which they were cast, the removal of ballot boxes to another place for counting was held not to constitute evidence of fraud.

Failure to comply with a requirement of the election law does not invalidate a vote unless the law so provides.

When under the forms of law the sitting Member has been duly certified as elected, the legal presumption is that the returns are correct, and the burden of proof to the contrary rests upon the contestant.

Instance wherein a minority report criticized the election laws of the State in which the contested election was held.

The contestee claimed that numbers of illegal votes were counted for the contestant in certain counties in which there was a fusion ticket for local officers, but on which no candidate for Congress was named.

The law of New Mexico provided:

SECTION. 1. That hereafter when any political convention held in this Territory or any county thereof for the purpose of nominating candidates to be voted for at any election held in this Territory or any county thereof, and the names of the candidate or candidates nominated by such convention, and certified to by the presiding officer of such convention and the secretary thereof, shall have been filed with the probate clerk of the county in which such convention was held, it shall be unlawful for any other political convention, person, or persons to print, or cause to be printed or circulated, any ticket or ballot having thereon the name or names of the candidate or candidates nominated by such political convention: *Provided,* That nothing in this section shall be construed to prohibit any person from erasing or changing in any manner any name on any such ticket or ballot voted by such person: *And further provided,* That this act shall not be so construed as to prevent any executive committee of any political party holding such convention from substituting the name or names of any candidate selected by such committee by authority of such convention to fill any vacancy caused by the death, declination, or retirement of any candidate nominated by such convention.

It also provided that:

No political party shall select any device or emblem or any portion thereof the same as, similar to, or that is liable to be confounded with or mistaken for the device or emblem then in use by any other political party.

It further provided that:

No person shall accept a nomination to more than one office nor from more than one political party. Ballots other than those printed by the respective county recorders according to the provisions of this act shall not be cast, counted, or canvassed in any election. Every ballot printed under the provisions of this act shall be headed by the name and emblem of the political party by whom the candidates whose names appear on the ballots were nominated, and each of said ballots shall contain only the names of the candidates nominated by said party.

It appears from the evidence that the fusion ticket carried a blank space in which the voter might write the name of the person for whom he desired to cast his vote for Delegate. Both candidates distributed large numbers of these tickets with stickers bearing his name affixed in this space.

The report says:

The distribution of these ballots having pasted upon them a printed sticker bearing the name of a person who was not nominated by the People's Party, and as a candidate for an office for which no nomination was made by that party, was not lawful.

There is no evidence from which we can determine how many such ballots were cast for Larrazola and how many were cast for Andrews. Therefore it is impossible to determine to what extent the result was affected.

The contestee also charges that in one precinct the election officers took the ballot box with them from the blacksmith shop, in which the election was held, to a church sociable, where they ate supper and then adjourned to the sampling room of a hotel, where the ballots were counted.

The report says:

This was, of course, irregular, but aside from its irregularity there is absolutely no evidence of fraud or mistake. There was no law specifically requiring the ballots to be counted in the blacksmith shop where the election was held.

The law of New Mexico provides for a system of absentee voting under which it was possible for one who had been duly registered and who expected to be away from home on election day to obtain a transfer authorizing him to vote elsewhere in the State. It was contemplated by the law that these transfers should be deposited

by the election officers in the ballot box with the ballot. It was claimed that in certain instances this was not done.

The majority, in passing on this question in their report, say:

Would it be right to disfranchise the voter because an election officer failed to perform his whole duty? We do not understand that by the law of New Mexico the vote is declared invalid because of failure to deposit the transfer in the ballot box.

In summing up the case the report finds:

The testimony in the case enters very largely into the realm of conjecture.

When, under all the form of law, a person has been duly returned and certified as elected to a seat in Congress, the legal presumption is that the sworn officers of the law have performed their duties and that the returns are correct. In order to successfully impeach that return the contestant must do more than raise doubts as to its correctness. Upon him there rests the burden of proving the falsity or error of that return. The proof offered in this case is not sufficient for that purpose.

A minority statement, signed by two members of the committee, declares that:

Without filing any assent or dissent to the above report, it is our judgment that the election system in New Mexico is radically defective; that the imperfect manner of registering voters, as well as the loose method of casting the ballots, renders it easily possible for the most outrageous frauds to be committed thereunder.

In the case before us we have discovered many inexcusable irregularities, if not frauds, all traceable to the abortive registration and election laws, and without giving in detail our many objections thereto, we deem it sufficient to say that, to the end that every voter may have a free and fair opportunity to cast his ballot, the law-making power of the Territory should revise and reform the existing statutes in this regard as speedily as possible.

The majority of the committee recommended resolutions declaring that the contestant was not elected and confirming the title of the sitting Delegate to his seat.

The House agreed to the resolutions without debate or division.

126. The Massachusetts election case of Galvin v. O'Connell, in the Sixty-first Congress.

Acts of Congress relating to the conduct of contested election cases are directory and not mandatory, and delay of contestant in forwarding testimony to the House within the time specified by law does not vitiate the proceedings.

If it is reasonable to suppose there was error in judgment in counting ballots cast in a portion of the precincts in the district, it is equally reasonable to assume there was error in judgment in counting the ballots in the remaining precincts.

If an issue involves the identification of the person for whom a ballot was counted, such identification may be demanded as a matter of right.

Where the evidence falls to establish a presumption that a recount of the ballots would change the result, the House declined to order such recount.

When, under all forms of law, a person has been duly returned as elected to Congress, it is presumed the count is correct, and a case must be made out clearly warranting the presumption of fraud or mistake in order to justify a recount.

On June 13, 1910,[1] Mr. Charles L. Knapp, of New York, from the Committee on Elections No. 1, submitted the report in the Massachusetts case of Galvin *v.* O'Connell.

The record does not disclose the official returns, but a recount before a bipartisan board under the laws of Massachusetts gave O'Connell 16,553 votes, Galvin 16,549 votes, and two other candidates 1,380 and 1,187 votes, respectively, a plurality of 4 votes for Galvin, the sitting Member.

The contestant made general charges that ballots had been wrongfully counted for the contestee and against him, the contestant.

The taking of the contestant's testimony was completed in January, 1909, but was not forwarded to the Clerk of the House of Representatives until the following August.

The statute provided that—

All officers taking testimony to be used in a contested election case, whether by deposition or otherwise, shall, when the taking of the same is completed, and without unnecessary delay, certify and carefully seal and immediately forward the same, by mail or express, addressed to the Clerk of the House of Representatives of the United States, Washington, District of Columbia.

The contestee denied the jurisdiction of the committee, alleging that the contestant's evidence has not been filed with the Clerk of the House of Representatives within the time prescribed by this statute, but the committee held:

It has been repeatedly held that the acts of Congress relating to the conducting of contested election cases are directory and not mandatory. They are to be construed more with reference to the substantial rights of the parties than to the exact wording of the statutes. (See McCrary on Elections, 3d ed., secs. 337, 338.) There was no wrong intent shown for the delay and as neither party was deprived of any material right by reason of such delay, the committee refused to entertain this technical objection and assumed jurisdiction of the case.

A point at issue involved the contention on the part of the contestant that the ballots in certain precincts should be recounted by the House, and the contention on the part of the contestee that if any of the ballots were recounted the whole number of ballots cast should be recounted.

The committee decided:

It is the opinion of the committee that if on the evidence submitted it would be reasonable to suppose that there was error in judgment in the counting of the ballots cast in the wards and precincts mentioned by the contestant and contestee, it would be equally reasonable to assume that there were errors in judgment in the counting of the ballots in the remaining wards and precincts, and that, if any, all of the ballots cast at said election, aggregating 35,669 should be ordered for recount by the committee and the House.

On the sufficiency of evidence justifying a recount the report continues:

It is a principle well established that when, under all forms of law, a person has been duly returned and certified as elected to Congress it is presumed that the election officers have done their duty and the count is correct. To justify the committee in ordering a recount there should be a case made out that would warrant the presumption of fraud, or, still more, in the case of an alleged mistake or error of judgment in the counting of ballots, a case made out that would clearly justify the presumption that a mistake had been made that would set aside the return. In other words, there must be evidence and proof other than that of speculative possibility.

[1] Second session Sixty-first Congress, House Report No. 1565; Record, p. 7935.

An incidental question concerned the right to require identification of the person for whom any individual ballot was counted.

The chairman of the board of election commissioners of the city of Boston testified as follows:

Question. Do you know of any law requiring an election commissioner to do it [identification of person for whom ballot was counted]?

Answer. I know of no law making it mandatory.

Question. Then the writing of any statement on the ballot is purely at the discretion of the election commissioners?

Answer. I should say so. If the counsel on either side request to have a ballot identified in order that an issue may be brought before a court or legislative body, I believe the election commissioners have the right to identify that ballot.

This evidence is quoted in the report as confirming the opinion that—

A careful examination of the laws and practices governing recounts in the State of Massachusetts, together with the fact that on the recount in this case individual ballots were questioned and identified for whom they were counted, leads the committee to the conclusion that it was the privilege of the respective parties on such recount to question any ballot, have the same examined and passed upon and counted, and to have the same identified for whom such ballot was counted.

No fraud was alleged and the issue resolves itself into a question of the accuracy of the recount.

The election laws of Massachusetts provided that—

SEC. 300. If, on or before five o'clock on the third day next succeeding the day of an election in a ward of a city or in a town, ten or more voters of such ward or town, except Boston, and in Boston fifty or more voters of a ward, shall sign in person, adding thereto their respective residences on the first day of May of that year, and cause to be filed with the city or town clerk, or in Boston with the election commissioners, a statement sworn to by one of the subscribers that they have reason to believe and do believe that the records, or copies of records, made by the election officers of certain precincts in such ward or town, or in case of a town not voting by precincts, by the election officers of such town, are erroneous, specifying wherein they deem them to be in error and that they believe a recount of the ballots cast in such precincts or town will affect the election of one or more candidates voted for at such election, specifying the candidates, or will affect the decision of a question voted upon at such election, specifying the question, the city or town clerk shall forthwith transmit such statement and the envelopes containing the ballots, sealed, to the registrars of voters, who shall, without unnecessary delay, open the envelopes, recount the ballots, and determine the questions raised; but upon a recount of votes for town officers in a town in which the selectmen are members of the board of registrars of voters, the recount shall be made by the moderator, who shall have all the powers and perform all the duties conferred or imposed by this section upon registrars of voters.

The registrars of voters, or in Boston the election commissioners, shall, before proceeding to recount the ballots, give notice in writing to the several candidates interested in such recount and liable to be affected thereby, or to such person as shall be designated by the petitioners for a recount of ballots cast upon questions submitted to the voters, of the time and place of making the recount, and each such candidate or person representing petitioners shall be allowed to be present and witness such recount, either in person, accompanied with counsel if he so desires, or by an agent appointed by him in writing. In the case of a recount of the ballots cast upon a question submitted to the voters, one representative from any committee organized to favor or to oppose the question so submitted shall be permitted to be present and witness the recount. In the city of Boston, the chairman of the city committee representing the largest political party and the chairman of the city committee representing the second largest political party may in writing designate two persons, or such further number as the election commissioners may allow

to be present and witness the count, and said election commissioners shall allow each candidate whose election is in question, or his representative, to be present and may allow representatives of other political parties and other persons to be present and witness the recount.

All recounts shall be upon the question designated in the statements filed, and no other count shall be made, or allowed to be made, or other information taken, or allowed to be taken, from the ballots on such recount.

The registrars of voters or election commissioners shall, when the recount is complete, inclose all the ballots in their proper envelopes, seal each envelope with a seal provided for the purpose, and certify upon each envelope that the same has been opened and again sealed in conformity to law; and shall likewise make and sign a statement of their determination of the questions raised. The envelopes, with such statement, shall, except in Boston, be returned to the city or town clerk, and the clerk or commissioners shall alter and amend such records as have been found to be erroneous in accordance with such determination; and the records so amended shall stand as the true records of the election. Such amended records of votes cast at a State election shall be made and transmitted as required by law in the case of copies of original records.

Upon the application of the contestant and with the concurrence of the contestee the recount was made under this law and the returns determined by the unanimous decision of the board.

And the committee concludes:

It must be borne in mind in connection with this case that the certificate of election is not based on the first return of the election inspectors, but is based upon the unanimous finding of bipartisan recount boards whose character and experience warrant the assumption that they were well qualified for the duties of their positions, and that their experience and familiarity in the counting of ballots justifies the belief that they are specially well qualified to make a correct count of the ballots. Certainly their return should stand until invalidated by proof.

It is the unanimous opinion of the committee that the evidence in this case does not warrant the committee or the House in ordering the ballots for a recount, and that to so order them would be to establish such a precedent as would not be justified in contested election cases. The result of such precedent would be not only to invite election contests in cases where certificates of election were based upon small majorities, but would also enable the contestant or contestee to single out a few ballots indistinctly marked, without proof either for whom they were counted or that they were not counted, as claimed by the respective parties they should be, or that they were wrongfully counted, and on such speculative evidence make Congress a recount board of all ballots cast. In other words, it would be reversing a rule confirmed by a long line of precedents that to justify a recount of ballots by Congress there must be such proof given or case made out as will establish a presumption of fraud or that there has been error or wrongful counting of ballots as would set aside or reverse the return made.

The committee, therefore, unanimously recommended resolutions declaring the contestant was not elected and confirming the title of sitting Member to his seat.

On June 23,[1] after a brief statement by the chairman these resolutions were agreed to by the House without division.

127. The Louisiana election case of Warmoth v. Estopinal, in the Sixty-first Congress.

The election laws of a State are assumed to be valid and constitutional until tested and declared otherwise by a proper tribunal.

A contestant is estopped from charging against the contestee irregularities which he himself practiced.

[1] Second session Sixty-first Congress, Journal p. 827; Record p. 8827; Moores' Digest, p. 320.

On June 13, 1910,[1] Mr. Arthur W. Kopp, of Wisconsin, from the Committee on Elections No. 1, submitted the report of the committee in the Louisiana case of Warmoth *v.* Estopinal.

The official returns from the district gave the contestant 1,916 votes and the sitting Member 13,923 votes.

The notice of contest submitted: First, that the contestee had obtained his nomination under a primary election law which violated the fifteenth amendment of the Constitution of the United States; second, that the contestant was legally nominated, and that as the votes cast for the contestant were the only legal votes cast in said election, contestant upon the face of returns is entitled to the seat in the Sixty-first Congress of the United States to which the contestee has been returned.

The report says:

> The only question involved, then, in this contest is the validity and constitutionality of the primary election law of the State of Louisiana. Your committee does not feel called upon to pass upon this question, for two reasons:
>
> First. The said primary election law has been passed upon in Labauve *v.* Michel (121 La., 374) and held constitutional. It is now charged by contestant that sad law "is in contradiction and defiance of the fifteenth amendment of the Constitution of the United States, and is therefore null and void" and that the election laws of the State are unconstitutional. The constitutionality of the election law of the State of Louisiana has never been tested, and so we must assume that the same is constitutional and valid.
>
> Second. No primary election was, in fact, held by either party for nominating candidates for Representatives in Congress, only one person registering with either party, and so, under the statutes, no primary was held. If the nomination thus secured by the contestee was unlawful, so was that of contestant, and the contestant is therefore estopped in the present case from asserting the invalidity of the nomination secured by the contestee.

The committee, therefore, unanimously recommended a resolution declaring that the contestant was not elected. The title of the sitting Member was not passed upon.

On June 23[2] the House agreed to the report with little debate and without division.

128. The South Carolina election cases of Richardson v. Lever, Prioleau v. Legare, and Myers v. Patterson, in the Sixty-first Congress.

The Supreme Court, and not Congress, is the proper tribunal to determine the constitutionality of a State's election system.

The House will not deny a district representation because reconstruction legislation, as to the qualification of voters has been disregarded.

Votes of persons listed as having been illegally denied the right to vote will not be counted on the strength of a mere certificate to that effect unauthenticated by other evidence.

An election is not invalidated by the failure of the State legislature to comply with the law in providing for registration of electors.

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[1] Second session Sixty-first Congress. House Report No. 1566; Journal, p. 772; Record, p. 7935.

[2] Second session Sixty-first Congress, Journal, p. 827; Record, p. 8830; Moores' Digest, p. 41.

The constitutionality of a State's election laws being challenged, the House declared contestant not elected without passing on the title of the sitting Member to his seat.

On June 18, 1910,[1] Mr. Michael E. Driscoll, of New York, from the Committee on Elections No. 3, reported on the South Carolina election cases of R. H. Richardson *v.* Asbury F. Lever, Aaron P. Prioleau *v.* George S. Legare, and Isaac Myers *v.* James O. Patterson.

Each of these cases involved the same constitutional question passed on in the South Carolina cases of the Fifty-eighth, Fifty-ninth, and Sixtieth Congresses, and the reports are largely in affirmation of the conclusions reached in those cases.

The notice of contest in each case contains allegations of arbitrary rulings and unfair discriminations on the part of election officers, and raises the question of the constitutionality of the constitution of South Carolina and the election laws enacted thereunder.

The same report is submitted for each of the three cases, and the accompanying minority views are practically identical.

As to the votes of persons alleged to have been illegally denied the right to vote, the report says:

> The contestant claimed that upward of 15,000 of his political friends and supporters offered to vote in the various election precincts in said congressional district for him, but were denied that right and privilege, and that if they had been permitted to vote they would have given him a majority over the contestee.
>
> Copies of those lists are set forth in the original record, but do not appear in the printed record.
>
> It is claimed by the contestant that his agents in the various election precincts kept those lists of names of colored citizens who were denied the right to vote. An examination of those lists in the original record does not satisfy your committee that they should be counted as having voted for the contestant in said election or be counted for him now in order to offset the coutestee's majority. The names in each of those lists were apparently written by the same person. There is at the head of some of those lists a form of an affidavit, but none of those persons signed such affidavit himself or swore to it in any form. The method of taking those lists in this case is somewhat different from what it is in the case of Prioleau *v.* Legare. No verified affidavit appears anywhere with relation to those lists, and in their present form they are not competent evidence on which this committee can say they should be counted for the contestant.
>
> Neither the contestant nor his counsel, in the brief or on the argument, gave much attention to those lists, nor did they claim much for them. They did not say that if all the names on the lists were counted they were enough to overcome the majority which the election returns show that the contestee received.
>
> On the other hand, the contestee's counsel stated in his brief and orally that if all the persons whose names appear on those lists were counted for the contestant, the contestee would still have a majority of 4,870; and so far as appears neither the contestant nor his counsel disputes that claim.
>
> Your committee therefore concludes that the contestant was not elected, and he is therefore not entitled to a seat in the Sixty-first Congress from the Seventh Congressional district of South Carolina.

In this conclusion the minority tacitly concurs.

As to the duty of the House in passing on the validity of a State constitution and laws enacted thereunder,

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[1] Second session Sixty-first Congress, House Reports Nos. 1638, 1639, 1640; Journal, pp. 805, 806, p. 8498.

The report concludes:

If the present constitution of South Carolina and the laws enacted thereunder are unconstitutional and void, then the necessary conclusion is that said election was null and void.

If no valid election were held in the Seventh Congressional district of South Carolina on November 3, 1908, and if the House of Representatives should so hold and declare the seat vacant, then no election could be held in said district under the present constitution and laws until they are changed to conform with the constitution of 1868 and the reconstruction act passed by the Congress on June 25, 1868.

That decision would apply to other districts in South Carolina, and with more or less force to other States which were rehabilitated under what are known as the fundamental conditions and reconstruction acts.

In view of the fact that Congress is not the proper tribunal to finally determine the question of the constitutionality of South Carolina's present constitution, and in view of the precedents in other congressional election contests which have come from the State of South Carolina, your committee does not feel justified at this time in reporting to the House that the election was null and void and declaring the seat vacant. That question should be determined by the Supreme Court of the United States. A test case should be made and taken to that court for determination, and your committee earnestly hopes that that may be done at the earliest possible opportunity. The Supreme Court is in a sense continuous and recognizes its own decisions and judgments, while the political complexion of the Congress may change from term to term, and a decision of one Congress might, and perhaps would, be overturned in the next in a case a majority of its members were of a different political party.

A majority of this committee doubts the wisdom or propriety of denying to that district representation in the House of Representatives pending a final decision of the whole question by the Supreme Court of the United States. The members of this committee have not found, or at least do not feel disposed to express an opinion at the present time as to the constitutionality of the laws of South Carolina under which said election was held, and do not feel disposed by their action in this particular case to affirm or deny that said laws are constitutional, and do not wish to establish a precedent one way or the other on that question, and therefore respectfully recommend the adoption of one resolution declaring the contestant was not elected.

In support of this position the report cites decisions in the cases of Prioleau *v.* Legare, in the Fifty-ninth, and Sixtieth Congresses; Dantzler *v.* Lever, in the Fifty-eighth and Sixtieth Congresses; Jacobs *v.* Lever, in the Fifty-ninth Congress; and Myers *v.* Patterson, in the Fifty-ninth and Sixtieth Congresses.[1]

On this phase of the case the minority say:

Although it has been held by the majority of the Elections Committee again and again, with each recurring contest of a similar nature, that the forum in which to test the constitutionality of a state constitution was rather in the courts of the nation than before a committee in Congress, such contests have persistently and contrary to the suggestion of the members of the majority continued to bring these pseudo contests before Congress, although each time there is found to be nothing differentiating the contest now before us from former ones from said State and district, and in none of which has there even been the slightest ground for action favorable to contestant even construing the words of the Federal Constitution that each House of Congress is the judge of the elections, returns, and qualifications of its own Members, in their broadest sense.

The constitution of South Carolina has been in force for fifteen years, thus affording ample time to those who question same to test the validity thereof in the highest court in the land, and the courts are still open for such consideration.

If there be any who desire to raise the question of the constitution and election laws of a State being in conflict with Federal statutes or our national organic law, we consider such a matter should be tested in the courts.

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[1] See secs. 1134, 1135, 7444, of Vol. VI of this work.

Especially this latter principle emphasized by the most recent precedents in such cases or contests, handed down to us by the majority party, to wit: That this Committee on Elections should not usurp the functions of the Supreme Court of the Nation and pass upon the legality of the constitution of South Carolina and its conflict vel non with the national organic law.

In the case of Richardson *v.* Lever, this further question was decided:

A new point is made in this case.

It is contended that the act of the General Assembly of South Carolina, under which the election on November 3, 1908, was held, is not only in violation of the Constitution and laws of the United States, but also contrary to the constitution of South Carolina adopted in 1895.

Section IV of article 2 of that constitution describes the qualifications for suffrage, and among those qualifications is registration which shall provide for the enrollment of every elector once in ten years, and also an enrollment during each and every year of electors not previously registered under the provisions of that article. It also provided that up to January 1, 1898, all male persons of voting age applying for registration who could read any section of the constitution submitted to them or explain it when read should be entitled to register and become electors.

Apparently the general assembly which met in 1896 considered that the registration provided for in the constitution would not be, in the contemplation of the law, complete until the 1st of January, 1898, and that the next registration thereafter should be taken in 1908, and it enacted a statute to that effect.

The general assembly did not in the year 1906 provide for registration or enrollment of electors, as the contestants claim should have been done; but it did, by an act approved January 24, 1908, provide for such general registration or enrollment. The contestant claims that since this second registration under the 1895 constitution was not made until 1908, the election held on November 3, 1908, in pursuance of that registration was null and void.

This committee is inclined to adopt the construction of the constitution given to it by the general assembly and hold that the second registration in 1908 was ten years after the first, which was completed on January 1, 1898. But suppose the contestant's contention is correct that the second registration should have been taken in 1906 and the general assembly of the State neglected to provide for it, what then? Should elections in the State be made impossible and government cease because the general assembly of 1906 neglected its duty? It seems quite clear that if the general assembly of 1906 committed an error in not providing for a general registration of the electors that the general assembly of 1908 corrected that error and cured the defect by making provision for such registration, and that so far as this question goes the election was regular and valid.

Your committee therefore respectfully recommends the adoption of the following resolution:

"Resolved, That R. H. Richardson, contestant, was not elected a Member of the Sixty-first Congress from the Seventh Congressional district of South Carolina and is not entitled to a seat therein."

In each report the majority of the committee recommend a similar resolution declaring the contestant was not elected, and omitting the usual resolution confirming the sitting Member's title to his seat.

In dissent the minority say:

We find ourselves unable to agree with our confreres of the majority in all particulars, though concurring with them in many respects as to the merits of the contest.

The difference between the majority and minority is that the majority reports and recommends the adoption of a resolution simply declaring that contestant was not elected; whereas the minority recommends a resolution declaring that contestant was not elected and that contestee was elected.

The majority resolution herein overturns even the very latest precedents established by the same majority party in this House and totally indifferent to such precedents harks back to earlier Congresses, ignoring, without even differentiating so as to show the slightest reason therefor, the majority report of the committee in the Sixtieth Congress made and adopted by the House in a contest case identical in character.

The report and recommendation thus ignored without rhyme or reason by the majority of this committee was a report submitted on the part of this committee in the Sixtieth Congress by the gentleman from Illinois, Mr. Mann, acting on behalf of said committee, which recommendation was adopted by the House.

The present majority report further ignores another precedent of the Sixtieth Congress, to wit, the report of the Committee on Elections No. 1, submitted on January 5, 1909, in the case of Prioleau *v.* Legare, and also that in the case of Myers *v.* Patterson in the same Congress, which were adopted.

In the present report submitted by the majority, while containing the language, "There are many precedents for this action which the committee feels constrained to respect," yet there is an absolute failure to respect the very latest precedents in the last Congress where the same party as that to which the present majority belong was likewise the majority party.

The minority of the committee submitting this report, while agreeing almost entirely with the majority hereon on the main features in this contest and their conclusions on same, are so thoroughly convinced that the action of the majority in overturning the lastest precedents of their own party as to the substance of resolutions recommended, that we can not subscribe to the inconsistencies of the present majority.

That contestant, R. H. Richardson, was not elected a Member of the Sixty-first Congress from the Seventh Congressional district of South Carolina, and is not entitled to a seat therein, is admitted by every member of your committee, irrespective of party afiliation. And the reasons and precedents cited in this minority report show conclusively that the majority hereof, in order to be consistent, and if not a majority of this committee, at least a majority of this House, should conclude that the contestee was elected and is entitled to such seat.

The minority of your committee therefore respectfully recommend, in accordance with the very latest precedents of this House, the adoption of the following resolution:

"Resolved, That R. H. Richardson was not elected a Member of the Sixty-first Congress from the Seventh Congressional district of South Carolina, and is not entitled to a seat therein.

"Resolved, That Asbury F. Lever was elected a Member of the Sixty-first Congress from the Seventh Congressional district of South Carolina, and is entitled to a seat therein."

These views have been submitted, not for the purpose of a contest on the floor of the House, because there is now no practical result to be accomplished by such a contest, but in order that the views of the minority may be preserved in the record and that justice may be done the people of South Carolina, and that the inconsistent attitude of the majority party may be pointed out.

On June 23,[1] the House, without debate or division, agreed to the resolutions recommended in each majority report.

[1] Second session Sixty-first Congress, Journal, p. 827; Record, pp. 8830–8833; Moores' Digest, p. 42.

Chapter CLXVII

GENERAL ELECTION CASES, 1911 TO 1913.

129. The Senate election case of Henry A. du Pont, of Delaware, in the Sixty-second Congress.

Instance wherein a resolution providing for investigation of election of Senator was referred to committee which made no report thereon.

On January 26, 1911[1] in the Senate, Mr. Harry A. Richardson, of Delaware, presented the credentials of Henry A. du Pont, elected a Senator by the Legislature of the State of Delaware for the term commencing March 4, 1911. The credentials were read and filed without question, and on April 4[2] Mr. du Pont took the oath of office.

On February 26, 1912,[3] Mr. James A. Reed, of Missouri, submitted the following resolution, which by unanimous consent was laid on the table subject to call.

Whereas the President of the United States, on the 22d day of January, 1912, appointed Cornelius P. Swain United States marshal for the State of Delaware, and sent said appointment to the Senate of the United States for confirmation, and said appointment was in due course referred to the Committee on the Judiciary of the Senate for proper action in the premises; and

Whereas certain prominent citizens of the State of Delaware caused it to be made known to said committee that they desired to protest against the confirmation of the appointment of the said Swain, upon the ground that he was an unfit person to hold the office of United States marshal for the said State of Delaware; and

Whereas the Committee on the Judiciary of the Senate of the United States designated two of its members, viz, Senators Sutherland and Overman, to act as a subcommittee, authorized to investigate the grounds and reasons for said protest; and

Whereas on the 2d and 9th days of February, 1912, there appeared before said subcommittee Hon. Willard Saulsbury, of Wilmington, Del., representing certain objectors to the confirmation of the appointment of the said Cornelius P. Swain, and there also appeared the said Cornelius P. Swain in person and by his counsel, Daniel O. Hastings, Esq.; and

Whereas said objectors, before said subcommittee, in substance and effect charged:

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[1] Third session Sixty-first Congress, Record, p. 1463.

[2] First session Sixty-second Congress, Record, p. 2.

[3] Second session Sixty-second Congress, Record, p. 2443.

1. That the said Cornelius P. Swain was unfit to occupy any place connected with or near the courts of the United States for the district of Delaware, because the said Cornelius P. Swain bore the common and general reputation of a persistent violator of the criminal provisions of the constitution of the State of Delaware intended to secure purity of elections;

2. That the said Cornelius P. Swain had notoriously been a vote buyer in the second representative district of Sussex County (New Fork Hundred) for many years:

3. That the said Cornelius P. Swain had procured and carried large sum of money into said precinct for the purpose of corrupting the voters of said district, and in the year 1908 was the assistant cashier of the corruption fund, and in substance charged that all of the above facts were notorious; and

Whereas the testimony of certain witnesses produced before said subcommittee and certain affidavits there read in evidence tended to prove:

(*a*) That at the election held in the State of Delaware in the year 1904 members of the legislature were being selected who would thereafter have the right to elect a United States Senator, and who did, in fact, elect the said Henry Algernon du Pont Senator from the State of Delaware;

(*b*) That shortly prior to said election a large sum of money, to wit, a sum in excess of $25,000, and claimed to be in excess of $58,000, was contributed by the said Henry Algernon du Pont.

(*c*) That said sum of money was distributed among various corrupt agents working in the interest of the said Henry Algernon du Pont.

(*d*) That said distribution took place in the office of the said Henry Algernon du Pont, and with his knowledge;

(*e*) That $3,000 of the money so contributed was in the office of the said Henry Algernon du Pont delivered to be used for the purpose of corrupting the voters of the second representative district of Sussex County, Del., and was in fact so used under the direction of the said Cornelius P. Swain, and it was admitted by the attorney representing said Swain that said $3,000 was so received by him; and

Whereas the evidence tended further to show that not only at the election held in the year 1904, but in the elections held in the years 1906, 1908, and 1910 similar corrupt practices were employed, and said evidence tended further to show that said corrupt practices did affect the election of the members of the legislature who in the year 1911 reelected the said Henry Algernon du Pont to a seat in this body; and

Whereas said subcommittee construed its duties to be confined to an investigation of the corrupt practices with which the said Cornelius P. Swain could be shown to be directly connected, and did not therefore investigate generally into the conditions surrounding said election, so that there has, in fact, been no investigation of the connection of the said Henry Algernon du Pont with said alleged corrupt practices, except in so far as the same was made to appear as an incident to the investigation of the said Swain; and

Whereas the said Cornelius P. Swain was appointed to said office at the request of the said Henry Algernon du Pont, notwithstanding the evidence tends to show his corrupt practices and general reputation as an election corruptionist: Now, therefore, be it

Resolved, That the Committee on Privileges and Elections, or any subcommittee thereof, be authorized and directed to investigate and to report to the Senate, whether, in fact, corrupt methods and practices were employed by the said Henry Algernon du Pont to secure the election of members of the legislature, who thereafter elected him to a seat in this body; whether said corrupt practices related to the general election of 1904, or the general election of 1910, or to his election by the members of the legislature selected at said elections; and whether the said Henry Algernon du Pont is a proper person to retain his seat, or ought to retain his seat, in this body as a Senator from the State of Delaware.

Said Committee on Privileges and Elections, or any subcommittee thereof, is hereby authorized to sit during the sessions or the recess of the Senate; to hold its sessions at such place or places as it shall deem most convenient for the purposes of the investigation aforesaid; to employ stenographers; to send for persons and papers; and to administer oaths. The expenses of the inquiry shall be paid from the contingent fund of the Senate upon vouchers to be approved by the chairman of the committee or chairman of the subcommittee.

Said committee is requested to proceed with said investigation with all reasonable speed and to report its findings, together with the evidence, at the earliest possible date.

On the following day,[1] in the Senate, Mr. du Pont rose to a question of privilege and said:

Mr. President, I rise to a question of personal privilege. Certain resolutions were offered yesterday in the Senate by the junior Senator from Missouri formulating charges against me. I will at this time confine myself to making the most emphatic denial of the truth of the charges made and invite any action which the Senate may deem proper to take in the premises.

Subsequently,[2] Mr. Reed called up the resolution and in debate said:

On the 22d day of January, 1912, the President of the United States appointed Cornelius P. Swain United States marshal for the district of Delaware and sent said appointment to the Senate for confirmation.

I am not at liberty to disclose the proceedings of the executive sessions, but if the newspapers are to be trusted the committee exercised remarkable diligence and unusual alacrity in reporting the appointment favorably upon the very day it entered the Senate. But objections were made by some Senator, and the vote reconsidered and the appointment recommitted on January 23. The nomination was afterwards withdrawn by the President on February 13.

Prior to the withdrawal, and on February 2, there appeared before the subcommittee of the Judiciary Committee Hon. Willard Saulsbury, representing certain objectors to the appointment. Cornelius P. Swain also appeared in person and by his attorney, Daniel O. Hastings.

Thereupon Mr. Saulsbury stated, among other things, as follows:

Cornelius P. Swain has notoriously been a vote buyer in the second representative district of Sussex County for many years. * * * Specification 2: That on November 4, 1904, a Republican mass meeting was held at Dover, Del. After this meeting, appointment was made with Col. du Pont's manager to meet a number of the old Addicks leaders at his, the manager's, office in Wilmington the next day, on Saturday, November 5, 1904. This appointment was made by a telephone call of one of the candidates on the State ticket, who had learned from the Addicks, or Union, Republicans that they were without money for the election. Addicks notified United States Senator Allee that he could not "make good" for election money. (This was on Thursday or Friday, November 3 or 4.) It was said that Col. du Pont's manager had blocked Addicks on getting his money in New York, and the Republicans were without money.

On Saturday, November 5, Senator Allee, Dr. R. C. Layton, Robert O. Houston, et al., went to Wilmington to Col. du Pont's manager's office, where they saw the colonel and his manager, and discussed how the money should be spent.

Enough paper money could not be had from the Wilmington banks to supply the demand, so there was a great amount of gold—in the neighborhood of fifty or sixty thousand dollars—divided there. It was understood that $10,000 more would be forthcoming on Monday.

C.P. Swain, now nominated for United States marshal, took his allotment for the second representative district of Sussex County (Northwest Fork Hundred) in gold coin $20 gold pieces, done up in bags, put it in a satchel and left for home. * * *

When the additional $10,000 was to be given out on Monday the manager telephoned Senator Allee to come with the man who was to get it, as he, the manager, would not otherwise trust that man.

Swain took the $3,000 in gold to Bridgeville, Del., where he and his friends discussed what they should do with it for safe-keeping over Sunday.

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[1] Record, p. 2492.

[2] Record, p. 2550.

Mr. Reed quoted charges that this money was delivered to political workers for the purchase of votes and was actually used for that purpose on election day. He further quoted Mr. Saulsbury as saying:

Addicks got some money loosened up on Monday and furnished it to his lieutenants, who already had the du Pont money, and in that way "out under" the Colonel (Mr. du Pont) and his manager; that is, Addicks's old crowd, and so produced the senatorial deadlock in 1905.

That the legislature thus elected met January 3, 1905, and adjourned March 23, 1905, without election of Senator; that a special session was called for May 31, 1905, the first vote taken on June 12, and Col. du Pont (now Senator du Pont) was elected June 13, 1906.

From all the evidence adduced Mr. Reed concluded:

The undisputed evidence shows Swain's corrupt practices, in at least one important transaction, to have been pursuant to a plan devised in the office of the Senator from Delaware. Assuming the facts to be true, as shown by the undisputed evidence, it must therefore be taken as proven that the Senator from Delaware recommended Cornelius P. Swain for the important position of United States marshal with full knowledge of his corrupt practices.

I challenge your attention to this fact, that if this testimony is true, then we are forced to the inevitable conclusion that the Senator from Delaware knew that his man Swain's hands were covered with the slime of corruption; that for 25 years he had been a defiler of the electorate of his State; that for a quarter of a century he had been a sapper and miner, digging beneath the citadels of Delaware, beneath the foundation of our civilization; and yet, nevertheless, he causes his name to be sent to this body that we may put the insignia of our approval upon the name of a man of that kind. To recommend that such a man as this should be put close to the courts of Delaware, put into the very halls of justice, given the authority to stand within the shadow of the figure of equity, to recommend that this vote buyer, this corruptionist, to be put in charge of juries and of witnesses is an offense against the Senate. If these witnesses have testified falsely, then let it be shown before a committee of the Senate. But if this evidence is true, you can not ignore it and preserve the chastity and the integrity of the United States Senate.

At the conclusion of Mr. Reed's remarks the resolution was referred to the Committee on Privileges and Elections which made no report thereon.

130. The South Carolina election case of Prioleau v. Legare in the Sixty-second Congress.

In the absence of proof to the contrary an election is assumed to have been properly held and the votes honestly counted.

The courts and not Congress constitute the proper forum in which to test the constitutionality of a State constitution.

A person on having unsuccessfuly instituted five consecutive election contests the House expressed the hope that the fifth would be the last.

On August 6,1912,[1] Mr. J. Charles Linthicum, of Maryland, from the Committee on Elections No. 2, submitted a report in the South Carolina case of Aaron P. Prioleau *v.* George S. Legare.

The official return gave the sitting Member 3,525 votes and the contestant 57 votes.

The notice of contest alleged in a general way that qualified citizens were denied registration and refused the right to vote because of African descent. It also averred that the constitution of South Carolina violated the fourteenth and fifteenth

[1] Second session Sixty-second Congress, House Report No. 1148; Record, p. 10307.

amendments to the Constitution of the United States, and the act of May 30, 1870, section 2004, and the act of 1868.

The committee say:

The contestee in answering denies all these averments and further asserts that the oontestee, further answering said notice of contest, alleges that the contestant, Aaron P. Prioleau, has persistently for a number of years past contested the election of contestee upon the same grounds as set forth in the present contest, and has upon each contest failed to establish the charges as set forth.

The reports of the House of Representatives show this to be the fifth, and we hope the last, consecutive contest of the contestant, all upon practically the same testimony and averments as herein.

The record in the case fails to disclose proof as to the registered vote of the district, and no information could be had on that subject at the hearing before the committee. It appears, however, that the election was held on the day set forth and that upon the face of the returns the contestee had a majority of over 3,400, and the committee must presume that the election was legal and properly held and the votes honestly counted unless the contrary can be shown.

Following this rule:

The committee is unanimous in concluding that the contestant has not shown by the evidence and exhibits produced before it that he was elected, and therefore declare that he is not entitled to a seat in the House of Representatives of the Sixty-second Congress.

As to the question of constitutionality raised by the contestant the committee further say:

The contestant further claims, however, that there was no election held, because the constitution of South Carolina is contrary to the Constitution of the United States in that it violates the fourteenth and fifteenth amendments, and likewise to the act of May 30, 1870, section 2004, and the act of 1868.

This contestant has been informed by four previous committees of the House that the forum in which to test the constitutionality of a State constitution is in the courts of the Nation, which are continuous bodies and recognize their own decisions and judgments, and not before a committee of Congress the political complexion of which is subject to change, and whose decisions are not binding upon the succeeding Congresses, not alone for political reasons but because of honest differences of opinions as to the interpretation of the provisions of the Constitution itself.

This contestant has, in disregard to the four adverse decisions by the House oi Representatives when in the control of his own party, brought this fifth contest upon the same grounds and upon substantially the same testimony as heretofore, when he knows there can be but the same result. The reason for his contest must therefore be apparent to all who care to examine the records.

The constitution of South Carolina has been in force for 17 years, thus affording abundance of time for the contestant and his biennial witnesses to test the same in the highest courts of the land, but he has constantly and persistently refused to do so. For reasons which we have assigned this committee feels that whenever it occurs in the minds of any of our citizens that the constitution and election laws of any State are in conflict with the Federal Constitution and statutes of our national organic law the courts of the land, so admirably established and safeguarded and so abundantly provided with the machinery for enforcing its decrees and mandates, is the proper and only forum for the determination of questions of this character.

Therefore the committee reported the following resolution, which, on August 16,[1] was unanimously agreed to by the House:

Resolved, That Aaron P. Prioleau was not elected a Member of the Sixty-second Congress from the first congressional district of South Carolina and is not entitled to a seat therein.

Resolved, That George S. Legare was elected a Member of the Sixty-second Congress from the first congressional district of South Carolina and is entitled to a seat therein.

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[1] Journal, p. 971; Record, p. 11119; Moores' Digest, p. 54.

131. The Missouri election case of Maurer v. Bartholdt in the Sixty-second Congress.

The contestant failing to submit evidence substantiating charges made in his notice of contest, the House confirmed the title of the sitting Member.

On August 9, 1912,[1] Mr. Charles A. Korbly, of Indiana, from the Committee on Elections No. 2, submitted the report in the Missouri case of Charles J. Maurer *v.* Richard Bartholdt.

The report in full is as follows:

The allegations of fraud made by contestant were not sustained by the evidence adduced; in fact, no evidence whatever was presented to substantiate the charge.

The allegation that contestee was not a naturalized citizen was not sustained. On the contrary, contestee furnished incontrovertible proof, by the presentation of his naturalization papers legally issued on May 23, 1877, that he is and has been a legal citizen of the United States since that date. Therefore we beg to submit the following resolution for adoption:

"Resolved, That Hon. Richard Bartholdt is entitled to his seat as a Representative of the tenth congressional district of Missouri."

The resolution was unanimously agreed to by the House without debate.

132. The Illinois election case of Crowley v. Wilson in the Sixty-second Congress.

Notwithstanding that the law requiring careful preservation of ballots may not have been complied with, and that opportunity to tamper with the ballots may be shown to have existed, unless evidence is produced to prove such tampering the point will not be considered.

In the absence of conclusive proof to the contrary it is presumed that all votes cast are legal votes and all voters casting them are legal voters.

On August 15, 1912,[2] Mr. E. F. Holland, of Virginia, from the Committee on Elections No. 1, submitted the report in the Illinois case of Fred J. Crowley *v.* William W. Wilson.

The sitting Member in this case had received according to the official returns a plurality of 57 votes. After notice of contest had been served a recount was agreed upon and made before a notary public before whom testimony was taken, which further increased the plurality of the contestee to 124 votes.

The first objection advanced by the contestant was that the ballots from the election districts outside of the city of Chicago were negligently and insecurely kept, and were thus constantly exposed to tampering. This seems to have been conceded, but as no evidence was adduced to show that they were in fact tampered with in any way the committee reported:

The Illinois statutes provide merely that ballot boxes, with ballots and returns, shall, after election, be carefully preserved. The ballot boxes were in this case in the custody of the proper authorities, and while the manner of their keeping may have afforded some slight opportunity for

[1] Second session Sixty-second Congress, House Report No. 1168; Journal, p. 946; Record, p. 10623; Moores' Digest, p. 54.

[2] Second session Sixty-second Congress, House Report No. 1195; Journal, p. 963; Record, p. 11025; Moores' Digest, p. 57.

tampering with them, there is not the slightest evidence in this case that a single ballot box, ballot, or return was, in fact, tampered with.

As to certain ballots inspected by order of court:

In regard to the 21 ballot boxes opened by order of the judges of the county court of Cook County, it is sufficient to say that the ballot used in elections in the State of Illinois contains the names of candidates for State, county, and municipal offices as well as the names of congressional candidates. These ballot boxes were opened by order of the court in a competent proceeding under the State laws to ascertain the vote upon a certain question submitted to the voters of a district, and to ascertain the vote for a candidate for the office of probate judge, and they were opened in the presence of the court, and the evidence is conclusive that they were not tampered with in any way.

The contestant also alleged that 100 men voted illegally in the town of Worth, one of the country districts of the congressional district.

The law of the State of Illinois provided:

No vote shall be received at any election in this State if the name of the person offering to vote be not on said register * * * unless the person offering to vote shall furnish to the judges of the election his affidavit in writing stating therein that he is an inhabitant of said district and entitled to vote therein at such election, and prove by oath of a householder and registered voter of the district in which he offers to vote that he knows such person to be an inhabitant of the district, * * * giving the residence of such person within the said district. (Ptd. Rec., 166.)

The law also provided that such oaths should be preserved, and the contestant contended that while the poll books of the Worth district showed that 100 men voted who were not registered, their oaths, if ever taken, had not been preserved as required by law.

The committee say:

The only witness produced by the contestant upon the matter of these nonregistered voters was the election clerk in the office of the county clerk of Cook County, one of the places where the affidavits of nonregistered voters may be filed under the law. He testified that the poll book used at the election in the district in question contained the names of 100 persons with a mark "IN. R." after their names, which he supposed meant "not registered." He further testified that the envelope in which affidavits of nonregistered voters should be returned was with the poll book, unused and empty. He further testified that he made a search for the affidsvits in the election vault of the county clerk's office and did not find them. He, however, admitted that the affidavits of nonregistered voters are not always in the envelopes prepared for them when returned, and he said in answer to the question, "Is it not possible, Mr. Zurburg, that these affidavits may be somewhere in the office with some of the returns of that election?" "They may and may not; I can not tell."

No election official of the district was produced as a witness to prove that votes were received from nonregistered persons without affidavits as required by law; the registry lists were not produced to show by comparison with the poll books that all the names marked "N. R." were nonregistered persons; and there was no evidence to show that the affidavits of all nonregistered voters in the district might not be in some lawful place of custody other than the office of the county clerk.

The presumption is that all votes cast are legal votes and that all persons costing them are legal voters. In the absence of conclusive proof that the 100 votes of alleged nonregistered voters in the district were fraudulent we can not reject them and throw out the district. The contestant has utterly failed in this proof.

Accordingly the committee reported a resolution confirming the title of the sitting Member to the seat which was unanimously agreed to by the House without debate or division.

133. The Iowa election case of Murphy v. Haugen in the Sixty-second Congress.

Where some of the ballots were missing a recount was denied.

No evidence of error in the counting of the votes having been adduced, the committee denied an application for a recount.

On August 16, 1912,[1] Mr. Henry M. Goldfogle, of New York, from the Committee on Elections No. 3, submitted the report in the Iowa case of Daniel D. Murphy *v.* Gilbert N. Haugen, as follows:

There appeared no evidence that any error was committed in the counting of the votes for Representative in Congress in the fourth congressional district of Iowa. It was, however, claimed and strongly asserted by the contestant that were the boxes opened and the ballots cast in said district recounted, it would be found that the contestant, Murphy, had received a majority of the lawful votes in said district for Representative in Congress. It appears that the ballots on which the names of candidates for various offices were printed, including those of the parties to this contest, had been recounted in one of the contests for local office. Some of those ballots, after they had been handled on such recount in Iowa, had not been preserved, so that in justice to all the parties they could have been examined to ascertain their validity and be recounted. The proof requisite to establish the integrity of all the ballots cast in the entire congressional district was lacking. This was due, it ought in fairness be said, to no fault whatever on the part of either the contestant or his learned and distinguished counsel. Under all the circumstances of this particular case, as they were developed on the hearings, the committee, applying the authorities as they obtain in the House of Representatives, felt themselves constrained to deny the application for a recount.

Therefore the committee reported a resolution declaring the returned Member elected and entitled to the seat.

The resolution was unanimously agreed to by the House without debate.

134. The West Virginia election case of Wiley v. Hughes in the Sixty-second Congress.

Counsel for contestee having admitted the justice of contestant's contention that certain returns ought to be excluded on account of fraud, it was held that the vote from those precincts should not be counted for either contestant or contestee.

Although the court refused to appoint challengers for both parties as required by law, and challengers attempting to serve were driven from the polls, the absence of challengers is not of itself sufficient to establish fraud.

The original existence of a certificate of naturalization being established, it was held competent to prove its contents by oral evidence.

Instance wherein leave was given to take further testimony and produce additional evidence after briefs had been filed and arguments, heard.

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[1] Second session Sixty-second Congress, House Report No. 1203; Journal, p. 973; Record, p. 11128; Moores' Digest, p. 58.

On August 20, 1912,[1] Mr. J. Harry Covington, of Maryland, from the Committee on Elections No. 1, submitted the report in the West Virginia case of Rankin Wiley *v.* James A. Hughes.

The sitting Member had been returned by an official majority of 2,942 votes.

The counsel for contestant and contestee in their briefs and by oral agreement eliminated practically every question in this case with the exception of the charges of fraud in the nine precincts in Mingo County and in McDowell County, and the question of the citizenship of the contestee.

The report says, as to Mingo County:

During the course of the argument Mingo County was eliminated as a factor in this case by the admission of counsel for the contestee that fraud was committed in that county in the interest of the contestee, and that it was so flagrant and outrageous that the returns from the nine precincts where the frauds were perpetrated ought to be excluded in counting the vote for the contestant and contestee.

As to McDowell County:

McDowell County is located immediately east of Mingo County. Its population is largely made up of foreigners and negroes who are employed in the various coal developments of the county. All of the county officers are Republicans. The county court, which appoints the election commissioners, is composed of Republicans, and the testimony in the case shows conclusively that the method of conducting elections in the county make it a most fruitful place to perpetrate wholesale election frauds. The testimony shows that the president of the county court, one Dr. H. D. Hatfield, who is also president of the Senate of West Virginia, refused to appoint challengers for the Democratic Party at the various voting precincts of McDowell County, although the law of West Virginia seems clear that the county chairman of the two leading political parties shall nominate and the county court shall appoint challengers of election. The testimony shows that this Dr. Hatfield was very active in the actual conduct of the election in McDowell County, and the refusal to appoint Democratic challengers raises a strong presumption that the conduct of the election was to be neither fair nor honest.

The committee decide, however:

However, the absence of challengers from the voting precincts is not of itself actual proof of fraud. The contestant relies upon the failure of the county court to appoint challengers of his party, upon the evidence that where democratic challengers attempted to serve they were either arrested or driven from the polls, and upon his own testimony that general political conditions were such in McDowell County that he had been warned not to go into the county to make speeches for fear of personal violence, to establish such a general conspiracy to defraud as warrants the rejection of the entire vote of McDowell County. With that proposition the committee is unable to agree. The circumstances are all strong as showing a deliberate intention to commit fraud in the interest of the contestee. On the other hand, there is no actual proof of a fraudulent vote in the county, and we can not reject the vote.

The question of citizenship is thus discussed by the report:

We now come to the question of the qualification of the contestee to hold the office of Representative in Congress.

Article I, section 2, of the Constitution of the United States, provides:

"No person shall be a Representative who shall not have attained the age of 25, have been seven years a citizen of the United States, and who shall not when elected be an inhabitant of that State in which he shall be chosen."

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[1] Second session Sixty-second Congress, House Report No. 1229; Journal, p. 994; Record, p. 11194: Moores' Digest, p, 58.

The record in this case discloses that James A. Hughes, the contestee, was born in Canada, in 1861, and was a subject of Queen Victoria; that he removed to the United States some time in the year 1872 and moved some time later to Boyd County, Ky. He claimed that he was naturalized in the city court of Boyd County, Ky., in 1882, by one W. W. Culbertson, who was then mayor of Ashland, Ky. The records of the city court of Ashland are extant and an examination of them from 1882 to 1890 shows that there is no record of such naturalization existing.

There was no evidence offered by the contestee to show the original existence of such a record, and that such record has been lost or destroyed. In consequence there was no legal foundation for the introduction of secondary evidence to prove the actual existence of such a lost or destroyed record of naturalization.

The contestee, on the 5th day of November, 1900, on the evening of general election of that year, at which time the said contestee was a candidate, filed a petition and affidavit, which appears on pages 443 to 444 of the record, and an order was made by the circuit court of Cabell County, W. Va., declaring that "the said James A. Hughes be, and he is hereby, declared to be a naturalized citizen of the United States."

The proceeding in the West Virginia court was, however, wholly void. If it be considered from the viewpoint of a proceeding to naturalize the applicant in the first instance, it failed, because there was no effort to produce the witnesses required by the Revised Statutes of the United States to authorize naturalization in the first instance. It obviously failed as an effort to perpetuate an alleged existing naturalization because the courts of one State have no power, by a nunc pro tunc order or otherwise, to perfect or cure defects in an original order or decree of the court of another State, nor can the court of one State by any supplemental proceeding perpetuate the missing records of the court of another State.

After briefs had been filed and the case had been argued before the committee, the contestee asked leave to take further testimony and produce additional evidence on this point.

On February 10, 1912,[1] in compliance with this request, the House agreed to the following resolution:

Whereas the contested-election case of Rankin Wiley *v.* James A. Hughes, from the fifth district of West Virginia, was referred to the Committee on Elections No. 1, and after the testimony and briefs of counsel were filed with said committee, and after counsel had fully argued and commented upon the same, counsel for the contestee requested leave of said committee to take the testimony of sundry witnesses and to produce additional evidence relative to the said contestee's citizenship: Now therefore be it

Resolved by the House of Representatives, That the Committee on Elections No. 1 shall be, and hereby is, authorized and empowered to permit the taking of such testimony as it shall deem relevant to better enable the said committee to determine the question of citizenship involved in the contested case of Wiley *v.* Hughes, from the fifth congressional district of West Virginia, and that the expenses incurred in taking such testimony shall be paid in the same manner as the other expenses incurred in the taking of testimony in this and similar cases.

After consideration of the additional evidence produced by authority of this resolution, the committee concluded:

The contestee, if not now a citizen, can not become one for five years, and the seriousness of the question impelled the committee to direct the taking of additional testimony on the question of his citizenship. As a result of that course it was proved by the contestee by competent and legal evidence that there was at one time in existence a legal and sufficient certificate of naturalization issuing from the court in Ashland, Ky., in which he claimed in his answer in this contest to have

[1] Journal, p. 291; Record, p. 1915.

been naturalized. The original existence of this certificate having been proved, it was legally competent for the contestee to prove its contents by oral evidence. The committee feels that this has been satisfactorily done, and in view of the fact the contestee since his alleged naturalization has served as a member of the Legislature of the State of Kentucky, as a member of the State Senate of the State of West Virginia, and for 12 years a Member of the House of Representatives of the United States, his citizenship has been sufficiently established in accordance with the precedents of the House, to prevent a denial to him of a seat as a Representative from the State of West Virginia in the present Congress. In consequence we report the adoption of the following resolution:

"Resolved, That James A. Hughes was elected a Representative in the Sixty-second Congress from the fifth district of West Virginia, and is entitled to a seat therein."

The resolution reported by the committee was agreed to without division or debate.

135. The Missouri election case of Kinney v. Dyer in the Sixty-second Congress.

The evidence failing to sustain allegations of fraud and intimidation, the title of sitting Member to the seat was confirmed.

On January 30, 1913,[1] Mr. John M. Nelson, of Wisconsin, from the Committee on Elections No. 2, submitted the report in the Missouri case of Thomas E. Kinney *v.* L. C. Dyer.

In this case general charges of fraud and intimidation were made in the notice of contest, but as no evidence was submitted tending to prove them the committee reported:

The allegations of fraud and intimidation made by contestant were not sustained by the evidence adduced.

Therefore we beg to submit the following resolution for adoption:

"Resolved, That Hon. L. C. Dyer is entitled to his seat as a Representative of the twelfth congressional district of Missouri."

The resolution was unanimously agreed to by the House without debate.

136. The Pennsylvania case of Bonniwell v. Butler in the Sixty-second Congress.

Instance wherein a memorial was referred to an election committee and on recommendation of the committee was laid on the table.

A committee of the House has no jurisdiction to determine any matter affecting rights to a seat in a succeeding Congress.

The jurisdiction of the House of Representatives over election matters is limited to the constitutional right to judge election returns and qualifications of its own Members, and does not extend to elections in general.

On February 15, 1913,[2] Mr. J. Harry Covington, of Maryland, from the Committee on Elections No. 1, submitted the report in the Pennsylvania case of Eugene C. Bonniwell *v.* Thomas S. Butler.

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[1] Third session Sixty-second Congress, House Report No. 1422; Journal, p. 201; Record, p. 2327; Moores' Digest, p. 60.

[2] Third session Sixty-second Congress, House Report No. 1523; Record, p. 3215.

The case originated in the House with the transmission to the Speaker on December 14, 1912, of the following communication:

WAYNE, PA., *December 14,1912.*

Hon. Champ Clark, Speaker of the House of Representatives, and
Members of the House of Representatives,
Washington, D.C.

GENTLEMEN: I hereby file notice of objection to the right of Thomas S. Butler to represent the seventh congressional district of Pennsylvania in the Sixty-third Congress and assign the following reasons:

First. The seventh congressional district of Pennsylvania is composed of Chester and Delaware Counties. To procure a majority upon the face of the election returns at the election held November 5, 1912, certain agents of the Republican organization of this district, in the service of and on behalf of Thomas S. Butler, the nominee herein, and certain other nominees, did, by fraud and perjury, falsely preempt upon the official ballot of the State of Pennsylvania two titles, one being "Bull Moose" and the other "Roosevelt Progressive." Each title was intended and designed to deceive and mislead the voter whose intention was to vote the ticket upon which Theodore Roosevelt was a candidate, to wit, the Washington Party of Pennsylvania. To accomplish these ends these men forged alleged preemptors' names to the certificates of preemption. They forged hundreds of names in order to place the names of Thomas S. Butler for Congress and William C. Sproul for State senator and the Republican candidates for the State legislature upon these two false and pretended Progressive tickets. They forged these names alphabetically, without even the feeble pretense of disguising the handwriting. They forged signers to the affidavits required at the ends of these nomination papers. They impersonated the affiants before the justice of the peace. These facts were known to Thomas S. Butler. Objections, under the ballot laws, were filed to the right of these fraudulent pretenders to masquerade as supporters of Roosevelt by the real Washington Party nominees. Copies of the objections were served upon Thomas S. Butler and the other candidates. Thomas S. Butler and the other candidates appeared in the Dauphin County court answering such summons and maintained their right to remain upon the perjured and forged tickets. The objections were dismissed upon a technicality, and Mr. Butler continued thereon in the face of the glaring frauds. Thereafter and prior to the election, seven men, active in the councils of the organization supporting Thomas S. Butler, were arrested upon the charges of forgery and perjury and held in bail for court. Despite the convincing evidence, Thomas S. Butler willingly shut his eyes to the nauseous scandal. Funds were supplied by the men interested to the fraudulent committees masquerading as Progressives. The seventh congressional district was circularized by letter falsely asserting that the Bull Moose ticket was the only genuine Roosevelt ticket in the seventh district, and thereby upward of 4,332 voters were deceived and misled into voting for Thomas S. Butler for Congress.

It is submitted that the perjury and corruption herein averred was the result of a deliberate conspiracy on behalf of the organization leaders whose candidate Thomas S. Butler was. He was cognizant of its details long before election. He approved of the forgery and perjury by remaining a candidate upon the said ticket after public notice. That these acts of themselves disqualify him from membership in the House of Representatives of the United States.

If further reason be deemed essential that this conspiracy went to the vitals of this election, let the pollution of the grand jury of Delaware County at this December session of court speak for itself. The bills of indictment charging the seven men with perjury and forgery were to be submitted to this December grand jury. The sheriff of Delaware County is S. Everett Sproul, brother of State Senator William C. Sproul, the Republican leader of Delaware County, and, with Thomas S. Butler, most concerned in these nominations. The grand jury, always the bulwark of the people's liberties, was prostituted by politicians to save their tools from conviction. Twelve false jurors, not drawn or entitled to serve, 6 of them members of the Republican county committee, 2 more relatives of Republican officials, were secretly added to the 11 bona fide jurors, and this corrupted jury sought to destroy justice in its very temple by ignoring the indictments against the forgers and perjurers, and so make a mockery of the law. This treacherous body, not content with dismissing every indictment laid against the corruptionists, to terrorize future men temerarious

enough to assail their vicious acts, imposed over $700 in costs upon J. Watts Mercur, the fearless citizen who brought these prosecutions, Washington Party nominee for State senator, against William C. Sproul. That 12 jurors were illegal Mr. Mercur discovered. Upon the fact being presented to the court of common pleas of Delaware County, the dishonest grand jury was summarily dismissed, all indictments recalled, and a sweeping investigation set upon foot. It was public knowledge that this contest was to be instituted, based upon these frauds. It can not be doubted that one of the chief aims of the men most concerned was to destroy this ground for contest. This pollution of justice merits the expulsion of this Representative from the Halls of Congress.

Second. That the expense accounts filed in this district are false and fraudulent; that money, thousands of dollars, unaccounted for by any candidate or committee, was expended in the seventh district on behalf of the Republican candidates, Butler and Sproul in particular, as will be shown upon the hearing of this contest.

Third. That a committee especially organized by personal friends of Thorn S. Butler, styled the Butler League, composed and caused to be published false and libelous articles concerning the contestant.

Fourth. The West Chester Village Record is a local newspaper largely owned and controlled by T. L. Eyre, Republican boss of Chester County and personal representative of Thomas S. Butler.

The Chester Republican is a local paper largely owned and controlled by Senator William C. Sproul, Republican boss and personal representative of Thomas S. Butler in Delaware County. On August 15, 1912, the West Chester Village Record published the following editorial:

"The Hon. Thomas S. Butler, the Republican nominee for Congress, was born and reared in the Society of Friends, and is proud of his Quaker ancestry. His opponent, Eugene C. Bonniwell, is a Roman Catholic."

On August 28, 1912, the Chester Republican reprinted this editorial. Coincident with the two said editorials messengers in the employ of supporters of Thomas S. Butler traversed the district, having in their possession and circulating a blasphemous and infamous libel, a copy of which is hereto attached, pretended to be an oath of the Knights of Columbus, of which body the contestant is a member. So revolting are the terms of this document and so nauseating its pledges that the injury it did not merely to the contestant, but also to the Knights of Columbus and to Catholics in general, can hardly be measured in terms.

I charge that the circulation of this oath and the publication of the two editorials herein referred to were part of a conspiracy, precisely as was the forgery and perjury referred to in paragraph 1—a conspiracy by the same people for the purpose of arousing religious rancor and of defeating the Democratic nominee. The Constitution of the United States prohibits any religious test for office. The organization supporting Thomas S. Butler created such a test, blazed bigotry in the hearts and minds of the ignorant, and slandered and villified a great body of honorable men.

I file no complaint because of adverse election returns. The Democracy of Pennsylvania is inured to adversity. Nor is this complaint registered because of defeat resultant upon faith or race. In these things I own a just pride and do not protest if, because of either, political honors are to be denied me. But when a calumnious, viperish attack upon either faith or race is launched injecting religious bigotry into the political affairs of this Nation, then this protest is made in certain confidence that all patriotic men, mindful of the religious as well as the political liberty that the forefathers designed should be our heritage, will rise and strike down the beneficiary of such treacherous and dastardly movement.

For myself I make no appeal to your honorable body that I may be seated. That a plurality of the legal votes cast in that district were cast for me no one pretends to deny, but representations is the least of my concerns. This I do maintain, that this man, receiving his election under these circumstances, adding the felonies of forged papers, perjured acknowledgments, and violated grand jury to the more wicked crime of religious slander, ought not to be tolerated in the House of Representatives.

Respectfully submitted.

EUGENE C. BONNIWELL.

Mr. Bonniwell was the Democratic candidate for the House of Representatives in the seventh congressional district of Pennsylvania at the election held November 5, 1912.

Mr. Butler promptly filed an affidavit in the nature of an answer denying in detail the charges preferred in the communication.

The Speaker,[1] on January 17, 1913[2] referred both communications as follows.

The Chair has in his possession two communications. One of them purports to be a notice of contest by Eugene C. Bonniwell against Mr. Butler, of the seventh Pennsylvania district. On examination of the document, however, it turns out not to be a notice of contest but to be something more in the nature of a memorial to this House, setting forth that the gentleman from Pennsylvania (Mr. Butler] ought to be expelled from the House. The Chair also has a copy of the reply of the gentleman from Pennsylvania [Mr. Butler], and without consuming any more time the Chair refers both papers to the Committee on Elections No. 1.

Notices to appear before the committee were addressed to both parties. Mr. Butler appeared before the committee as requested and denied specifically all charges contained in the memorial. Mr. Bonniwell did not appear before the committee but transmitted to the chairman a letter asking for a report on the question of the committee's jurisdiction.

This question the committee discuss as follows:

This committee, of course, has no jurisdiction to determine any matters affecting the right of any person to a seat in the House of Representatives in the Sixty-third Congress. It does not, therefore, attempt to pass upon any question involved in any valid contest which may have been instituted against the said Thomas S. Butler by the said Eugene C. Bouniwell of anyone else, alleging that he and not the said Thomas S. Butler is the duly elected Representative from the seventh congressional district of Pennsylvania in the Sixty-third Congress.

The communication, however, is thus passed upon by the committee:

However, from a careful examination of the document filed by Mr. Bonniwell, it appears that the Speaker was entirely correct in declaring that it is a paper in the nature of a memorial to this House alleging certain sets and conduct by persons for which Representative Butler, it is asserted, should be expelled.

The paper, or memorial, is addressed to "Hon. Champ Clark, Speaker of the House of Representatives, and Members of the House of Representatives, Washington, D. C."

The only Congress in which Mr. Clark is or ever has been Speaker of the House of Representatives is the present or Sixty-second Congress, and the only "Members of the House of Representatives" in being are the Members of this House.

It is true that the paper of Mr. Bonniwell begins with the statement:

"I hereby file notice of objection to the right of Thomas S. Butler to represent the seventh congressional district of Pennsylvania in the Sixty-third Congress."

But, in the said paper Mr. Bonniwell distinctly states:

"I file no complaint because of adverse election returns"—

And—

"For myself, I make no appeal to your honorable body that I may be seated.

The paper of Mr. Bonniwell being filed with this House, and the author disclaiming that it is filed as a notice of contest in which he intends to claim the seat of Representative Butler in the Sixty-third Congress, and it containing such allegations against Representative Thomas S. Butler, the sitting Member from the seventh congressional district of Pennsylvania, as follows:

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[1] Champ Clark, of Missouri, Speaker.

[2] Journal, p. 131; Record, p. 1688.

"This pollution of justice merits the expulsion of this Representative from the Halls of Congress"—
And—

"This man receiving his election under these circumstances, adding the felonies of forged papers, perjured acknowledgments, and violated grand jury to the more wicked crime of religious slander, ought not to be tolerated in the house of Representatives"—

the committee has felt it to be its duty to examine with some care the document to ascertain whether there are any charges made against Representative Butler which warrant reporting to this House a resolution recommending his expulsion.

Charges preferred by the communication are thus disposed of:

The paper of Mr. Bonniwell is adroitly drawn, but when analyzed it is found to be one of innuendo and not of direct charge. It refers to perjury and forgery in connection with the nominations of Representative Thomas S. Butler and candidates for local offices in Chester and Delaware Counties, Pa., and asserts that these crimes of perjury and forgery were committed through a conspiracy. But there is no charge that Representative Butler committed or furthered the perjury or forgery or took part in the alleged criminal conspiracy.

The paper of Mr. Bonniwell further refers to an alleged pollution of the grand jury of Delaware County, Pa., after the election of 1912, and at a time when certain election officials were about to be indicted for alleged offenses at that election, but there is no actual charge that Representative Butler participated in, furthered, or was even cognizant of the alleged conspiracy to pollute the grand jury.

The paper of Mr. Bonniwell alleges that a committee especiajly organized by the friends of Thomas S. Butler, styled the "Butler League," composed and caused to be published false and libelous articles concerning Mr. Bonniwell. It will be noted that it is not charged that said false and libelous articles were either prepared or published by Representative Butler or that he even had knowledge of their publication. It merely charges that these publications were made by the personal friends of Hon. Thomas S. Butler. This allegation, if true, might make "the personal friends" of Representative Butler guilty of a crime; but it certainly could not make Representative Butler himself guilty of a crime.

The paper of Mr. Bonniwell further alleges that "The West Chester Village Record is a local newspaper largely owned and controlled by T. L. Eyre, Republican boss of Chester County and personal representative of Thomas S. Butler," and that this newspaper published an editorial calling attention to the religion of the said Eugene C. Bonniwell, and that this editorial was republished in the Chester Republican for the purpose of arousing religious rancor and defeating the Democratic nominee, Mr. Bonniwell.

137. The case of Bonniwell v. Butler, continued.

It is the uniform practice of the House not to investigate charges of crime against a member when denied by him and subject to prosecution in the courts.

Libelous abuse of a defeated candidate by party adherents of the returned Member for which the latter is in no way responsible does not furnish grounds for contest.

A memorial of an equivocal character, not considered sufficiently definite to be dismissed, was laid on the table.

As to criminal charges against a Member of the House the report holds:

The paper of Mr. Bonniwell asserts that Representative Butler has filed a false and fraudulent expense account under the State law as a candidate for election as a Representative in the Sixty-third Congress. This, if true, charges a crime against Representative Butler, but we find that there is provided ample machinery under the laws of Pennsylvania to try that charge. It has been the uniform practice of this House not to investigate a charge of crime against a Member

where it has been denied by him and where he can be legally prosecuted in the courts. If Representative Butler shall be prosecuted under the corrupt practices act of Pennsylvania and shall be found guilty, then an entirely different proposition may arise upon which to memorialize either this House or the House of the Sixty-third Congress.

The report condemns:

This committee can not condemn too strongly the publication of the false and libelous article referred to in the paper of Mr. Bonniwell and which was the spurious Knights of Columbus oath, a copy of which is appended to the paper. It also condemns the publication of editorials to excite religious prejudice in a political campaign. No man should be prosecuted for his religion, whether he be Catholic or Protestant. However, it is not alleged in the paper that Representative Butler published or caused the publication of either the false oath or the prejudiced editorials.

The jurisdiction of the committee is defined:

This committee does not intend either to inculpate or to exculpate those who conducted the campaign and election in the counties of Chester and Delaware, in Pennsylvania, in 1912. The campaign and the election in general are not proper subjects for investigation by the House of Representatives of the United States. The jurisdiction of the House of Representatives in such matters is based solely upon Aritcle I, section 5, of the Constitution of the United States providing:

"Each House shall be the judge of the elections, returns, and qualifications of its own Members, punish its Members for disorderly behavior and, with the concurrence of two-thirds, expel a Member."

Under that power the House considers contests against the seat of a Member holding a certificate of election and memorials against a sitting Member or a Member about to take his seat under his certificate of election charging him with offenses which if true justify his expulsion from the House. The committee has already stated that it has no jurisdiction over any contest filed by anyone claiming the seat from the seventh congressional district of Pennsylvania in the Sixty-third Congress.

In conclusion the committee recommend:

Upon a careful consideration of the paper in the nature of a memorial filed by Mr. Bonniwell, and other papers and evidence therewith, the committee report that there is nothing shown or alleged against Thomas S. Butler which disqualifies him from holding his seat in the Sixty-second Congress.

The committee therefore recommends the adoption of the following resolution:

"Resolved, That the memorial of Eugene C. Bonniwell against Thomas S. Butler, dated December 14, 1912, addressed to and filed with the Speaker of this House, be laid upon the table."

In debate on February 19,[1] Mr. Henry M. Goldfogle, of New York, took the position that the proper practice was to dismiss the memorial.

In reply, Mr. Covington said:

I will inform the gentleman from New York that in view of the equivocal character of the paper filed by Mr. Bonniwell the committee thinks the proper thing to do is to lay it on the table. We entertained it as a memorial, and we report that in so far as this House is concerned it contains nothing which warrants the committee in presenting a resolution to vacate the seat of Representative Butler in this House. We had nothing to do with whether or not there is pending any contest, and thought it proper to provide simply that the memorial do lie upon the table.

Thereupon, the resolution recommended by the committee was agreed to by the House without division.

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[1] Journal, p. 277; Record, p. 3431; Moore's Digest, p. 60.

Chapter CLXVIII.

GENERAL ELECTION CASES 1914 TO 1917.

138. The Missouri election case of Gill v. Dyer in the Sixty-third Congress.

Under the practice of the House ample time is allowed for filing minority views in contested election cases.

Discussion as to the evidence required to prove a conspiracy to commit election frauds.

Upon proof of a conspiracy to defraud, the returns from the part of the district involved were rejected.

On May 7, 1914,[1] Mr. Henry M. Goldfogle, of New York, from the Committee on Elections No. 3, submitted the report in the Missouri case of Michael J. Gill *v.* L. C. Dyer.

Mr. John C. McKenzie, of Illinois, asked eight days in which to file minority views. Mr. Frank Buchanan, of Illinois, suggested that four days were sufficient.

Thereupon Mr. James R. Mann, of Illinois, the minority leader, said:

It has always been the custom of the House that the minority be given a reasonable time in election cases in which to file their views after the majority report has been presented to the House. Sometimes they have had two or three weeks. This is a very limited time proposed in comparison with the precedents heretofore.

Mr. Oscar W. Underwood, of Alabama, the majority leader, further stated:

In the case where the right of a Member to a seat in this House was involved it has always been customary to allow the minority a reasonable time in which to present its views, and, with the pressure of other business, I do not see where it is going to be possible for the gentleman from Illinois [Mr. McKenzie] to get that report ready before 10 days, and I can not see any reason why the gentleman's request should not be granted, that this side of the House may have a full opportunity to present their views properly.

Mr. McKenzie's request as submitted was then agreed to.

This case involved charges of conspiracy between judges and clerks of election, and disregard of statutes specifying procedure to be followed by election officials in marking ballots for voters. The charges relate to one ward only and no question is raised to any other part of the district.

[1] Second session Sixty-third Congress, House Report No. 629, Record, p. 8231.

In this ward the original returns gave Dyer 2,213 votes and Gill 815 votes. A recount of the vote in this ward, ordered pursuant to the laws of Missouri on application of the contestant, gave Dyer 2,009 votes and Gill 994.

There was no charge against either the contestee or his party. Both the minority and majority reports hold him innocent of any responsibility for the irregularities charged. In fact the charges involve the conduct of judges and clerks of the contestant's party only.

The majority report explains this unusual situation:

> Some of the judges and clerks of election entertained what might well be called a political factional antagonism against Gill for what they conceived he had done as a voter in the election of 1910. In that election Thomas Kinney was the Democratic candidate and Mr. Dyer the Republican candidate for Congress in the twelfth district of Missouri. Dyer was declared elected, and took his seat. Kinney contested the election. Subsequently and in 1912 Gill was nominated as the Democratic candidate for Congress, receiving Kinney's support at the primaries. While this Kinney-Dyer contest was in progress a recount of the ballots was had.
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> An examination of Gill's ballot revealed the fact that he had scratched Kinney and voted for Dyer. Thomas Kinney died before the disclosure was made, and Michael E. Kinney, his brother, succeeded him in the Democratic leadership of the ward. Gill was called before the congressional committee of the ward to make an explanation of his scratched ballot. He stated that there must have been some mistake. That explanation was not accepted, and Kinney and his brother-in-law, Thomas Egan, Democratic committeeman for the fifth ward, thereupon made known to their followers that they were strongly opposed to Gill's election, and desired his defeat. In fact, contestant's counsel contends in his brief, and argued to the committee that the election officials "were involved" in the conspiracy "to please Egan." This unquestionably was so. Egan and Kinney both bitterly and vigorously opposed Gill, giving instructions to their followers to scratch Gill on the Democratic ticket. A reading of their testimony leaves no doubt in the minds of the committee that what was so perniciously done by the election officials was done in their belief that they were serving Kinney and Egan in their expressed desire to compass Gill's defeat.

In the ward in question there were 51 Democratic judges and clerks and 51 Republican judges and clerks, a total of 102 election officials. The recount disclosed the fact that 87 of these officials had voted for Dyer. After reviewing the vote and other evidence produced before the committee, the majority report concludes:

> The evidence establishes the fact that a conspiracy was formed and existed between the judges and clerks of election in many of the precincts of the fifth ward to deprive Gill of votes cast for him and if possible to count him out. The Missouri law with reference to the votes of illiterate persons and persons physically disabled requires such persons, if they desire to have their ballots marked by a judge of election, to make oath as to their illiteracy or physical disability, in which case the ballots of such voters may be marked as they direct by a judge of election in the presence of the other judge. The evidence in the case demonstrates that this law was in many instances utterly disregarded by the judges of election. In some cases voters whose names were signed on the registry list and therefore could not be said to be illiterate, had their ballots openly marked by judges of election, although no oath was administered to them, and the evidence fails to disclose any physical disability on their part. In some cases ballots of unsworn voters were scratched by judges of election, sometimes by direction of the voter, sometimes without any direction by them, and sometimes by the suggestion of the election judge, and the ballots then put in the box.
>
> The committee does not hold that a disregard of the provision requiring oaths to be administered to illiterate or disabled persons necessarily invalidates the election of the sitting member or justifies the rejection of the poll or the casting out of the vote of the person whose ballot was thus irregularly received. Upon that question we are not required now to pass. But a persistent violation of the statutory provisions, coupled with other acts of misconduct, as gathered from the

testimony, including unlawful marking of ballots, tampering with the votes cast for the contestant and making returns so glaringly false that their falsity could only have been the result of willful design, constitute circumstances so strong as to weigh potentially in favor of the contestant's contention that election officers in precincts where such misconduct and illegality occurred, resorted to a concerted and devised scheme to prevent by the means adopted by them the election of the contestant.

As to proof of such conspiracies, the majority say:

Conspiracies and fraud are frequently not susceptible of direct or positive proof. They usually are connived at and concocted in secret. They may be established by evidence of facts and surrounding circumstances, which properly linked together agreeably to rules of law exclude the presumption of innocent conduct and point logically and convincingly to the fact, and satisfy both the mind and conscience that the conspiracy was formed or the fraud was committed.

In conformity with this finding the majority recommended the rejection of the several polls affected, citing in support of their position from the case of Washburn *v.* Voorhees (2 Bartlett Cont. Cases, p. 58):

When the result in any precinct has been shown to be so tainted with fraud that the truth can not be deducible therefrom, then it should never be permitted to form a part of the canvass. The precedents, as well as the evident requirements of truth, not only sanction but call for the rejection of the entire poll when stamped with the characteristics here shown.

139. The case of Gill v. Dyer, continued.

Instance of refusal of sitting Member's request for leave to submit evidence.

While disregard for statutory revisions does not necessarily justify rejection of the poll, a persistent violation of law coupled with corroborative evidence constitutes circumstances warranting presumption of fraud and rejection of the vote.

The contestant in an election case is entitled to be heard by the House in his own behalf.

An affirmative vote on the first part of a resolution declaring the sitting member not elected, followed by a negative vote on the second part declaring the contestant elected, leaves the seat vacant.

An incidental question arose over the application of the contestee, presented after a tentative vote had been taken by the committee, asking leave to submit further testimony. The application was denied, the committee basing its denial on the opinion reported under similar circumstances in the case of Gidding *v.* Clark in the Forty-second Congress.

The committee further say:

The voluminous testimony in the case, comprising 2,205 pages of closely printed matter and a multitude of exhibits, was given careful reading, searching attention, and painstaking consideration. In view of the fact that no charge of misconduct or impropriety attaches to Mr. Dyer personally, that he was not a participant in the conspiracies, irregularities, or frauds which gave rise to this contest and has served as an honorable Member of this House, the discharge of the serious and important duty of this committee was rendered the more difficult; but the deplorable situation of affairs created by the fraudulent and illegal acts of election officers, constituting a grievous assault on the integrity of the ballot box, is such that the committee finds itself constrained, upon the facts established and the law as it applies thereto, to set aside the returns of the seven precincts mentioned, namely, the second, third, fourth, fifth, ninth, fourteenth, and seventeenth.

Eliminating these precincts, the vote in the fifth ward would stand as follows:

For Dyer	1,185
For Gill	586
Dyer over Gill in the fifth ward	599
Gill's plurality in district outside of fifth ward	666
Deducting Dyer's plurality in the fifth ward with the 7 precincts eliminated leaves Gill a plurality of.	67

The committee recommends the adoption of the following resolutions:

"Resolved, That L. C. Dyer was not elected a Representative in the Sixty-third Congress from the twelfth district of the State of Missouri, and is not entitled to a seat therein.

"Resolved, That Michael J. Gill was duly elected a Representative in the Sixty-third Congress of the United States as a Representative from the twelfth district of the State of Missouri, and is entitled to a seat therein.

From this recommendation the minority views presented by Mr. McKenzie dissent both as to the facts and the law. The minority find no evidence of fraud or conspiracy and insist:

The vote as returned should be corrected in so far as the evidence shows any possible errors, but that in the face of this mass of testimony corroborating the returns it would be unconscionable to throw out seven precincts, from which some 2 per cent of the voters have been examined as to their ballots, and about 1 per cent have impeached the official returns. To do so is certainly a new rule in congressional election contests.

As to the law:

The majority lay some stress upon the fact that voters were assisted by judges in the preparation of their ballots, without having been sworn to alleged illiteracy or disability. And, though the majority admits that a disregard of the provision of the Missouri statute requiring such oaths does not necessarily invalidate the election or justify casting out the vote of the person so assisted, they argue that a persistent violation of this statute constitutes a circumstance of suspicion. This statute, however, has been construed years before by the Supreme Court of Missouri, the highest court in that State, to be only directory, and that it can be disregarded without affecting the validity of the votes received. It was so held in the case of Hope *v.* Flentge (140 Mo., 390).

In conclusion the minority recommend the following resolution:

Resolved, That the Committee on Elections No. 3, or a subcommittee thereof, be instructed to take additional testimony in the contested-election case of Michael J. Gill *v.* Hon. L. C. Dyer, touching the election of November fifth, nineteen hundred and twelve, in precincts two, three, four, five, nine, fourteen, and seventeen, of the fifth ward of the city of St. Louis, with particular reference as to whether or not the Democratic ballots in those precincts, which had Michael J. Gill's name scratched, were the correct votes of the voters in question, or whether some person or persons had fraudulently scratched the name of the said Gill without the knowledge and consent of the said voters; and that the said committee, after it has taken and considered this additional evidence, in connection with testimony heretofore taken, make its report to the House, with its recommendations, within thirty days after the adoption of this resolution.

The report was debated on June 18 and 19.[1] On the latter date the contestant submitted through Mr. Goldfogle a request to be heard in his own behalf.

[1] Record, p. 10732.

A question as to whether there was objection to the request being raised, the Speaker [1] said:

It does not make any difference whether anybody makes any objection, the gentleman has a right to make a speech.

The question being on agreeing to the substitute offered by the minority, Mr. Mann submitted as a parliamentary inquiry—

The majority resolution consists of two parts. If the substitute offered by the minority should not be agreed to and a separate vote should be had on the two parts of the majority resolution, and that part unseating Mr. Dyer should prevail and that part seating Mr. Gill should not prevail, would the result be that the seat would be left vacant?

The Speaker held the seat would be left vacant.

The question being taken,[2] was decided in the negative, yeas 107, nays 136. A division of the majority resolution having been demanded, the first proposition unseating the sitting Member was agreed to, yeas 147, nays 98, and the second proposition seating the contestant, yeas 125, nays 108.

Thereupon Mr. Gill appeared and took the oath.

140. The Connecticut election case of Donovan v. Hill in the Sixty-fourth Congress.

Instance wherein the committee without submitting formal report authorized submission to the House of resolutions deciding an election case.

On January 24, 1916,[3] the Clerk of the House transmitted to the Speaker a list of contests for seats in the House of Representatives for the Sixty-fourth Congress, including the case of Jeremiah Donovan *v.* Ebenezer J. Hill from the fourth district of the State of Connecticut.

In his notice of contest the contestant charged the sitting Member with violation of the corrupt-practices act of the State of Connecticut.

The case was referred to the Committee on Elections No. 1.

On February 20, 1917,[4] Mr. Hubert D. Stephens, of Mississippi, from the committee, submitted as privileged the following resolution:

Resolved, That Jeremiah Donovan was not elected a Member of the Sixty-fourth Congress from the fourth congressional district of Connecticut and is not entitled to a seat therein.

Resolved, That Ebenezer J. Hill was elected a Member of the Sixty-fourth Congress from the fourth congressional district of Connecticut and is entitled to a seat therein.

The resolutions were unanimously agreed to by the House without debate.

141. The Massachusetts election case of Horgan v. Tinkham in the Sixty-fourth Congress.

Instance wherein a contested election case was decided without formal report from the committee.

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[1] Champ Clark, of Missouri, Speaker.

[2] Journal, p. 674; Record, p. 10757; Moores' Digest, p. 84.

[3] First session Sixty-fourth Congress, Record, p. 1480.

[4] Second session Sixty-fourth Congress, Journal, p. 256; Record, p. 3698; Moores' Digest, p. 94.

On January 24, 1916,[5] the Speaker laid before the House a communication from the Clerk of the House transmitting a list of contests for seats in the House of Representatives for the Sixty-fourth Congress. Among the cases so listed was that of Francis J. Horgan *v.* George Holden Tinkham. from the eleventh district of the State of Massachusetts.

Subsequently on the same day the Speaker referred the case to the Committee on Elections No. 2.

No written report was submitted in the case, but on August 7, 1916,[1] the following proceedings were had in the House:

Mr. James A. Hamill, of New Jersey. Mr. Speaker, I offer the following privileged resolution from the Committee on Elections No. 2, which I send to the desk and ask to have read.

The Clerk read as follows:

"House resolution 340.

"Resolved, That GEORGE HOLDEN TINKHAM was duly elected a Member of the Sixty-fourth Congress as a Representative from the eleventh congressional district of Massachusetts and is entitled to the seat therein."

The SPEAKER. The question is on agreeing to the resolution.

The resolution was agreed to.

142. The South Carolina election case of Prioleau v. Whaley in the Sixty-fourth Congress.

A petition unsworn to and not offered as an exhibit to a deposition should not be included in the record of an election case.

In the absence of proof to the contrary, the presumption of law is that election officials have complied with the law, and persons refused the privilege of registering or voting were disqualified under the law.

The House declined to invalidate an election because a State constitution had established qualifications of voters in disregard of reconstruction legislation.

The validity of an election is not affected by the failure of a majority of the qualified electors to exercise their right of suffrage.

On July 21, 1916,[2] Mr. Hubert D. Stephens, of Mississippi, from the Committee on Elections No. 1, submitted the report in the South Carolina ewe of Aaxon P. Prioleau *v.* Richard S. Whaley.

In this election the sitting Member received 2,989 votes and the contestant received 56.

The contestant in his brief charges that election officials arbitrarily prevented the registration and voting of over 27,000 legal voters because they were American citizens of African descent.

On this point the committee decide:

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[1] Journal, p. 923; Record, p. 12247. The case is not reported in Moores' Digest.

[2] First session Sixty-fourth Congress; House Report No. 1034; Journal, p. 890; Record, 11400; Moores' Digest, p. 92.

[5] First session Sixty-fourth Congress; Journal, p. 250; Record, p. 1480.

An analysis of this testimony shows that there is nothing to prove that there was "any arbitrary action on the part of the officials" that prevented anyone either from registering or voting.

Witnesses for contestant testified that negroes paid taxes, but that many of them are not allowed to register or vote, and that this is true of many who can read and write, and who own more than $300 worth of property. This is the gist of all the testimony taken by contestant.

The constitution of South Carolina states that every male citizen of the State and the United States shall be an elector, who is not laboring under the disabilities named in the constitution, and who possesses the qualifications required by it.

The qualifications referred to are residence in the State for two yews, in the county one year, in the precinct four months, and the payment of a poll tax six months before the election; and the ability to read and write any section of the constitution, or proof of payment of taxes on property in the State assessed at $300 or more.

Persons convicted of certain offenses are disqualified for registering or voting.

It does not appear from the record that any person was refused the right to register and vote who was qualified to do so. Payment of taxes, ability to read and write, and ownership of property in the sum of $300 or over are not the only qualifications of an elector.

If it be true that many persons were not allowed to register and vote, there is nothing to show that they possessed all the necessary qualifications.

There is no proof in the record that any "harsh, unreasonable, and unlawful means, rules, regulations, and methods were used that discriminated against the rights and privileges" of a single person, either in the matter of registration or voting.

It may be true that, as stated in the record, many negroes were prohibited from registering and voting, and that the registrars were white men, but in the absence of any proof the presumption of law is that these officers followed the law rather than that they violated it, and that the persons refused the privilege of registering and voting were disqualified under the law.

Incidentally, touching a petition signed by 431 persons and reaffirming statements contained in the notice of contest, the report declares:

This petition really has no place in this record. It is not sworn to, is not an exhibit to any deposition, and was not offered in evidence by contestant.

A further contention that the election laws and constitution of South Carolina are in conflict with the reconstruction act of June 25, 1868 (15 Stat. L., 73) is briefly disposed of by the committee:

The second specification, which relates to the act of Congress which was enacted June 25, 1868, and the fourteenth and fifteenth amendments to the Constitution of the United States, is not a new question. It has been presented to the House in several contested-election cases that have come from the State of South Carolina.

This contestant has been the contestant in six or seven contested-election cases. In the Sixtieth Congress, in the case of Aaron P. Prioleau *v.* Geo. S. Legare, this contestant raised the identical point involved in the case now pending before us. The minority leader, Mr. Mann, was then chairman of this committee. In the report made by Mr. Mann the point was decided adversely to contestant, and that report quoted the reports made in three other contested-election cases from South Carolina. In each case this same question was involved.

We do not deem it necessary to argue the question or to present decisions of the court on this point, but simply call attention to the four cases referred to above where the House has taken action in cases involving the same point, and we are willing to follow the precedent set by the House.

On the contention advanced by the contestant that a majority of the electors of the district failed to vote at the election, the committee say:

The third point made in the brief is that "neither the contestee nor the contestant was elected." It was argued that there are about 60,000 voters in the congressional district, and that because only about 3,000 votes were cast no valid election was held.

There is no merit in the contention that the election was invalid simply because a very small per cent of the electors voted in this election.

McCrary on Elections, section 167, says:

"If an election is held according to law, and a fair opportunity is afforded for all legal voters to participate, those who do not vote are bound by the result. It has been held that if the majority expressly dissent and do not vote the election of the minority is good."

The same authority, section 462, says:

"Where the statute provides in general terms that the election shall be determined by the majority of the electors, it will be held to mean the majority of the electors voting; and in ascertaining the result under such a statute, no inquiry as to the whole number of persons entitled to vote will be necessary or proper."

In conclusion the committee recommend the usual resolutions declaring the contestant was not elected and the returned Member was elected and entitled to the seat.

The resolutions were agreed to without debate or division.

143. The New York election case of Brown v. Hicks in the Sixty-fourth Congress.

The presumption that election officers properly discharged their full duty must obtain until refuted by competent and convincing evidence.

Petition for an inspection of ballots must be supported by evidence indicating error in the official, return and such request based merely on the hope of discovering error will not be entertained.

The authority of the House to judge the elections and qualifications of its Members is infinite and in no way circumscribed by State statutes or the decisions of State courts.

While the House has often signified willingness to recognize constructions placed upon State laws by State tribunals, the decisions of State courts are not necessarily binding upon the House and will be accepted only when commending themselves to favorable consideration.

The power of the House to examine ballots and correct returns is inherent but should be exercised only after the official returns have been discredited.

On January 22,1917,[1] Mr. Lewis L. Morgan, of Louisiana, from the Committee on Elections No. 3, submitted the report in the New York case of Lathrop Brown *v.* Frederick C. Hicks.

The official return in this case had given Mr. Hicks, the sitting Member, a, plurality of 15 votes. Questions relating to the conduct of the election and the counting of the, ballots were submitted to the Supreme Court of the State of New

[1] Second session Sixty-fourth Congress; House report No. 1326; Journal, p. 146; Record, p. 1756; Moores' Digest, P. 93.

York which handed down an opinion reducing the plurality from 15 votes to 4 votes. (168 App. Div., 370; 170 App. Div., 358.) On appeal the Court of Appeals of the State of New York again revised the returns giving the sitting Member a plurality of 10 votes (216 N. Y., 732; 110 N. E., 776).

The paramount question presented in this case was whether the ballots should be inspected. The contestant alleged numerous errors on the part of the inspectors of election and contended that the committee ought to view the ballots.

There was a sharp division of opinion in the committee on this point.

In order to do full justice to the attitude of the various members of the committee on this subject it may not be amiss to state in this connection that several members were of opinion that the failure of the election inspectors, in many instances, to comply with the mandatory provisions of the State law, requiring all disputed ballots to be segregated for judicial review and the consequent inability of the court to administer complete relief in this case, together with the known errors in the official count developed in the court proceedings dealing with only a portion of the ballots in question, justified and even required a recount of all the disputed ballots in this case. And thereupon a motion was submitted by these gentlemen that said disputed ballots should be sent for and inspected. This motion, however, failed on a poll of the committee, and as there was no satisfactory evidence, outside of what a review of the ballots might or might not have disclosed, upon which contestee's title could successfully be questioned, the committee as a whole acquiesced in and do hereby submit to the views of the majority as herein expressed.

It was therefore agreed:

This contest is predicated largely upon the hypothesis that the inspectors of election, in their effort to differentiate between void and valid ballots, committed many errors. Upon this supposition the contestant urged that the committee ought to view the ballots.

Now, the presumption that the sworn officers of the law did their full duty must obtain until the contrary is made to clearly appear by competent and convincing evidence, and we submit that proof sufficient to overcome this presumption does not, in our judgment, appear in the record. To view the ballots merely in the hope of discovering that the differences of opinion, which naturally arise between honest inspectors of election, caused enough errors to change the result would be in contravention of a cardinal rule of law.

On this question the New York Court of Appeals, in its adjudication of the case as presented to the court, had negatived the right of the House of Representatives under the circumstances to inspect the ballots. But the committee maintained:

It was argued that inasmuch as the New York court of final resort held that the ballots could not be recounted, for the reason that they had not been marked and segregated in accordance with the requirements of the statute of that State, that this committee is estopped and precluded from arrogating to itself the right to view such ballots. We do not think that there is much force in that contention.

Your committee maintains that the authority of the House of Representatives to judge of the elections and qualifications of its members is infinite. Since the formation of the Government the House has often signified its willingness to abide by the construction given by a State court, in good faith, to its statutes. But the decisions of a State court are not necessarily conclusive on the House, and will only guide and control it when such decisions commend themselves to its favorable consideration.

The power to examine ballots and to correct both deliberate and inadvertent mistakes and errors, shall always remain in the House. But this power should be exercised only after the official returns have been discredited.

The report concludes with a recommendation for the adoption of the following resolutions:

Resolved, That Lathrop Brown was not elected a Representative to the Sixty-fourth Congress from the first congressional district of New York.

Resolved, That Frederick C. Hicks was elected a Representative to the Sixty-fourth Congress from the first congressional district of New York, and he is entitled to retain his seat therein.

The House without debate or division agreed to the resolutions recommended by the committee.

Chapter CLXIX.

GENERAL ELECTION CASES, 1917 TO 1920.

144. The Michigan election case of Beakes v. Bacon in the Sixty-fifth Congress.

Statutes prescribing methods of preservation of ballots are directory merely and it is sufficient if ballots have been so preserved as to furnish satisfactory evidence of the will of the voters.

An official return shown to be erroneous and incapable of correction ought to be rejected in entirety.

An unofficial recount, the correctness of which is not disputed, displaces the original return.

According to the precedents of the House of Representatives, official returns may be invalidated only in event of fraud in conducting the election, or want of authority in the election board, or irregularities rendering the result uncertain.

On October 5, 1917,[1] Mr. Walter A. Watson, of Virginia, from the Committee on Elections No. 3, submitted the report in the case of Samuel W. Beakes *v.* Mark R. Bacon from the second district of Michigan.

The record in this case is rather unique in that no unworthy motive is ascribed and there is no conflict of evidence.

The origin of the contest is explained in the report:

> The official returns of the election for Congress, November 7, 1916, gave Bacon 27,182, Beakes 27,133—a majority of 49 for Bacon.
>
> Reviewing the returns from the various precincts, contestant discovered that at first precinct, second ward, city of Jackson, he had run far behind the other candidates of his party, State and Federal; and unaware of any local sentiment or condition to produce such a result, he instituted unofficial inquiries to ascertain the cause. As the returns did not indicate that the contestee had polled any more votes there than the rest of his party ticket, it was obvious that the lost votes had not gone to his competitor. The matter became the subject of public discussion and of press comment, and a very general impression got abroad that a mistake had been made in the official count. Some of the election inspectors themselves concluded they had made a mistake. And when, two weeks later, the board of county canvassers met to canvass the returns, four of the inspectors who held this election sent to the board a written statement saying that, in compiling the vote for

[1] First session Sixty-fifth Congress, House Report No. 194, Record, p. 7842.

Congress, they had inadvertently failed to include 70 or more votes, and that therefore their return was wrong and did not reflect the true state of that poll.

Contestant, from this disclosure, believing a mistake had been made large enough to affect the result in the whole district, thereupon retained counsel to appear before the board and obtain a correction of the error, or, if this were not possible, a recount of the vote. In these proceedings contestee was likewise represented by counsel.

At this juncture the board, on the application of one of the candidates for the office of coroner, voted for at same election, opened the boxes of this precinct and directed a recount of the ballots. Counsel for both of the parties to this contest being present, they concluded to examine unofficially the vote for Congress as the recount for coroner progressed, and in this way it was ascertained that, as the ballots then stood, the contestant was entitled to 87 votes more than the official returns had given him.

Application was then made to the board on the part of the contestant to correct the error, or award a recount. That a mistake had been made was openly acknowledged by counsel for contestee and conceded by the board (Rec., 50–62); but, deeming its functions to be only ministerial the board felt unable to correct the returns and found no provision in the statute authorizing itself to hold a recount in case of a Federal office. Application was then made to the State board of canvassers for a recount of the vote, but with like result. The supreme court was then asked for a mandamus, compelling a recount, but refused to award the writ. The laws of his State seeming to afford no remedy for a situation like this, contestant then determined to bring the matter before this House for decision upon its merits.

The State law, while providing for a recount of the ballots in the election of State offices, made no provision for such proceeding where Federal offices were involved. However, by agreement of counsel, the ballot boxes were produced before a notary and practically the entire district was recounted.

This recount made it apparent that serious errors had been made in the official count, and it was generally conceded that the official returns were erroneous. When the board of canvassers for Jackson County convened to canvass the returns for that county, four of the six inspectors who conducted the election addressed to the board the following communication:

We, the undersigned inspectors of election of the first precinct, second ward, of the city of Jackson in said county, at the general election held November 7, 1916, at which election State, county, and district officers were voted for, including candidates for Congress, hereby certify that in preparing the statement in duplicate showing the whole number of votes cast for candidates for Representative in Congress, and the number of votes received by each of such candidates, which statement was certified by the inspectors of election for delivery to the proper officers, as provided by statute, a mistake was made in that all the votes cast for the candidates for Representative in Congress were not included therein, and, through inadvertence and mistake, votes cast for each of such candidates were omitted from said statement; and that statement of the result of the election in said precinct, so far as it relates to the office of Representative in Congress, does not correctly represent the votes cast by the electors in that it does not show the whole number of votes cast for each of the candidates for said office—the votes not so counted aggregating 70 or more votes.

CHAS. F. BARCKUS.
GEO. E. VAN CAMP.
GIFFORD BILLMAN.
HENRY MARRIOTT.

NOVEMBER 20, 1916.

The inspectors were summoned before the board and all admitted that error had been made. But the board deeming itself unauthorized to order a recount certified to the State board the original returns with a separate statement calling attention to this situation.

The contestant contended that as the returns were conceded to be erroneous they should be set aside and a recount of the ballots had. The contestee insisted that, as the ballot boxes had not been sealed and kept in safe custody as provided by law, a recount would be unlawful and the official returns must stand.

In support of his contention he cited the Michigan statute on the subject:

After the ballots are counted they shall, together with one tally sheet, be placed in the ballot box, which shall be securely sealed in such a manner that it can not be opened without breaking such seal. The ballot box shall then be placed in charge of the township or city clerk, but the keys of said ballot box shall be held by the chairman of the board and the election seal in the hands of one or the other inspectors of election. (See. 37, Elec. Laws Mich., revision 1913.)

As to whether this provision of the Michigan law should be construed as mandatory or as merely directory the committee decided:

The general rule applicable to the construction of such statutes is well stated by McCrary:

"If the statute expressly declares any particular act to be essential to the validity of the election, or that its omission shall render the election void, all courts whose duty it is to enforce such statute must so hold, whether the particular act in question goes to the merits or affects the result of the election or not. * * * But if, as in most cases, the statute simply provides that certain acts or things shall be done within a particular time or in a particular manner and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they do and directory if they do not affect the actual results of the election. (McCrary on Elections, 225. See also to same effect Barnes *v.* Supervisors, 51 Miss., 305; Wheelock's Case, 82 Pa. St., 297; Allen *v.* Glynn, 17 Col., 338; Parven *v.* Wineberg, 130 Ind., 561; Bowers *v.* Smith, 111 Mo., 145; State *v.* Van Camp, 36 Nebr., 91.)

"Those provisions of a statute which affect the time and place of the election and the legal qualifications of the electors are generally of the substance of the election, while those touching the recording and return of the legal votes received and the mode and manner of conducting the mere details of the election are directory. (Idem 172, and Ill., Pa., Kan., and Mich. cams there cited.)"

And where the question concerned the sealing of the ballots themselves the same author said:

"In accordance with the rule that the errors of a returning officer shall not prejudice the rights of innocent parties, it has been held that, where it was the duty of a presiding officer to return the vote sealed up, a return of them unsealed, in the absence of proof or suspicion of fraud, was good. (Idem 236.)"

But statutory provisions regulating the conduct of elections and the preservation of the returns are, after all, only a means to an end, and that end is to secure a true expression of the will of the electors—a free ballot and a fair count. To this end all merely formal legal requirements must bend, and, if the returns are so made and preserved as to furnish satisfactory evidence of the will of the voters, that will must prevail.

The real question to be answered in this case is not whether the precise form of the statute was observed, but whether the ballots recounted were the identical ballots cast at the election, and if their condition had remained unchanged. If so, their value as evidence is unimpaired, and in the absence of statutory restraint, there can be no legal objection to their being recounted.

That this is the true principle from the standpoint of authority we quote:

"It is well settled that statutes prescribing the mode of preservation of the ballots are directory merely, and if it be clearly and satisfactorily proved that they have been kept intact and inviolate in the same condition as when counted, the ballots are admissible in evidence, although not preserved in the manner prescribed by the statute. (15 Cyclop. Law & Proc., 426.)

"In determining this and similar questions in cases of contested election it should be kept constantly in mind that the ultimate purpose of the proceeding is to ascertain and give expression to the will of the majority as expressed through the ballot box and according to law. Rules should be adopted and construed to this end, and to this end only. (McCrary on Elections, 232; People *v.* Bates, 11 Mich., 362.)

"The better opinion seems to be that, if the deviation from the statutory requirements relative to the manner of preserving the ballots has been such as necessarily to expose them to the public or unauthorized persons, the Court should exclude them; but if the deviations have been slight, or of such a character as to render doubtful the identity of the ballots, the question of their identity will go to the jury to be determined upon all the evidence. (Idem, see. 473, and People *v.* Livingston, 80 N. Y., 66.)"

As to the proper sealing of the ballot boxes the committee say:

We can find no satisfactory evidence in the record to show that the boxes ever contained any other seals than those which appeared when they were produced before the county board, and therefore can find no warrant for the inference of fraud based upon the assumption that the boxes had before borne a different seal. The theory that the boxes were tampered with after delivery to the clerk seems to us not only most improbable but inconsistent with all the known facts of the case.

Our conclusion, therefore, is that there is no proof or reasonable suspicion of fraud connected with these returns, that they have at all times remained in safe and legal custody, and that their value as evidence was nowise impaired by the failure of the inspectors to seal the boxes in the precise manner required by the statute.

In the second precinct of the sixth ward in the city of Jackson confusion arose over the unintentional mixing of the ballot boxes:

To sum up the whole matter: The official return is conceded by everybody to be wrong; it ought not therefore to be made the basis of title to anybody's seat in Congress. If it can not be corrected, it ought to be rejected entirely. But we think the means are at hand whereby this error may be legally corrected. In the presence of a sworn officer of the law, counsel for both parties recounted these ballots and reached a result which is not in dispute. We think that recount should stand in place of the original return as the true vote.

The ballot boxes for the city were all labeled with the numbers of their respective precincts and wards, but by mistake on election morning one box labeled "third precinct" was delivered at the second precinct, and one box labeled "second precinct" was delivered at the third precinct. At the close of the election the canvassed returns at the second precinct were placed in three boxes—two belonging to the precinct and properly labeled, and one, the box labeled "third precinct" already described; while at the third precinct all the ballots were put in the box labeled "second precinct" aforesaid, and delivered to the clerk's office.

The situation was still further complicated by the fact that when the work of the election ended at the second precinct the inspectors failed to return to the clerk's office along with the rest of the returns one of the ballot boxes containing a considerable number of the ballots, and left it in the polling booth uncovered and unlocked (though the polling booth was locked), where it remained until it was discovered by the clerk four months afterward, when he went to prepare for another election. He, of course, covered and locked the box, and carried it to the clerk's office for safe keeping.

Both sides agreed that a lawful recount of this portion of the ballots could not be had, as identification was impossible, and in this the committee concurred:

Though the ballots bore every internal evidence of not having been disturbed, yet would it be a hazardous experiment and dangerous precedent to permit a recount of returns unsecured and without lawful custody for four months.

Contestant holds the official returns should stand; contestee contends that the failure of the officers to preserve a portion of the ballots, as required by law, so discredits their conduct and official character as to invalidate their whole return, and that it should be set aside in toto; and, that being done, that a recount should be had of the ballots which were properly preserved and they be accepted for the vote of the whole precinct.

But on the contention that because of this irregularity the whole return should be invalidated:

The only known fact upon which it is asked to impeach this return is that one of the four ballot boxes in use on election day (for there was a larger box for the reception of ballots during the day in addition to the three in which the returns were placed) was left open in the polling booth by the inspectors after the election, and not delivered to the clerk as required by law. From this single act of omission we are asked to infer a willful violation of the law on the part of the inspectors, and contestee's brief charges it was perpetrated with intent to commit a fraud. Is this so? We are constrained to feel otherwise, and that such harsh conclusion is inconsistent with the other known facts and all the probabilities of the case.

1. There is nothing else in the record reflecting upon the character of any of the officers who held the election. One of them at least had long been a resident of the community. No citizen complained of their conduct during or after the election. There is nothing to show that any one of them had any personal or political interest in the election of the contestant. It is not known that any of them even voted for him. Indeed it was asserted by counsel in oral argument before the committee (committee hearing) that nearly all the inspectors in the city were Republicans in politics and the statement was not denied. If this be true, even barring the question of personal character, it is inconceivable they would perpetrate a fraud to elect the Democratic. candidate.

2. It is difficult to imagine how it was possible to consummate a fraud by the method chosen in this case. The poll book showing the identity and number of electors and the form of certificate showing the votes for the candidates having been returned to the clerk along with the other ballot boxes, it is not seen how the result could have been affected by anything done to the ballots in the box that was left. The only theory, consistent with crime under the circumstances, would seem to be that the officers had all conspired in advance to frame up a false return, and had retained this box with enough ballots to be altered so as to sustain the return. How this could have been accomplished where the vote was canvassed in public as required by the Michigan law, is not attempted to be explained. But if such a scheme had been executed, surely such wary criminals would have contrived in some way to "deliver the goods," and not have left the highly finished work of their hands exposed to the uncertainties of fortune in a remote corner of the city. With an official ballot in use and no extra ballots obtainable, It is not probable that outsiders could have been expected to aid materially in "doctoring the returns."

3. The facts that the total number of ballots collected from this and three other boxes (one of which was from another precinct) corresponded with the number called for by the poll books; that they were all properly initialed by the inspectors; that the unused ballots returned bore the right serial numbers; and that the vote of the candidates for Congress shown by the ballots was substantially the same as that polled for the other candidates of their respective parties are all strong internal marks to show that no fraud had been practiced upon those returns.

4. The record shows that it was 3 o'clock in the afternoon of the second day before the inspectors finished their work; they had been continuously on duty thirty-odd hours; under such conditions is it not reasonable to suppose that the box was inadvertently left behind and without thought of wrong?

On the subject of the invalidation of official returns in general the committee lays down this rule:

In the precedents of the House we have found no case in which the official returns have been set aside except for one or more of the following causes:

1. Want of authority in the election board.
2. Fraud in conducting the election.
3. Such irregularities or misconduct as render the result uncertain.

In the Missouri contested-election case of Lindsay *v.* Scott, Thirty-eighth Congress, a case arose resting, we apprehend, upon the same legal grounds as obtain here. An official return was sought to be set aside because of the subsequent destruction of the ballots; but the ballots having been regularly numbered and counted, and the vote entered on the poll book, in the absence of

any other proof of fraud, the Election Committee reported unanimously in favor of the return, and the House sustained the report without a division.

In the long line of cases, embracing nearly every variety, adjudicated by the House, we can find no precedent for the contestee's proposal that the official return in this case be set aside, and the portion of the ballots preserved be counted for the vote of the whole precinct. Regarding certificates of election, based on partial returns of an election district—a somewhat analogous question—the House in the case of Niblock *v.* Walls (42d Cong.), rejected a county return because the county canvassers did not include all the precincts in the county.

"If a part of the vote is omitted and the certificate does no more than show the canvass of part of the vote cast * * * it is not even prima facie evidence, because non constat that a canvass of the whole vote would produce the same result. (McCrary, see. 272.)

At the precinct in question 577 duly qualified voters participated in the election; 289 of these were so fortunate as to have their ballots properly preserved; 288—the other half—without any fault on their part were so unfortunate as to have their ballots left or to become mixed with others that were left at the polls and not preserved according to law. Under these conditions we know of no principle of law or of morals that would justify us in disfranchising one-half the electors of that precinct and substituting the will of the other half for that of the whole. The very statement of the proposition carries its own refutation.

We find no sufficient cause why the official return from the second precinct, sixth ward of the city of Jackson, should be rejected and are of opinion it should be accepted as a true record of the vote cast for Congress at that poll.

The committee accordingly tabulates the official returns remaining unimpeached and adds the returns from the recount in those precincts in which the original count was rejected. This revision gave Beakes a total of 27,179 votes and Bacon a total of 27,047 votes in the district, a majority of 132 votes in favor of the contestant.

In the debate in the House it was pointed out by Mr. Watson that if the two disputed precincts were ignored the returns from the recount accepted by both sides for the remainder of the district gave the contestant a majority of 46 votes. Then, whether the official returns for the two districts in question were accepted as originally reported or whether rejected in toto, the effect was the same. The contestant was elected in either case.

On this showing the committee unanimously recommended the adoption of the following resolutions:

1. That Mark R. Bacon was not elected a Representative to this Congress in the second district of the State of Michigan, and is not entitled to retain a seat herein.

2. That Samuel W. Beakes was duly elected a Representative in this Congress for the second district, State of Michigan, and is entitled to a seat herein.

The debate in the House, when the case was called up for consideration on December 13,[1] was largely a discussion of the facts as reported, with little difference of opinion as to the conclusions reached by the committee, and the resolutions were unanimously agreed to without division.

Mr. Beakes then appeared and took the oath.

145. Ruling by the Vice President on tenure of office of Senators holding temporarary appointment in the Senate.

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[1] Second session Sixty-fifth Congress; Journal, p. 43; Record, p. 246.

On October 15, 1918, the Vice President,[1] in response to a written inquiry from the Financial Secretary of the Senate as to payment of salaries of Senators and clerks to Senators holding temporary appointment in the Senate, replied:[2]

In response to your inquiry as to the tenure of office of temporary appointment of Senators by the governors of the several States, I have the honor to give you the following opinion:

The supreme law of the land upon this question is the seventeenth amendment to the Constitution of the United States. Neither Congress nor the general assembly of any State of this Union can add to or take therefrom. The portion of the seventeenth amendment which has to do with this question reads as follows

"When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided,* That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct."

To my mind this clause authorizes the legislature of any State to empower the executive to make a temporary appointment until an election; that the legislature could either provide for a special election to take place within a reasonable time, or a fair construction of the constitutional provision would permit the legislature to delay the election until the next general election in the State.

It may be contended with some plausibility that the election might be postponed until the expiration of the term of the Senator whose death occasioned the temporary appointment. Personally, I do not so believe, nor is it needful under present circumstances to express an opinion upon this subject.

The tenure of office of those holding temporary appointments in the United States runs until the people have filled the vacancies by election, as the legislatures may direct. In all cases now under consideration the people will vote for United States Senators to fill the vacancies now being filled by these temporary appointments upon the 5th day of November next. The sole question for determination is, therefore, What constitutes an election?

The phraseology of the Constitution of the United States is radically different from that of many of the Commonwealths. Numerous State constitutions provide a tenure of office and then add that the incumbent shall hold the office for that period of time and until his successor is elected and qualified. In the seventeenth amendment to the Constitution of the United States nothing is said about holding beyond the election.

In the absence of disqualification to hold office, Senators will be elected on the 5th day of November next. They may be compelled to run the gamut of executive, administrative, judicial, and senatorial investigation before they are entitled to qualify and take their seats as Members of the United States Senate. They may fail to even reach the coveted positions. Equitably, it would seem that the present incumbents ought to be permitted to hold until the successors elected on the 5th of November have been sworn in as Senators of the United States. Such, however, is not the law. The tenure of office of all Senators now holding temporary appointment in the Senate of the United States will expire upon the 5th day of November next, and in the discharge of my sworn duty I can certify no compensation after that date.

I regret being compelled to render this opinion, but I think my duty is plain as a pikestaff.

Very respectfully,

THOS. R. MARSHALL.

146. The Iowa election case of Steele v. Scott in the Sixth-fifth Congress.

Proof that the law has been innocently disregarded in the counting of ballots opens the door to a recount as effectually as if deliberate fraud had been shown.

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[1] Thomas R. Marshall, of Indiana, Vice President.

[2] Third session Sixty-seventh Congress, Record, p. 12.

Though the marking of ballots by voters may not be in accordance with statutory requirements, if the intention of the voter is clear the vote will be counted.

Discussion of constructions placed upon the Australian ballot laws.

On May 22, 1918.[1] Mr. Riley J. Wilson, of Louisiana, from the Committee on Elections No. 1, submitted the report of the committee in the case of T. J. Steele *v.* George C. Scott, from the eleventh district of Iowa.

The sitting Member had been returned by a majority of 131 votes, which the contestant attacked, alleging failure to count votes cast for the contestant and illegal counting of votes for the contestee.

Two principal questions were presented for the consideration of the committee: First, as to the counting or rejection of ballots which had not been marked by the voter in accordance with statutory requirements; and second, as to the validity of returns certified by election officials who had disregarded the law in the manner of counting the ballots.

No question was raised by either contestant or contestee as to the correctness of the returns from 8 of the 15 counties composing the district. In the remaining five counties both had caused a recount to be made, arriving at slightly different results.

The committee, therefore, accepted the official returns from the eight counties and proceeded to take a recount of the ballots in the five counties in dispute, with the following result:

Scott	26,033
Steele	26,029
Plurality for Scott	4

In the course of this recount the committee found:

With very few exceptions the differences as shown by the recount of the contestant and contestee resulted from either including or excluding from the count, by one or the other, ballots which had been marked by placing a cross by the names of the presidential and vice presidential candidates, no squares being placed opposite their names on the ticket, but opposite the names of the presidential electors. In some instances the voter would place an X by the name of the candidate for President and Vice President on the Democratic or Republican ticket as the case might be, and then proceed on down the column and place an X by the name of each presidential elector, and then an X opposite the name of the congressional candidate for whom he desired to vote. In other instances the voter would place an X by the name of the candidate for President and Vice President, then skip the presidential electors and mark the square opposite his choice for Congressman. While this manner of marking the ballots was not strictly in accordance with the provisions of the law, yet, in the judgment of your committee, the intentions of the voters were entirely clear and these votes were counted.

It appeared that the rejection of ballots in the original count had been based upon the theory that the manner in which voters had marked them violated the Australian ballot law by rendering them susceptible of identification.

On this point the report cites the opinion of the Supreme Court of the State of Iowa in the case of Fullarton *v.* McCaffrey (158 N. W. Rep, 506):

[1] Second session of Sixty-fifth Congress, House Report No. 595, Record, p. 6911.

The distinguishing mark prohibited by law is one which will enable a person to single out and separate the ballots from others cast at the election. It is something done to the ballot by the elector designedly and for the purpose of indicating who cast it, thereby evading the law insuring the secrecy of the ballot. In order to reject it the court should be able to say, from the appearance of the ballot itself, that the voter likely changed it from its condition when handed him by the judges of election, otherwise than authorized, for the purpose of enabling another to distinguish it from others.

Distinguishing between the strict construction formerly placed upon the Australian ballot law and the modern view now generally accepted, the report further quotes from the same opinion:

In distinguishing between the former strict construction placed upon the Australian ballot law and the modern view now taken by nearly all the courts, the Iowa court, in its opinion, further says:

"Some of the earlier decisions rendered shortly after the enactment of the Australian ballot law in the several States are somewhat extreme in applying that portion relating to identifying marks, going, as we think, to the verge of infringing on the free exercise of the voting franchise, but these may be explained, if not justified, by the supposed prevalence of corrupt practices at elections prior to such enactment and the laudable purpose of efficiently applying the remedy.

"Subsequent experience has disclosed how the ordinary voter proceeds under regulations in preparing his ballot, and many of the marks at first denounced as evidencing a corrupt purpose are now thought to be due to carelessness, accident, or inadvertence. What is an identifying mark is not defined in our statute, and whether any mark on a ballot other than the cross authorized to be placed thereon was intended as a means of identifying such ballot must be determined from the consideration of its adaptability for that purpose, its relation to other marks thereon, whether it may have resulted from accident, inadvertence, or carelessness or evidence designed and the similarity of the ballot with others and the like.

"Electors are not presumed to have acted corruptly, and identifications only which may fairly be said to be reasonably suited for such purpose, and likely to have been so intended, will justify the rejection of the ballot."

Applying the law as thus construed, the committee admitted and counted all ballots on which the voter had clearly indicated a choice for Representative in Congress.

The second question raised by the contestant involved the observance by judges and clerks of election of section 1138 of the Iowa Code. The section provides:

When the poll is closed the judges shall forthwith and without adjournment canvass the vote and ascertain the result of it, comparing the poll lists and correcting errors therein. Each clerk shall keep a tally list of the count. The canvass shall be public and each candidate shall receive credit for the number of votes counted for him.

The testimony disclosed that after the polls were closed the judges in order to expedite the count separated the ballots into piles which were counted simultaneously, each judge counting separately. At the close of this count the results were compiled and certified by all as the official return.

On the propriety of this procedure the committee rule:

It is evident that all the judges did not see any one ballot, and that no one judge saw all the ballots and that no one clerk recorded or tallied them all. At the close of the count the results were combined. This method is not only irregular but contrary to law.

Although no fraud may be intended by thus disregarding the provisions of the statute, yet in the judgment of your committee proof showing that the law has been so entirely disregarded and in effect violated in the manner of counting and calling ballots, just as effectually opens the door to a recount as though deliberate fraud had been actually proven.

Various other questions growing out of the contest were presented which the committee stated but did not consider necessary to pass upon, as the recount by the committee indicated a majority of 4 votes in favor of the sitting Member. The following resolutions were accordingly recommended:

First. That T. J. Steele was not elected a Representative in this Congress from the eleventh district of the State of Iowa and is not entitled to a seat herein.

Second. That George C. Scott was duly elected a Representative in this Congress from the eleventh district of the State of Iowa and is entitled to retain a seat herein.

The report was considered in the House on June 4.[1] After brief debate, confined to an explanation of the facts in the case, the resolutions recommended by the committee were agreed to without division.

147. The Alaska election case of Wickersham v. Sulzer in the Sixty-fifth Congress.

Statutory enactments prescribing the form of ballot to be used held to be directory and not mandatory.

Instance wherein the House reversed the ruling of a United States Federal District Court.

The vote of innocent electors will not be invalidated because of error or misconduct of election officers in the performance of statutory duties.

Differentiation between mandatory election laws and election laws merely directory.

Unsworn statements and ex-parte affidavits are not admissible as evidence and will not be considered by the Committee on Elections in the adjudication of an election case.

On December 4, 1918,[2] Mr. Riley J. Wilson, of Louisiana, from the Committee on Elections No. 1, submitted the report in the case of James Wickersham *v.* Charles A. Sulzer, Territory of Alaska.

The case involved three essential points:

(1) Certain proceedings had before the judge of the United States District Court of Alaska, first division:

The act of Congress of March 7, 1906, making provision for the election of Delegate to the House of Representatives from the Territory of Alaska, provided that voting at such elections should be by printed or written ballot. Subsequently the Territorial Legislature of Alaska passed an act adopting the Australian ballot system, including the following exception as to the use of the official ballots, known as section 21:

That in any precinct where the election has been legally called and no official ballots have been received the voters are permitted to write or print their ballots, but the judges of election shall in this event certify to the facts which prevented the use of the official ballots, which certificate must accompany and be made a part of the election returns.

The Territorial board whose duty it was to canvass and certify the result of the election canvassed the votes cast at this election with the following result:

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[1] Journal, p. 425; Record, p. 7354.

[2] Third session Sixty-fifth Congress; House Report No. 839; Record, p. 97.

Charles A. Sulzer	6,459
James Wickersham	6,490
Lena Morrow Lewis	1,346
Plurality for Wickersham	31

Before a certificate was issued in accordance with the vote so canvassed, the contestee presented a petition to the United States District Court of Alaska, praying for a writ of mandamus directing the Territorial canvassing board to reject the vote returned from seven precincts as follows:

Choggiung:	
For James Wickersham	25
For Charles A. Sulzer	3
Deering:	
For James Wickersham	10
For Charles A. Sulzer	6
Nizina:	
For James Wickersham	7
For Charles A. Sulzer	3
Nushagak:	
For James Wickersham	10
For Charles A. Sulzer	3
Utica:	
For James Wickersbam	13
For Charles A. Sulzer	4
Bonafield:	
For James Wickersham	3
For Charles A. Sulzer	1
Vault:	
For James Wickersham	8
For Charles A. Sulzer	2

In the petition it was charged that the vote at each and all of the above named precincts except Vault and Nizins should be rejected and not counted for the reason that the form of official ballot prescribed by the Territorial legislature had not been used and that no certificate explaining the facts which prevented the use of the official ballots had accompanied the election returns as a part thereof and as required by the laws of Alaska. In other words, that the election officials had not complied with the provisions of section 21 of the act of 1915 in that no official ballots were used at either of the said precincts and no certificates explaining the facts which prevented the use of the official ballots accompanied the returns. As to Vault precinct, it was charged that no certificate of the result of the election in this precinct specifying the number of votes cast for each candidate accompanied or was included in the returns. At Nizina it was claimed that the judges of election were not sworn.

An alternative writ of mandamus was issued March 2, 1917, as requested, and was made peremptory March 23, directing the rejection of the vote cast at each of the precincts listed with the exception of Nazina.

The effect of this judgment was to revise the returns as follows:

Sulzer	6,440
Wickersham	6,421
Plurality for Sulzer	19

In accordance with this decree, the canvassing board issued the certificate of election to contestee:

As to the action of the court in issuing the writ of mandamus the committee say:

The thing important in this phase of the case is the proper construction of the Alaska election law, and particularly section 21.

Judge Jennings held the law mandatory, and specifically the proviso in section 21, and that the failure of the judges of election to place with and make as a part of the returns a certificate showing the facts which prevented the use of official ballots vitiated the returns from five of the six precincts named, and ordered the vote thereat rejected and not counted for Delegate to Congress;

Your committee has found itself unable to agree with that construction of the law, and herewith submits the facts and legal considerations which have impelled that conclusion. We readily admit as a general proposition that under the Australian ballot law the provisions requiring the use of an official ballot must be followed, and that no other form of ballot can be used without some special provision of the law authorizing its use.

The statute under consideration authorized the electors in event they were not supplied with official ballots to write or print their ballots, that is, to use a ballot that was not official, and imposed upon the judges of election the duty of certifying to the facts which prevented the use of official ballots.

The conditions in Alaska were such that the Territorial legislature wrote into the law this exception for the use of nonofficial ballots. The question now is to determine whether or not this section of the Alaskan election law is mandatory or is it merely directory.

The report discusses the question of mandatory and directory statutes as follows:

The question of mandatory and directory statutes as applied to elections has been discussed before the House of Representatives more often than any other legal question pertaining to contested-election cases. The precedents indicate that the rulings here have been quite as uniform as in the courts. Each case has some peculiar distinctive features of its own, and after the facts have developed the task becomes one of correct application of the law as established by the many precedents here as well as the decisions of the courts.

The following authorities are submitted as establishing a correct interpretation of the law applicable to the issues in this case.

"Those provisions of a statute which affect the time and place of the election, and the legal qualifications of the electors, are generally of the substance of the election, while those touching the recording and return of the legal votes received and the mode and manner of conducting the mere detaBs of the election are directory. The principle is that irregularities which do not tend to affect the results are not to defeat the will of the majority; the will of the majority is to be respected even when irregularly expressed. The officers of election may be liable to punishment for a violation of the directory provisions of a statute, yet the people are not to suffer on account of the default of their agents. (McCrary on Elections, p. 172, sec. 228.)"

It has been repeatedly held that where the law itself forbids the counting of ballots of certain kinds or forms that do not meet the provisions of the statute, it is mandatory, and that it should be so construed by the courts.

Where the statute itself provides what the penalty shall be on the failure to comply with its terms, if the law is constitutional, there is no room left for construction. There is no provision of this character in the Alaska election law or pertaining in any way to section 21.

The Supreme Court of Missouri in the case of Horsefall *v.* School District, One hundred and forty-third Missouri Reports, page 542, in passing on a case where the irregularities charged were failure to number the ballots and that the form of the ballots was not as prescribed by the statute, said:

"The decisions of the supreme court of this State have not been altogether harmonious as to the effect of irregularities upon the result of an election, and we shall not attempt to review these cases, but we think that it may now be said to be the established rule of this State, as it is generally

in other jurisdictions, that when a statute expressly declares any particular act to be essential to the validity of an election, then the act must be performed in the manner provided or the election will be void. Also if the statute provides specifically that a ballot not in prescribed form shall not be counted, then the provision is mandatory and the courts will enforce it; but if the statute merely provides that certain things shall be done and does not prescribe what results shall follow if these things are not done, then the provision is directory merely, and the final test as to the legality of either the election or the ballot is whether or not the voters have been given an opportunity to express, and have fairly expressed, their will. If they have the election will be upheld or the ballot counted, as the case may be."

This decision has been widely quoted and approved and is in our judgment a correct statement of the law and peculiarly applicable to the issues in this case.

Another very interesting decision is found in the Sixty-eighth Texas Reports, page 30, Fowler *v.* The State, in which the complaints were largely against the manner in which the election returns were made, being

"First. That no tally sheets or poll lists were kept and returned as required by law.

"Second. That the ballot box was sent to the county judge through the United States mail instead of by the presiding officer or manager of election.

"Third. Because the county judge did not receive the returns sent him.

"Fourth. Because the returns were not made in triplicate as required by statute."

In this case the court, after reviewing the grounds upon which the election was asked to be set aside, said:

"Without separately considering each of the objections raised to the manner of holding the election at precinct No. 3 and of returning its results, all such objections, including those we have already passed upon, may be disposed of on the ground that the requirements of the election law not obeyed by the managers were not mandatory but directory. The statute does not say that a failure to pursue the course pointed out by it in these respects shall vitiate the election, nor is there anything in the nature of these provisions which requires us to give them that effect. The object of every popular election for officers is to ascertain the will of the people as to what persons shall serve them as such in the various positions to be filled. A free, fair, and full expression of the public will is sought, and certain means are prescribed by law as the most certain to bring about the desired result. Some of these, from their very nature, or from the manner in which they are prescribed, are deemed absolutely essential to the accomplishment of the desired result. Among these may be named the requirement that the voting shall be by ballot; that it shall take place on a certain day and within certain precincts, etc. These are prescribed to insure perfect freedom of choice to the citizen, to serve his convenience in getting to the polls, and to bring out a full vote at the election.

"Then there are other requirements, such as those which have been neglected in this case, that are merely formal in their character. The law deems that it is proper that they should be pursued in order to prevent frauds in the election and tampering with the votes and returns. If strictly followed, they furnish the best evidence that the election has been fairly conducted, and the burden of proof to show that it was not, either wholly or in part, rests upon the party attacking the returns. But these requirements are always treated as directory unless the law, either expressly or in effect, makes them essential to the validity of the election. Electors must not be deprived of their votes on account of any technical objection to the manner in which the election has been held, or for any misconduct on the part of its presiding officers, if these have not affected the true result of the election. (Cooley's Constitutional Limitations, 617, 618; Prince *v.* Skillin, 71 Maine 361.) This would be to deprive the citizen of a great constitutional privilege for a mere informality; to place within the power of a few persons to defeat the right of suffrage altogether. The very means provided to insure a fair and proper election might become an instrument of fraud and dishonesty."

The New York Court of Appeals, in the case of People ex rel. Hirsh *v.* Wood, New York Reports, 143, stated the law in relation to this question as follows:

"We can conceive of no principle which permits the disfranchisement of innocent voters for the mistake or even willful misconduct of election officers in performing the duty cast upon them.

The object of elections is to ascertain the popular will and not to thwart it. The object of election law is to secure the rights of duly qualified electors and not to defeat them. Statutory regulations are enacted to secure freedom of choice and to prevent fraud, and not by technical obstructions to make the right of voting insecure and difficult."

We have been cited to numerous authorities, holding that the mandatory or directory character of a statute does not always depend upon its form or the terms used, but rather grows out of the nature of the subject with which it deals, and the legislative intent and purpose in framing and adopting the law. With these authorities we agree, but they can only be applied here in so far as they are applicable to the case under consideration.

The application of the law as stated is then made to the case at issue:

As we understand and appreciate the facts and issues in this case the legislative intent is very clear and the purposes and scope of the law easily determined.

The law of Alaska providing for official ballots, in the respect that it contains an exception authorizing the voter to use under certain conditions a ballot of his own make, is in a claw by itself.

There are a few statutes directing that in event the regular official ballot is not supplied, certain designated officers may prepare and furnish a ballot in the form prescribed by law. This, then, becomes an official ballot.

Section 21 of the Alaska law says, in the event that the official ballots are not received, "the voters are permitted to write or print their ballots." These are the methods to which they had been accustomed under the congressional act. The ballot prepared by the elector provided for in section 21 is not official, but it is legal. He is doing just what the law says he may do.

The statute imposes certain duties upon the judges of election at each precinct; that is, they receive the official ballots from the United States commissioner, and deliver such ballots to the electors as they appear to vote, and in the event they have no official ballots with which to supply the voters, should they avail themselves of the privilege given to write or print their ballots, then the said officers shall certify to the facts which prevented the use of the official ballots, which certificate must accompany the returns as a part thereof.

The object of this certificate is to furnish an explanation by these officers showing why they had not supplied the electors with the official ballots and had permitted the use of those that were not official.

Now, why should the voter who had done just what the law told him he might do lose his vote because these officials neglected to make out and enclose with the returns a certificate, making the proof that they had not failed in the discharge of the duties imposed upon them. The court held section 21 to be mandatory not only in its requirement that this certificate be made (and we incline to agree with him in so far as the officials were concerned), but to the extent that no proof of its existence could be considered unless it be with and made a part of the returns and that no manner or form of evidence as to the failure to receive the official ballots could save the rejection of the vote.

It is with this latter strict construction we can not agree. Neither do we find anything in the law to authorize the assumption that the legislature intended that innocent voters might forfeit their franchise without any fault of their own or that any man might be deprived of his traditional day in court

In construing this statute and arriving at the legislative intent the general situation in Alaska becomes important in many respects. The extent of its territory, and the conditions prevailing in relation to transportation and communication between its various sections are parts of the res gestae. Alaska is in extent of territory one-fifth the size of the United States, thinly populated, and with the exception of a few towns and cities is composed of settlements scattered over its extensive area. There are few railroads and the method of communication to many points is difficult and uncertain. In all this territory at the November election of 1916 only about fifteen thousand (15,000) ballots were cast for the Delegate to the House of Representatives. It is only natural that the legislature in adopting the Australian ballot should take these facts into consideration and in order that all the people in the Territory might have the opportunity to exercise the elective franchise, it being evident in many instances that at precincts in remote sections the official

election supplies would not be delivered, enacted the provision, which is such an unusual exception to the Australian ballot law in general.

It was foreseen by the Territorial legislature that it would be necessary, if the electors in many of the outlying precincts were to have the opportunity to vote at all, they should be given the privilege of either writing or printing their ballots, and the legislature's foresight and expectstions in that respect are abundantly confirmed by the facts in this case. This provision was enacted in the interest of the electors in remote places in order to secure for them the exercise of the privilege of voting, and it is not quite possible to believe that in making it the duty of the election judges to certify to the facts which prevented the use of the official ballots it was ever intended that their failure to do so would vitiate the returns and deprive the citizen of the right to have his ballot counted as cast.

According to the record in this case, there were only eight precincts in the entire Territory where the official ballots were not received in the 1916 election. From five of these there were no certificates accompanying the returns showing why official ballots were not used. It is not contended that any fraud was committed at any of these precincts, and there is no proof in the record to that effect.

If the result of the election should be determined by the vote at these precincts, why should not a candidate be permitted to submit proof to a court or to the House of Representatives showing the facts as to the presence or want of presence of the official ballots? In the judgment of your committee, such a right existed. We are further of the opinion that the record satisfactorily establishes the fact that official ballots were not received at the precincts in question and that the proof is made by legal and competent evidence.

In announcing this conclusion, the committee incidentally refer to the character of evidence presented:

It is contended that this conclusion could not be reached without considering ex parte affidavits, private letters, telegrams, and incompetent hearsay. It is true that there is much private correspondence by letter and wire and a number of ex parte affidavits in this record which are not evidence, and which have no place here, and have not been considered by the committee in reaching its conclusion.

It is important, therefore, to state the facts established by legal proof upon which we reached the conclusion that the required official ballots were not supplied.

148. The election case of Wickersham v. Sulzer, continued.

In the absence of proof to the contrary, election officers are presumed to have fully discharged the duties devolving upon them as such.

The vote of qualified electors offering to vote, but improperly denied, were counted as if cast.

The domicile of soldiers in the service of the United States is established by nativity or by residence with the requisite intention or derivative as that of family or dependents.

Service in the United States Army does not disqualify as a voter at the legal place of residence, but residence may not be acquired by length of time quartered under Army orders in any particular place.

Native Indians who had severed tribal relationship held to be citizens and entitled to vote.

To qualify as an elector a person must be in legal acceptation, an inhabitant, initiating and continuing his residence voluntarily, on his own motion and in his own right.

Where the nature of illegal votes could not be determined the committee on election made a pro rate reduction from the poll of each candidate.

At the Vault precinct the judges had failed to sign the certificate in the back of the register and tally book. They had, however, signed the duplicate certificate transmitted to the clerk of the court and had complied with all other formalities. So, in the absence of any evidence of willful misconduct, the committee held the omission was not vital and that the vote at Vault should not have been rejected.

(2) As to the legality of votes cast by Indians in certain sections of the Territory:

It is contended by both parties that in certain precincts the votes of a number of Indians should not have been received and counted; that is, the contestant claims that in a number of precincts where Indians voted and the majorities were for the contestee, the Indian were not entitled to vote, for the reason that they had not severed their tribal relations and were not citizens in the sense that they might be qualified electors; while on the other hand, the contestee claims that at certain other precincts where the majorities were for the contestant, a portion of the vote being that of Indians, was not legal for like reasons. In these charges are also included Russians of mixed Indian blood called Creoles and Eskimos. Apparently in respect to citizenship and the right to vote all these are classified as Indians.

Under the law of Alaska every native Indian, born within the limits of the Territory, who has severed his tribal relationship and adopted the habits of civilized life becomes a citizen and is entitled to vote. The law provides methods by which he may obtain evidence showing that he has met with the requirements of the law, but this is not compulsory, leaving the matter a question of fact peculiar to the individual case.

From the indefinite, conflicting, and unsatisfactory character of the evidence in this case it is not practical or possible to say whether or not the election officers were within the law in receiving or rejecting the votes of Indians who voted or would have voted at this election. With very few exceptions, the evidence is of a general nature, and with respect to many there is no evidence at all. The evidence fails to disclose any intention or attempt to commit fraud at either of the precincts in question and where the Indians voted. The election officers have particular knowledge of the conditions and the people in the locality surrounding precincts where they preside, and it is their duty to know that each voter is duly qualified before permitting him to deposit a ballot. These officers are presumed to have discharged this duty. The evidence shows very clearly that many of the Indians were entitled to vote. The Indian vote is mingled with that of other citizens, and the record points out no intelligent way by which it may be ascertained that any injury is actually proved to have resulted to either candidate on account of the Indian vote. It is probable that a portion of this vote is illegal, but the action of election officers charged with the duty of conducting elections should not be set aside except upon definite proof, and the votes once received by such officers should not be rejected unless the proof establishes in some definite way that the voters were not qualified and the number and identity of votes that should not be counted, and especially is this true in the absence of proof of any conspiracy to commit fraud.

The attorney for the contestee, in his very able argument before your committee, after reviewing the entire question of this phase of the case, took the position that if a portion. of the Indian vote was counted it should be counted as an entirety, or if rejected it should be rejected as a whole.

For the reasons above stated, the committee has reached the conclusion that the fairest thing to do, in view of the testimony, is to count it all.

Now, as exceptions to the above, George Demmert and R. J. Peratovich, who appeared in person and offered to vote at Craig precinct, should have been permitted to do so.

The testimony shows that they were qualified electors under the laws of Alaska, and each on being examined as a witness states that he appeared in person and offered to vote and that he would have voted for Sulzer, and the committee is of the opinion that their votes should be so counted.

(3) As to the legality of the votes of soldiers of the United States Army stationed at Fort Gibbon and who voted there, and the votes of other soldiers in the Army who voted at Eagle precinct:

The evidence shows conclusively that 36 soldiers in the United States Army, stationed in Alaska, voted in this election—4 at Eagle and 32 at Fort Gibbon. Apparently there is no difference or controversy as to the facts in relation to these soldiers, except in respect to their right to vote at these precincts in Alaska. Hence, the question is purely of a legal nature. The facts may be stated as follows:

Each and all the men whose votes are in question here came to Alaska as soldiers in the United States Army. They remained in such service from the respective dates of their arrival in Alaska up to and until November 7, 1916, the date of this election, and were there in such service on that date. All were enlisted and accepted for service in the States.

Seven were honorably discharged and reenlisted in Alaska on the following day.

Each and all of them had been in the Territory more than a year immediately preceding the date of election and at Eagle or Fort Gibbon more than 30 days immediately preceding election day.

If they had acquired a legal domicile in Alaska, they were entitled to vote and the votes should be counted; otherwise not.

To become a citizen and a qualified elector in Alaska, a bona fide residence of one year in the Territory and 30 days in the voting precinct is required.

The question of domicile or place of residence of those in the military service of the country either as officers or as men in the line, has been before Congress and in the courts in a number of cases, but not of very recent date so far as Congress is concerned. The subject is one of great importance and absorbing interest just at this time, not only in this case and in Alaska, but throughout the country.

Hence a very careful examination of the authorities bearing upon this question has been made, and we submit as a correct statement of the law the following:

"(1) In the case of an officer or enlisted man in the Military Establishment, held that his domicile during his continuance in the service is the domicile or residence which he had when he received his appointment as an officer or entered into an enlistment contract with the United States. This is true whether such a domicile was original—that is, established by nativity—or by residence with the requisite intention, or derivative, as that of a wife, minor, or dependent. This residence or domicile does not change while the officer remains in the military service, as his movements as an officer am due to military orders; and his residence, so long as it results from the operation of such orders, is constrained, a form of residence that works no change in domicile.

"(I. A.) A person in the military service of the United States is entitled to vote where he has his legal residence, provided he has the qualifications prescribed by the laws of the State. He does not lose such residence by reason of being absent in the service of the United States. The laws of a particular State in which he is stationed and has only a temporary as distinguished from a legal residence may, however, permit him to vote in that State after a certain period of actual residence.

"(Digest of Opinions of the Judge Advocates General of the Army. Howland. Pages 976, 977, 978.)"

Also from McCrary on Elections, page 70, sections 90 and 91:

"Sec. 90. The fact that an elector is a soldier in the Army of the United States does not disqualify him from voting at his place of residence, but he can not acquire a residence, so as to qualify him as a voter, by being stationed at a military post whilst in the service of the United States.

"Sec. 91. Soldiers in the United States Army can not acquire a residence by being long quartered in a particular place, and though upon being discharged from the service they remain in the place where they have previously been quartered, if a year's residence in that place is required as a qualification for voting, they must remain there one year from the date of discharge before acquiring the right to vote."

Applying this law to the facts here, the 36 soldiers stationed in Alaska who voted at Eagle and Fort Gibbon were without legal domicile there, and were not in any legal sense inhabitants of the Territory and therefore were not qualified electors therein.

It is contended, however, that these soldiers had changed their residence from the States where they enlisted to Alaska and had acquired domicile there. The evidence in support of this is that they appeared on election day, and upon their votes being challenged, took the required oath containing the declaration of residence and voted. The contention is made that the residence or domicile of a soldier is determined by his intention; that (quoting from brief) "these soldiers have already shown their purpose and have established their residence in Alaska."

This argument seems to be based upon the assumption that the soldier or officer in the military service sent under orders away from the State of his original domicile and stationed in another State, while subject to the orders of his superiors, can have and exercise voluntarily and in his own right the requisite intention necessary to effect a change in domicile and that, after being so stationed for the statutory period required for voting, a declaration of choice of domicile accompanied by the act of voting constitutes sufficient evidence that the change has been effected.

Without stopping to discuss the public policy of approving here and establishing a rule of this kind, it is sufficient to say that the law and authorities are in practical harmony and are all the other way.

So under the laws of Alaska, as in all the States in so far as the committee is informed, a person to be a qualified elector must, in legal acceptation, be an inhabitant.

Manifestly no one can become an inhabitant in Alaska or in any of the States (at least without some provision of the law authorizing) who does not initiate and continue his residence there voluntarily on his own motion and in his own right.

At Eagle and Fort Gibbon precincts, where the 36 votes thus invalidated by the committee were cast, a total of 92 votes were polled. As it was not shown for whom the 36 votes were cast, the committee, in order to save the votes legally cast and avoid discarding the entire poll at the precincts affected, ruled that a pro rata, reduction should be made from the poll of each candidate.

Readjustment of the entire vote of the district in accordance with these findings of the committee on the various issues presented resulted as follows:

Wickersham	6,480
Sulzer	6,433
Plurality for Wickersham	47

On the strength of this showing the committee recommended the following resolutions:

1. That Charles A. Sulzer was not elected a Delegate to the House of Representatives from the Territory of Alaska in this Congress, and is not entitled to retain a seat herein.

2. That James Wickersham was duly elected a Delegate to the House of Representatives from the Territory of Alaska in this Congress, and is entitled to a seat herein.

The case was spiritedly debated in the House on January 3, 4, and 7, 1919.

On January 4,[1] Mr. John L. Burnett, of Alabama, moved to recommit the report to the Committee on Elections No. 1, with instructions to report thereon by or before February 10, 1919.

On January 7,[2] the question being taken on the motion to recommit it was decided in the negative—yeas 131, nays 187. The question then recurring on the

[1] Journal, p. 53; Record, p. 1059.

[2] Journal, p. 55; Record, p. 1106.

resolutions recommended by the committee, the resolutions were agreed to—yeas 229, nays 64.

Thereupon, Mr. Wickersham appeared and took the oath.

It may be noted that Mr. Wickersham belonged to the minority party of the House, while contestee belonged to the majority party.

149. The Oklahoma election case of Davenport v. Chandler in the Sixty-fifth Congress.

Instance wherein the committee on elections submitted resolutions deciding an election case without accompanying report.

On January 27, 1919,[3] Mr. John N. Tillman, of Arkansas, a member of the Committee on Elections No. 2, introduced the following resolution:

Resolved, First. That James S. Davenport was not elected to the House of Representatives from the first district of the State of Oklahoma in this Congress and is not entitled to a seat therein.

Second. That T. A. Chandler was duly elected to the House of Representatives from the first district of the State of Oklahoma in this Congress and is entitled to seat therein.

On February 5,[4] Mr. Tillman said:

Mr. Speaker, I ask to call up House resolution 523 and dispose of it. It is the report of the Committee on Elections No. 2, seating Mr. Chandler of Oklahoma, the sitting Member.

The resolution was agreed to without debate or division.

150. The New York election case of Gerling v. Dunn in the Sixty-fifth Congress.

Congress has authorized the use of voting machines in the States.

Although the notice of contest filed by contestant was defective, the House considered the merits of the case.

The House of Representatives does not pass upon matters of policy in the conduct of elections or questions relating to the validity of State laws, and such questions should be addressed to the legislative department of the State government or adjudicated in the State courts respectively.

On February 17, 1919,[5] Mr. Riley J. Wilson, of Louisiana, from the Committee on Elections No. 1, submitted the report in the New York case of Jacob Gerling *v.* Thomas B. Dunn.

The vote polled for contestant and contestee, respectively, as shown by the official returns in this case, was as follows:

Thomas B. Dunn	29,894
Jacob Gerling	13,867
Majority for Dunn	16,027

The contestant in his notice of contest duly filed alleges that the election was illegal and unconstitutional and therefore void for the reasons that:

First. The voting machines used at said election did not comply with the requirements of the election law of the State of New York and that they were not legal machines as defined by the

[3] Third session Sixty-fifth Congress, Journal, p. 123; Record, p. 2186.

[4] Journal, p. 152; Record, p. 2757.

[5] Third session Sixty-fifth Congress House Report No. 1074; Journal p. 199; Record p. 3578.

statutes of that State and were not so arranged for use in voting as required by the New York election laws.

Second. That certain provisions of the constitution of the State of New York had been violated in the manner and method of conducting the election by the use of such voting machines and also by the enactment of a special law by the Legislature of New York State designed especially for Monroe County, under which law this election was conducted.

Third. That the voting machines used at this election were prepared and arranged by an expert and not by the proper legally constituted authorities, and that such machines were not properly tested before use at this election.

Fourth. That the machines used at this election did not provide a secret method of voting as provided by the New York State constitution.

The report says:

The notice of contest is faulty and defective in the respect that the allegations are vague, indefinite, and general. However, the committee considered the merits of the case.

Practically all the grounds upon which the contest is based relate to matters of policy that should be addressed to the consideration of the legislative department of the State government, or to questions proper to be determined and adjudicated by the courts of New York State and not by Congress.

It has not been and should never be the policy of the House of Representatives to pass upon the validity of State laws under which elections are held when the complaint is that the legislative enactment is contrary to the provisions of the State constitution.

The contestant bases his case entirely upon questions relating to the use, authorization and arrangement of voting machines provided for voters at the election. The committee point out:

Congress has authorized the use of voting machines in the States.

On February 14, 1899, section 27, Revised Statutes of 1878, was amended and reenacted to read as follows:

"All votes for Representatives in Congress must be written or printed ballot or voting machine, the use of which has been duly authorized by the State law; and all votes received or recorded contrary to this section shall be of no effect."

Voting machines have been in use in New York State for many years, authorized by its constitution, provided for by its legislature, and sanctioned by its courts.

The evidence in this case fails to support by definite proof any of the charges made against the machines used at this election or to disclose any fraudulent or illegal action on the part of any official connected with the conduct of the election, or the canvass, tabulation, and return of the vote.

As the contestant did not allege his own election or the failure of the contestee to receive a majority of the votes cast, the committee in reporting to the House omitted the usual resolution declaring the contestant not elected and not entitled to a seat therein, and submitted the following only:

That Thomas B. Dunn was duly elected a Representative in this Congress from the thirty-eighth congressional district of the State of New York and is entitled to retain a seat herein.

The resolution was agreed to without debate.

151. The Missouri election case of Salts v. Major in the Sixty-sixth Congress.

The committee having found the sitting Member duly elected, deemed it unnecessary to consider claims that he was entitled to additional votes.

It is not the policy of the House of Representatives to pass upon the validity of State election laws alleged to be in conflict with the State constitution.

A law forbidding the counting of ballots which fail to conform to statutory requirements is mandatory, and such ba1lots win not be counted.

On May 11, 1920,[1] Mr. Frederick W. Dallinger, of Massachusetts, from the Committee on Elections No. 1, submitted the report of the committee in the Missouri case of James D. Salts *v.* Sam C. Major.

According to the official returns in this case the contestee received 20,300 votes and the contestant 20,222 votes, a majority of 78 votes for the sitting Member.

Numerous irregularities were alleged in the notice of contest, but in the testimony adduced and in the briefs filed the contestant relied entirely on allegations that a fraudulent alteration of the tally sheet in the second ward of the city of Sedalia credited to contestee 40 votes which should have been credited to contestant, and that an error in the tabulation of the vote in Boone Township in Green County had deprived contestant of 37 votes which should have been counted for him.

The sitting Member in his answer denied these allegations and claimed that the entire vote of the fourth ward of the city of Springfield, in Green County, should be rejected on account of the failure of election officials to indorse thereon the registration numbers of the voters as required by the election laws of the State of Missouri.

Considering the ballots themselves to be the best evidence, the committee directed the Sergeant at Arms to send for ballots and records of the two precincts in question. The ballots at Sedalia had been destroyed at the expiration of one year from the date of the election as provided by the election law of the State of Missouri. But the ballots cast in Boone Township were still available and were forwarded to Washington and counted by the committee.

The count of these ballots by the committee increased the vote cast for James D. Salts by 32 votes over that certified in the official return from the precinct.

As to the charge of fraud in altering the tally sheets in the second ward of the city of Sedalia, the committee say:

> In regard to the vote in the second ward of the city of Sedalia, in Pettis County, where the contestant claim that through a fraudulent alteration of the tally sheet 40 votes were taken from him and added to the vote of his opponent, in the absence of the ballots themselves, the committee was obliged to rely upon the testimony as contained in the record of the case. While it is true that the tally sheet and the official record were altered, the overwhelming weight of the testimony shows that there was no fraud involved, but that the alterations were honestly made to correct a mistake of an incompetent election clerk. The evidence discloses the fact that the two election clerks in this ward on election day were Charles P. Keck, Republican, and Mark A. Magruder, Democrat. It also appears from the evidence that Mr. Keck, the Republican clerk, was a bank cashier, while Mr. Magruder, the Democratic clerk, was inexperienced in clerical work and had continual trouble with his tally sheet during the day; and that when the vote was tabulated on election night it was found that Mr. Magruder's total did not agree with that of Mr. Keck as to several of the offices, including that of Congressman. Mr. Kell, the Republican judge of elections, thereupon instructed Mr. Magruder to make his totals agree with those of Mr. Keck. In accordance with these instructions Mr. Magruder made the changes in the tally sheet which are complained of by the contestant.

[1] Second session Sixty-fifth Congress, House Report No. 961; Record, p. 6892.

Your committee therefore finds that the official returns of the second ward in Sedalia, as certified to by the election officers and the secretary of state, are the correct returns, and that James D. Salts, the Republican candidate, is not entitled to any additional votes from said ward.

As to the fourth ward of the city of Springfield:

The committee having found that as a matter of fact Sam C. Major, the Democratic candidate, was duly elected, it is unnecessary to consider the claim raised by counsel for the contestee that the entire vote of the fourth ward of the city of Springfield which was included in the official returns, should be thrown out. Your committee, however, is of the opinion that attention ought to be called to the fact that the precedents of the House of Representatives clearly support the contention of the contestee in this matter.

It is admitted that section 5905 of the Revised Statutes of the State of Missouri (1909) provides that in cities where registration of voters is required—and it is also admitted that Springfield is one of such cities—the clerks of election shall place on each ballot "the number corresponding with the number opposite the name of the person voting, found on the registration list, and no ballot not so numbered shall be counted."

It is further admitted that this provision has been in the statutes of the State of Missouri for many years and that it has never been declared to be in conflict with the constitution of that State by any tribunal either Federal or State.

The contestant in rebuttal submitted that this statute was in contravention of the constitution of the State of Missouri, but the committee reaffirmed the decision in the case of Gerling *v.* Dunn in the Sixty-fifth Congress, holding that it was not the policy of the House of Representatives to pass upon the validity of State laws under which elections are held when the complaint is made that the legislative enactment is contrary to the provisions of the State constitution.

The contestant further submitted that the statute, even if constitutional, was directory merely and not mandatory, and failure to comply with its requirements did not vitiate the vote. The committee held this contention to be at variance with the well-established precedents of the House of Representatives, and cited the statement from the decision in the case of Wickersham *v.* Sulzer to the effect that where the law itself forbids the counting of ballots which do not meet its requirements, the statute is mandatory.

In further support of this doctrine the committee cite the cases of Miller *v.* Elliott in the Fifty-second Congress, and Threasher *v.* Enloe in the Fifty-third Congress, and quote the following excerpt from the opinion by the Supreme Court of the State of Missouri in the case of Horsefall *v.* School District:

If the statute provides specifically that a ballot not in prescribed form shall not be counted, then the provision is mandatory and the courts will enforce it; but if the statute simply provides that certain things shall be done and does not prescribe what results shall follow if these things are not done, then the provision is directory merely.

They then make the following application to the present case:

In the present case the Missouri statute provides specifically that "no ballot not so numbered shall be counted," and is clearly mandatory and not directory. Accordingly, if the other facts in the case did not clearly show that Sam C. Major, the Democratic candidate, was duly elected, the committee would be obliged, if it followed its own precedents, to hold as a matter of law that the vote of the fourth ward of the city of Springfield should be entirely thrown out. If this were done, then even if the entire contention of the contestant as set forth in his brief were granted, the contestant would have only 20,093 votes, whereas the contestee would be entitled to 20,127 votes and would still be elected by a plurality of 34 votes.

If, however, we take the facts as to the correct returns of the election as found by the committee in this report and then throw out the entire vote of the fourth ward of the city of Springfield in accordance with the law and the precedents of Congress, it would make the total vote of the contestee, Sam C. Major, 20,169 and the total vote of James D. Salts, the contestant, 20,048, which would give the contestee a plurality of 121 votes over the contestant.

In conformity with its findings on the various questions presented, the committee amended the total returns, giving Sam C. Major 20,310 votes and James D. Salts 20,254 votes, a plurality of 56 votes for the sitting Member. The committee therefore unanimously reported resolutions declaring the contestant was not elected and that the sitting Member was elected, and confirming his title to the seat.

The case was briefly debated on May 18, 1920,[1] and, after a perfunctory explanation by Mr. Dallinger, the resolutions reported by the committee were agreed to without division.

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[1] Journal, p. 412; Record, p. 7231

Chapter CLXX.

GENERAL ELECTION CASES, 1921 TO 1923.

152. The election case of John P. Bracken of Pennsylvania.

In the event of the death of a Member-elect from the State at large, the candidate receiving the next highest number of votes is not entitled to the seat.

An instance of adverse action on a memorial presented by a person claiming to have been elected to the House of Representatives.

On July 14, 1921,[1] Mr. Robert Luce, of Massachusetts, from the Committee on Elections No. 2, submitted the report of the committee in the Pennsylvania case of John P. Bracken.

The case was initiated through a memorial presented by John P. Bracken, a citizen of Pennsylvania, claiming to have been elected to the House of Representatives of the Sixty-seventh Congress.

At this election four Members of the House of Representatives were to be elected at large. Between the day the votes were cast and the completion of the canvass. Mr. Mahlon M. Garland, one of the four receiving the largest number of votes, died. The memorialist, John P. Bracken, stood fifth on the list.

In the debate in the House Mr. Luce explained that the memorialist relied on certain decisions by State courts, among them the decision in the case of Morris v. Bulkeley,[2] in which the court said:

> The election of State officers in this State is a process. It includes the preliminary registration, by which those persons who have the right to vote are determined; the time when, the place where, and the manner in which the votes are to be given in, and also the manner in which the votes are to be counted and the result made known. Each of these steps must be taken in pursuance of the law existing at the time the election is had. That part of the election process which consists of the exercise by the voters of their choice is wholly performed by the electors themselves in the electors' meetings. That part is often spoken of as the election. But it is not the whole

[1] First session Sixty-seventh Congress, House Report No. 265; Record, p. 2033.

[2] 61 Conn., pp. 287, 359.

of the election. The declaration of the result is an indispensable adjunct to that choice, because the declaration furnishes the only authentic evidence of what the choice is.

The committee, however, held:

Upon the canvass of votes cast in the State of Pennsylvania November 2, 1920, Hon. Mahlon M. Garland was declared to have been elected as one of the four Representatives at large in Congress from that State. Before the completion of the canvass Mr. Garland died. Mr. Bracken received the highest vote given to any candidate not declared to have been elected. In the judgment of your committee this state of facts does not warrant the conclusion that Mr. Bracken was elected, and therefore the committee recommends the passage of the following resolution:

"Resolved, That John P. Bracken was not elected a Representative at large to the Sixty-seventh Congress from the State of Pennsylvania."

The case was perfunctorily debated in the House on October 20, 1921,[1] when the resolution recommended by the committee was agreed to without division.

153. The Alabama election case of Kennamer v. Rainey in the Sixty-seventh Congress.

The contestant failing to produce evidence sustaining charges made in notice of contest, the House confirmed the title of the sitting member to his seat.

On October 31, 1921,[2] Mr. Cassius C. Dowell, of Iowa, from the Committee on Elections No. 3, submitted the report of the committee in the Alabama case of Charles B. Kennamer v. L. B. Rainey.

The sitting Member had been returned by an official majority of 739 votes.

The contestant charged that the state officials, including the governor and members of the State legislature, had conspired to delay legislation authorizing the registration of women voters, and had delayed the appointment of registrars.

The committee find:

The proclamation of the ratification of the woman's suffrage amendment was made on August 26, 1920. The governor issued a call for a special session of the legislature on August 28, 1920, to convene on September 14, 1920. The record shows that the legislature convened on the 14th day of September, 1920, in special session, and the legislation referred to was completed and signed by the governor on October 2, 1921, which was the last day of the extra session. It appears that other legislation was considered and acted upon by the legislature during this time.

Your committee do not find the charge of conspiracy to delay this legislation and to delay the appointment of registrars to be sustained by the evidence.

Testimony submitted by the contestant to show that a number of women who would have voted for him were not permitted to register is also held by the committee to be too indefinite and uncertain to sustain the charge.

After full consideration of the case the committee conclude:

Your committee find from a careful inspection of the evidence that some persons were registered unlawfully, and the evidence shows that a small number not legally entitled to vote voted for the contestee, Mr. Rainey; but the testimony does not show that the number of votes cast of those who were not properly registered and who were not legally entitled to vote materially affected the result of the election.

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[1] Journal, p. 494; Record, p. 6564.

[2] First session Sixty-seventh Congress, House Report No. 453; Record, p. 7058.

While there were some other irregularities, and perhaps violations of the law in some instances, the evidence does not disclose that these irregularities or violations affected the result of the election in this district. Neither does the evidence disclose that the persons who failed to vote in said district were deprived of their right to register and vote, nor is it shown by competent evidence that they offered to register or vote.

On the whole case the official returns show that contestee, L. B. Rainey, received a majority of 739 votes, and the evidence submitted in this case does not sustain the charges of the contestant that contestant should be declared elected.

The committee therefore recommend the usual resolutions declaring the contestant was not elected and confirming the title of the sitting Member to his seat.

The case was called up in the House on November 2,[1] and after a short statement by Mr. Dowell, the resolutions were agreed to without division.

154. The North Carolina election case of Campbell v. Doughton in the Sixty-seventh Congress.

Discussion of methods of determining the domicile of a voter.

In the absence of fraud, electors may not be deprived of their vote by omission of election officers to perform duties imposed upon them by law.

Unfair campaign tactics directed at one candidate may not be taken as the basis of a contest in behalf of another candidate on the same ticket.

When performance of a statutory duty is within the discretion of an election official and its performance is accompanied by no denial of right, such performance may not be impeached on the score of partiality.

On April 2, 1922,[2] Mr. Robert Luce, of Massachusetts, from the Committee on Elections No. 2, submitted the report of the majority of the committee in the North Carolina case of James I. Campbell v. Robert L. Doughton.

The sitting Member had been returned by an official majority of 1,088 votes.

The election laws of the State of North Carolina provided that electors absent from the precinct in which they were entitled to vote, or physically incapacitated from going to the polls, might vote by mail. The law originally specified a form of certificate to accompany such ballots and provided that certificates and ballots should be preserved by the proper officials for six months after the elections.

The contestant charges gross irregularities through the counting of ballots accompanied by fraudulent certificates and their destruction in violation of the statute as soon as counted.

The majority deem the evidence submitted by contestant insufficient to establish his contention.

As to uncertainty of domicile:

The committee does not think the charges are borne out by the evidence. The difficult problem of domicile, so greatly involving in its determination the question of intent, seems on the whole to have been met by the local officials with as much fairness and wisdom as could have been reasonably expected, and the testimony presents little if any suggestion of conscious misfeasance. In the case of new registrations a registrar is rarely in position to question the applicant's declaration of intent. In the case of voters already on the roll the declaration in the certificate accompanying the ballot of an absentee, that he is "a qualified voter," seems virtually to preclude the officials at the polls from rejecting the ballot on the gound that the absentee has abandoned his residence.

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[1] Journal, p. 514; Record, p. 7214.

[2] Second session Sixty-seventh Congress, House Report No. 882: Record, p. 5183.

The practical effect is to postpone inquiry until the result of the election is contested. Such inquiry must then be largely confined to persons other than the absentee voters themselves, as it turned out in the present case. The testimony of such other persons must be largely opinion testimony, which is always of doubtful weight. For this reason it was held in Lowe *v.* Wheeler, Forty-seventh Congress, that the mere statement of a witness that an elector is a nonresident is insufficient; the witness must give facts to justify his opinion. Furthermore, lack of acquaintance on the part of a single witness will not be adequate proof. In Letcher *v.* Moore, Twenty-third Congress, the committee unanimously adopted as a rule of decision "that no name be stricken from the polls as unknown upon the testimony of one witness only that no such person is known in the county." This becomes of all the more importance in the case of absentee voters because they are so often persons who are little at home and who may indeed have passed most of the time away for years. If these things be borne in mind, much of the contestant's testimony aimed at the absentee vote will be found to fall to the ground.

The committee further find that only about 175 absentee votes are specifically questioned and the number is so small that the rejection of all of them would not change the result of the election.

The contestant, however, insists that all absentee votes cast should be rejected because of the failure to preserve the ballots and certificates.

The statute [1] on which he relies is as follows:

In voting by the method prescribed in chapter 23 of the Public laws of 1917 the voter may, at his election, sign, or cause to be signed, his name upon the margin or back of his ballot or ballots, for the purpose of identification. The ballot or ballots so voted, together with the accompanying certificates, and also the certificates provided in section two of this act, in case the voter ballots by that form, shall be returned in a sealed envelope by a registrar and poll holders, with their certificates of the result of the election and kept for six months, or, in case of contest in the courts, until the results are finally determined.

The majority claim the statute had been so amended as to obviate this requirement, and explain:

This was in an act ratified March 11. On the previous day had been ratified the work of a commission that had been engaged in revising and consolidating the public and general statutes, and it had been provided that the commissioners should insert the enactments of the current general assembly, with proper technical changes "and make such other corrections which do not change the law as may be deemed expedient."

The Consolidated Statutes were to be in force from and after August 1. When they appeared, they contained this provision (sec. 8101):

"All public and general statutes passed at the present session of the general assembly shall be deemed to repeal any conflicting provisions contained in the Consolidated Statutes."

From all this it is evident that when the commissioners dropped from section 4a of chapter 322 the words italicized in the section as quoted above, they could not change the purport of the original provision; could not legitimate any interpretation of the section other than the natural interpretation of the original phraseology.

This confutes the argument that the word "so" in the phrase, "The ballot or ballots so voted, together with accompanying certificates," refers back to all the absentee ballots and certificates. Otherwise there would be no significance in the word "also" in the phrase omitted by the commissioners. It is clear, then, that the actual law required the keeping of only the ballots signed for the purpose of identification. Such was the interpretation generally given to it by the election officials of both parties.

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[1] Section 4a of Chapter 322 of the Public Laws of 1919.

It was an interpretation buttressed by the fact that the laws of North Carolina make no provision for the preservation of main election ballots in general; and that no apparent gain would result from segregating at any rate such unmarked ballots as were sent in by the absentee.

It is clear that failure to preserve the certificates by which a straight party ballot was cost was a violation of the actual law, but it is to be remembered that the phraseology of what purported to be the law, as contained in the Consolidated Statutes and in the extract therefrom printed as a pamphlet entitled "Election Law," which undoubtedly the election officials commonly relied upon, might fairly be construed to mean that only the certificates accompanying marked ballots were to be kept. Election officials can not reasonably be expected to unravel the technical difficulties found in such a situation as this. Indeed, as far as they grow out of the changes made by the commissioners who consolidated the statutes, their very existence was left to your committee itself to ascertain and disclose.

Even if errors were committed in this matter by the election officials, it is well established that "in the absence of fraud the voter can not be deprived of his vote by the omission of election officers to perform the duties imposed upon them by law."

It was charged by the contestant that at Furr and Big Lick precincts voting was purposely delayed and preference was given those who desired to vote for the contestee.

The minority views, filed by Mr. John L. Cable, of Ohio, claim that the opening of the polls in the Furr precinct was delayed at least an hour and a half and quote the report in the case of Yates *v.* Martin in the Forty-sixth Congress, holding that failure to open the polls on time shifted the burden of proof to the party seeking to to uphold the election, to show that the result was not affected. It is claimed that in these two precincts 254 electors, who would have voted for the contestant, and only 24 who would have voted for the contestee, were deprived of the opportunity to vote. This vote alone, if counted, the minority views contend, would have given the contestant a majority of all the votes cast in the district.

The majority decide, however:

In two precincts of Stanly County (Big Lick and Furr) the conduct of the polling was not inconsistent with the possibility of conspiracy. Insufficient accommodation was provided for the voters; apparently the crowd was not handled with ordinary skill; there were instances of delay that might well have aroused suspicion. On the other hand although the total vote polled was much less than in sundry other precincts, and it was charged that 264 voters were unable to vote before the polls closed at sunset, yet in one case 750 and in the other 695 ballots were cast, more than one a minute, leaving no ground to infer conspiracy simply from the total of the figures. The weight of the evidence showed no discrimination, except in favor of the women and most of the elderly men, who regardless of party were given precedence. Although as these precincts were strongly Republican, the loss fell chiefly on the Republican ticket, yet Democrats suffered as well as Republicans, and it is hard to believe that men would deliberately plan to deprive their own partisans of exercising the right of suffrage in the hope that a larger number of their opponents would be shut out. Direct evidence of conspiracy was wholly lacking, and the circumstances could be explained as due to the inefficiency of election officials.

Another issue raised was the circulation of literature, aimed at another candidate on the same ticket with contestant, and calculated to arouse undue prejudice. The majority, while strongly condemning such tactics, do not consider the interests of other candidates on the ticket sufficiently prejudiced by such attacks to warrant interference by the House, and declare:

Language strong enough for the censure of such methods of campaigning is hard to find, but it would be unwise to say that because of a vicious attack, wholly indefensible, aimed at a

candidate for one of the various offices to be filled at an election, candidates for other offices should be imperiled.

As to charges of discrimination in the registration of voters the majority say:

In North Carolina the law requires the attendance of registrars at the place of registration on the four Saturdays preceding an election, and permits the registrars at any other time to register elsewhere. The contestant averred unfairness by registrars when away from the registration places, in that they would then devote their energies mainly to registering voters of their own faith, to the neglect of voters of opposite faith. If there was violation of law in this particular, it was to be found only in disregard of that part of the oath taken by the registrar which imposed on him the duty of acting "impartially." Undoubtedly a registrar would have been delinquent if he had refused to register any qualified voter presenting himself at the registration place on the appointed days, for registration was then obligatory. To register elsewhere and at other times was wholly permissive. Where it is altogether within the discretion and pleasure of an official whether an act shall be performed at all, and its performance is accompanied by no denial of rights, can the act be impeached on the score of partiality? No voter in North Carolina has either an inherent or a statutory right to be registered away from the registration place. If there was neglect to give any voter an opportunity that in fact was within the discretion of the official concerned, it can not be treated as partiality from the legal point of view.

Complaint was made that in various instances friends of the contestant were impeded in getting access to registration books in time to make proper inquiry as to ground for preferring challenges on challenge day or at the polls. However, even putting the worst face on the episodes cited, the offenders, if they were such, generally kept within the letter of the law, and the exceptions were neither considerable nor important enough to be given much weight in the balancing of considerations.

155. The election case of Campbell v. Doughton, continued.

Where voting by electors who had not paid a poll tax, although in violation of the State constitution, was permitted by common consent, the committee strongly condemned the practice but did not recommend rejection of such voters.

Where provisions of the State constitution forbidding registration unless able to read and write were generally ignored, the committee, in an inconclusive case, censured the procedure but did not recommend invalidation of the vote.

Where acts violative of the provisions of a State constitution do not appear to have changed the result, the House is not justified in declaring the seat vacant.

Failure to enforce the provisions of a State constitution, when acquiesced in by candidates and electors without heinous circumstances or injustice and without effect in altering the result, does not of itself suffice to vitiate the election.

Instance wherein final action was not taken in an election case.

Violations of requirements embodied in the State constitution, making prepayment of poll taxes and ability to read and write qualifications for voting, are discussed by the majority at length.

Relative to the prepayment of poll taxes as a qualification the majority say:

The constitution of the State required, with certain exceptions, the prepayment of poll taxes as a qualification for voting. The requirement was in general disfavor, and indeed at this very election was taken out of the constitution. Nevertheless, it was at the time a living thing and

should have functioned universally and impartially. It did not so function. In one county, by definite agreement between the organizations of both parties, the law was not enforced at all. Throughout the district it was not enforced against men in the military service, justification being supposedly found in an opinion of the attorney general of the State which held that such men might be exempted. In many other instances enforcement or refusal to enforce was more or less arbitrary and accidental, seeming to depend on the whim of the officials or the sentiment of the locality. Of course this opened wide the door for abuse, and abuse walked in. Each side contends that many votes improperly cast accrued therefrom to the benefit of the other. To determine the facts and strike a completely accurate balance would be impossible without prolonged and exhaustive individual inquiry on the spot, and even then the lack of certain records would so embarrass investigation as to cloud its results. For example, in Iredell County, where it was agreed that the poll-tax requirement should not be enforced, the sheriff did not certify the list of those who had paid, as required by law. This might entail individual inquiry as to the legality of every vote cast in the county. Furthermore, that would be of no avail unless the voters were compelled to disclose the character of their votes, which raises the mooted question of violation of the secrecy of the ballot. Indeed, the situation is so confused that the contestant asks us to throw out the whole vote of the county. Such drastic treatment does not seem to us called for by the circumstances. The contestant saw fit not to rely solely upon his request, but proceeded with examination of many Iredell County witnesses in this particular, and we deem it sufficient to content ourselves with their testimony and that of witnesses for the contestee in the same field. The same course has been pursued in respect of the contentions about votes said to be invalid because of nonpayment of poll taxes in the other counties and of absentee votes as well as of those personally cast.

The question of literacy qualifications is then discussed:

The constitution of the State requires, with exceptions not now of material consequence, that every person presenting himself for registration shall be able to read and write. As in the case of the poll-tax provision, this requirement was extensively ignored. In certain parts of the district the people seem to have been unanimous in the opinion that their judgment in this particular was above the constitution. Each side contends that as a consequence the other gained many votes with which it ought not to have been credited. Here, too, an attempt to determine the facts with complete accuracy would require lengthy and laborious inquiry on the spot, with little promise of satisfactory conclusion, and we have thought it sufficient to rely on the testimony.

These kindred contentions, relating to constitutional requirements in the matter of poll-tax and literacy qualifications, furnish the main question of principle involved in this case. It will be seen to differ from the usual contest in that the important complaint is not of restraint of suffrage, nor its improper extension on a large scale without the knowledge or consent of a candidate or his adherents, but of such an extension made with common knowledge and general consent. Strictly speaking, there is no difference in effect between the suppression of votes and their nullification by offsetting votes illegally cast. The question here is whether the approval, avowed or tacit, by the candidates and their adherents, prior to the conclusion of the election, alters the situation.

This question is restated and answered in the following form:

When an electorate deliberately and with common consent disregards the provisions of a State constitution to an extent clouding the result, has there been a valid election?

It is a question of much perplexity. On the one hand there is grave danger in encouraging the belief that a constituency may violate constitutional injunctions with impunity. On the other hand there is grave doubt whether Congress may properly mete out punishment where there is no clear and convincing proof that the will of the constitutional majority has been thwarted. Balancing these considerations, your committee has concluded, though not without misgivings, that when acts alleged to have violated the provisions of a State constitution do not, appear to have changed the result, either by themselves or in combination with statutory misdemeanor, the House is not justified in declaring a seat vacant.

This neither excuses nor palliates the conduct in question. We have no hesitation in declaring that it was reprehensible. Respect for law and observance of constitutions are essential to the safety of our common rights. If either basic or secondary law ceases to represent the will of the majority, it should be annulled or changed, but while it stands, it should be enforced. We are not called upon to consider what may be the duty of the State itself in the way of prevention or penalty. Our position simply is that failure to enforce the provisions of a State constitution, a failure generally approved or acquiesced in by candidates and electors, without conscious defiance of authority, and without heinous circumstances, resulting from no wish or intent to work injustice, and not proved to have altered the result, will not in and of itself suffice to vitiate an election to the House of Representatives.

Accordingly the majority conclude that, even with liberal allowance of the contestant's claims, the sitting Member would still have a majority of the votes cast in the district. They therefore recommend resolutions declaring the contestant was not elected and confirming the title of the contestee, while the minority views recommend resolutions to the contrary.

The case was debated on May 27.[1] After much difficulty in maintaining a quorum, the House adjourned before debate was concluded. The case was not again considered by the House, and Mr. Doughton continued to occupy the seat.

156. The Senate case relating to qualifications of Rebecca Latimer Felton, of Georgia, in the Sixty-seventh Congress.

Discussion as to the term of service of a Senator appointed by a State executive to fill a vacancy.

The first woman to sit in the Senate.

On October 3, 1922, during recess of Congress, Rebecca Latimer Felton was appointed Senator from Georgia by the governor of that State, to fill a vacancy occurring in the Senate by the death of Thomas E. Watson. At the election held November 7, Walter E. George was elected to fill the unexpired term.

The third session of the Sixty-seventh Congress commenced November 20, and on the following day,[2] while credentials were being presented, Mr. William J. Harris, of Georgia, said:

Mr. President, after the death of my late colleague, Thomas E. Watson, the governor of my State appointed as his successor Mrs. Rebecca Latimer Felton. Her credentials were sent to the Secretary of the Senate and have been here for some days. I hope no Senator will object to her taking the oath of office. The Senator elect from Georgia, Hon. Walter F. George, very generously and very graciously has withheld his credentials in order that Mrs. Felton may take the oath and, as I said, I hope no Senator will object. This will not in any way prejudice Mr. George's claim to his seat in the Senate, to which the people of my State have elected him, and his credentials will be presented to-morrow.

Discussing at length the question raised by Mrs. Felton's attendance in the Senate as the appointee of the governor of the State after the issuance of a certificate of election to the Senator elect elected to fill the vacancy to which she had been appointed, Mr. Thomas J. Walsh, of Montana, said:

I have said this much because I did not like to have it appear, if the lady is sworn in—as I have no doubt she is entitled to be sworn in—that the Senate had so far departed from its duty in the premises as to extend so grave a right to her as a favor, or as a mere matter of courtesy,

[1] Second session Sixty-seventh Congress, Journal, p. 389; Record, p. 7808.

[2] Third session Sixty-seventh Congress, Record, p. 8.

or being moved by a spirit of gallantry, but rather that the Senate, being fully advised about it, decided that she was entitled to take the oath.

Mrs. Felton's credentials having been presented, the oath was administered and she took her seat, the first woman [1] to sit in the Senate.

On the following day the credentials of Mr. Walter F. George, as Senator elect, were presented and he took the oath.

On November 23, 1922 [2] in the Senate, following the approval of the minutes, Mr. Walsh said:

Mr. President, there was introduced on yesterday by the senior Senator from Georgia, Mr. Harris, a Senate resolution reading as follows:

"Resolved, That the Secretary of the Senate be, and he hereby is, authorized and directed to pay from the contingent fund of the Senate to Rebecca Latimer Felton $287.67 for compensation, and $280 as mileage, the same being amounts due her as a Senator from the State of Georgia from November 8 to November 21, 1922."

The resolution was appropriately referred to the Committee to Audit and Control the Contingent Expenses of the Senate. I hope, however, that the resolution will not be adopted by the Senate. I trust that we shall not throw further confusion into the matter by now exhibiting some doubt as to whether Mrs. Felton was really a Member of the Senate from November 8 to November 21. If she were a Member—and the Senate so decided by admitting her and swearing her in—she is to be paid out of the regular appropriation, as is every other Senator. This is not a matter which should be charged against the contingent fund of the Senate. If the appropriations do not cover the item, it will be very proper for the Committee on Appropriations to bring in a deficiency item in the deficiency bill to take care of it. The payment should be made as the

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[1] The first woman to sit in the Congress of the United States was Miss Jeannette Rankin, elected to the House of Representatives in the Sixty-fifth Congress from the State of Montana at large. No woman was returned to the Sixty-sixth Congress, but women have occupied seats as Members of each succeeding Congress as follows:

In the Sixty-seventh Congress: Mrs. Rebecca Latimer Felton, appointed to the Senate from the State of Georgia; Miss Alice Mary Robertson, elected to the House from the second district of Oklahoma; Mrs. Winnifred Mason Huck, elected to the House from the State of Illinois at large to fill the vacancy occasioned by the death of her father; and Mrs. Mae E. Nolan elected to the House from the fifth district of California to fill the unexpired term of her husband.

In the Sixty-eighth Congress: Mrs. Mae E. Nolan, elected to the Sixty-eighth Congress, at the same election in which she was returned to the Sixty-seventh Congress.

In the Sixty-ninth Congress: Mrs. Mary T. Norton, elected to the House from the twelfth district of New Jersey; and Mrs. Florence P. Kahn, from the fourth California district, and Mrs. Edith Nourse Rogers, from the fifth Massachusetts district, each elected to the vacancy occasioned by the death of her husband.

In the Seventieth Congress: Mrs. Pearl Peden Oldfield, of Arkansas; Mrs. Kahn; Mrs. Rogers; Mrs. Katherine Langley, of Kentucky; and Mrs. Norton.

In the Seventy-first Congress: Mrs. Oldfield; Mrs. Kahn; Mrs. Ruth Bryan Owen, of Florida; Mrs. Ruth Hanna McCormick, of Illinois; Mrs. Rogers; Mrs. Langley; Mrs. Norton; and Mrs. Ruth Baker Pratt, of New York.

In the Seventy-second Congress: Mrs. Hattie W. Caraway, of Arkansas, appointed to succeed her husband and subsequently elected, the second woman to sit in the Senate and the first to be elected to that body; Mrs. Effiegene Wingo, of Arkansas; Mrs. Kahn; Mrs. Owen; Mrs. Rogers; Mrs. Norton; Mrs. Pratt; and Mrs. Willa B. Eslick, of Tennessee.

In the Seventy-third Congress: Mrs. Caraway; Mrs. Isabella Greenway, of Arizona; Mrs. Kahn; Mrs. Virginia E. Jenckes, of Indiana; Mrs. Kathryn O'Loughlin McCarthy, of Kansas; Mrs. Rogers; and Mrs. Norton.

[2] Record, p. 47.

payment of the salaries of all Senators is made, not out of the contingent fund of the Senate, but out of the regular fund.

It occurs to me that the manner proposed in the resolution is not the proper way to take care of this particular item. I feel like saying that it would throw a very grave doubt upon the action taken by the Senate in seating Mrs. Felton as a Senator.

The resolution was agreed to,[1] however, and mileage and compensation for the same period were paid to Mr. George from the regular appropriation.

157. Senate election case of Smith W. Brookhart in the Sixty-seventh Congress.

Although the fact of election was unquestioned, a Senator-elect delayed attendance until credentials were received.

Credentials being delayed, a Senator appointed by a State executive continued to serve after another had been elected to fill the vacancy.

Charles A. Rawson, Senator from Iowa, was appointed by the Governor of Iowa, February 21, 1922, to fill a vacancy in the Senate occurring by the resignation of William S. Kenyon, and took his seat February 23.[2] Under these credentials Mr. Rawson held his seat during the remainder of the second session of the Sixty-seventh Congress, ending September 22, 1922.

On November 7, 1922, Smith W. Brookhart was elected to fill the unexpired term. Under the election laws of the State of Iowa,[3] election boards are allotted twenty days in which to canvass returns and certificates of election may not issue prior thereto. The third session of the Sixty-seventh Congress commenced on November 20, and in the absence of Mr. Brookhart's credentials, which under the State law could not be issued prior to November 27, Mr. Rawson attended as the junior Senator from Iowa and continued to serve until December 2,[4] when Mr. Brookhart's credentials arrived and were presented.

On December 7, 1922,[5] the following resolutions were agreed to by the Senate:

Resolved, That the Secretary of the Senate be, and he hereby is, authorized and directed to pay out of the contingent fund of the Senate to Hon. Charles A. Rawson $493.15, salary from November 8, 1922, to December 1, 1922, both dates inclusive, and $459.20, mileage for attendance at the third session of the Sixty-seventh Congress, said sums being due him as a Senator from the State of Iowa.

Resolved, That the Secretary of the Senate be, and he hereby is, authorized and directed to pay out of the contingent fund of the Senate to Roy H. Rankin $182.67 and to Edna T. Vovo, $122.67, for clerical services rendered the Hon. Charles A. Rawson, a Senator from the State of Iowa, from November 8, 1922, to December 1, 1922, both dates inclusive.

Salary and mileage due Mr. Brookhart, and compensation due his clerks, from November 8, 1922, to December 1, 1922, inclusive, were disbursed from the regular appropriations provided in the legislative bill for the current year.

158. The Virginia election case of Paul v. Harrison in the Sixty-seventh Congress.

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[1] Record, p. 452.

[2] Second session Sixty-seventh Congress, Record, p. 2987.

[3] Section 877, Iowa Revised Statutes, 1924.

[4] Third session Sixty-seventh Congress, Record, p. 440.

[5] Fourth session Sixty-seventh Congress, Record, p. 179.

Requirements of State constitution that voters be registered on application in their own handwriting only, held to be mandatory and registration of voters, without written application as provided by State constitution is void.

Votes of persons assisted in the preparation of their ballots, in violation of the provisions of the State constitution, are void and should not be counted.

Defective applications for registration, when once received by registrar and supplemented by examination under oath, are not void but merely voidable, under the Virginia law, and votes cast under such registration should not be rejected.

Votes of persons failing to pay poll taxes as required by State constitution should not be counted.

On June 14, 1922,[1] Mr. Frederick W. Dallinger, of Massachusetts, from the Committee on Elections No. 1, submitted the report of the majority of the committee in the Virginia case of John Paul *v.* Thomas W. Harrison.

The sitting Member in this case was returned by an official majority of 448 votes. The contestants sets forth numerous grounds of contest which are summarized in the report under three heads:

One. That a large number of persons voted at this election who were not lawfully registered, and therefore under the constitution of Virginia were not qualified to vote, and that if the votes of these persons were eliminated the contestant would be elected.

Two. That a number of persons voted at this election without paying their poll tax, as required by the constitution and laws of Virginia, and that if the votes of these persons were eliminated together with the other facts in the case, the contestant would be elected.

Three. That the conduct of the election in certain precincts of the district was marked by such reckless disregard of the provisions of the constitution and laws of Virginia that the returns from those precincts do not represent the expression of the will of the people; that there was no valid election in those precincts, and therefore the returns from them should be thrown out, in which case the contestant would be elected.

(1) Illegal registration:

Under section 18 of the constitution of the State of Virginia no one is allowed to vote who has not been registered as provided in section 20. Requirements on the voter for registration are as follows:

1. That he has personally paid to the proper officer all State poll taxes assessed or assessable against him, under this or the former constitution, for the three years next preceding that in which he offers to register; or, if he came of age at such time that no poll tax shall have been assessable against him for the year preceding the year in which he offers to register, has paid $1.50, in satisfaction of the first year's poll tax assessable against him.

2. That, unless physically unable, he make application to register in his own handwriting, without aid, suggestion, or memorandum, in the presence of the registration officers, stating therein his name, age, date and place of birth, residence and occupation at the time and for two years next preceding, and whether he has previously voted; and if so, the State, county, and precinct in which he voted last.

3. That he answer on oath any and all questions affecting his qualifications as an elector submitted to him by the officers of registration, which questions and his answers thereto shall be reduced to writing, certified by the said officers, and preserved as a part of their records.

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[1] Second session Sixty-seventh Congress, House Report No. 1101, Record, p. 8733.

The majority report thus reviews this phase of the case:

In the voluminous record in this case there is evidence of hundreds and even thousands of cases of persons who were registered although no applications at all had been filed with the registrar. There are also numerous instances in the record where assistance was given to applicants for registration, either by the registrar himself or by some third person. In addition to this the contestee introduced in evidence a large number of cases of persons who were placed on the registration list whose applications were not in strict conformity with the requirements of the constitution.

Both the contestee and his counsel contended that these provisions of the constitution were merely directory and not mandatory, and that the votes of persons not registered in conformity with the constitution could not be questioned at the election, the only remedy being to have the names of persons thus illegally registered stricken from the voting list previous to the election as provided in the constitution. On the other hand the contestant and his counsel contended that these provisions of the constitution being mandatory on the legislature of the State are also mandatory on the registration and election officials; and that where application is filed the registrar acquires no jurisdiction and the vote of any person placed on the registration list in the absence of such application is void ab initio.

The committee is firmly of the opinion that the great weight of authority sustained the contention of the contestant.

After citing authorities in support of their views, the majority continue:

It is true that in Virginia were all members of the party to which the contestee belonged, and they testified that they registered the voters whose names were inquired of without requiring any written applications as required by the constitution. In a large number of the precincts registrars testified that they had never received any written applications during their entire terms of office. The committee finds that there were almost 1,900 cases of such illegal registration of persons whose names were set out in the contestant's notice and in the contestee's answer. In addition there were almost 31,200 additional cases of void registrations not set out in the notice and answer but shown by the evidence, making a total of over 5,000 cases of persons who voted at the last congressional election in this district whose registration and therefore whose votes were invalid. In its consideration of the evidence the committee has in the first instance confined itself to the names set forth in the notice and answer on the theory that where the parties in their pleadings set up particular names they should be strictly held to the names set forth in the pleadings.

The contestant further contended that the votes of persons who were assisted in making their applications, either by the registrar or by other parties, are equally void ab initio and should not be counted. In view of the fact that the constitution provides that the voter must make application "without aid, suggestion, or memorandum, in the presence of the registration officer," the committee is of the opinion that this contention is sound, as the written applications in such cases would not be the applications of the voters themselves.

While the contestee vigorously contended throughout the taking of the testimony and at the hearings before the committee that all the votes of persons registered contrary to the provisions of the constitution should be counted on the ground that the registration could not be attacked collaterally, he also contended that if the committee should decide against him, all applications which did not strictly contain all the information set forth in the constitution should be treated in the same manner, and he had placed in the record a large number of alleged defective applications.

The committee has examined with care the applications in the cases of all persons whose names were set forth in the contestee's answer and finds that a very large number of the applications contain all the information required by the second clause of section 20 of the constitution. In the case of a considerable percentage of the applications which are technically defective the voters, mostly women, voting for the first time under the nineteenth amendment to the Federal Constitution, have simply neglected to state that they had never before voted, a fact of which any court might well take judicial notice. The contestant contends that it would be absurd to place such defective applications in the same category as cases where no applications were filed

or where assistance was given, and cites the analogy of the validity of a judgment, even though the notice, in a court of record, is grossly defective in form, once the court has acted on it and when judgment is given. He also calls attention to the fact that, although a notice in a suit is defective, amendments are invariably allowed by the courts whenever the interests of justice demand.

The committee is of the opinion that this analogy is sound. As Judge McLemore well says in the Suffolk Local Option Election case (17 Va. Law Reg. 358) "the registrar has no jurisdiction in the premises until there has been an application as specifically provided by the constitution." The fact that the third paragraph of section 20 of the Virginia constitution provides for an examination under oath of the applicant by the registrar as to his qualifications, implies that the written application might not contain all of the required information; otherwise the registrar would not need to ask the applicant any questions but could from the application itself, after having sworn the applicant, make the proper entries on the registration book. If, however, the written application is imperfect then the registrar can put the name of the applicant on the registration book after asking him questions as to his qualifications. In other words, while the registrar has no authority under the constitution to ask any questions or to do anything else until a written application has been made to him by a person in his own handwriting, without aid, suggestion, or memorandum, when such application has been made, however defective it may be, then the registrar has jurisdiction to act, and he can ask the applicant any questions about his qualifications to vote, the registrar in such cases being required to reduce such questions and answers to writing and to preserve them. Consequently the committee is of the opinion that defective applications when once received by a registrar, under the Virginia law are not void but merely voidable, and the vote of a person registered on such an application supplemented by the examination under oath by the registrar should not be thrown out in an election contest.

On this point the contestant maintained, that registration of voters by the registrar was conclusive; that even though registrars put on the registration books the names of persons who had not made application to register as prescribed by law, which was denied, and in respect to which the contestee called for strict proof, the votes of such persons should not be rejected, and the right of such persons to vote could not be collaterally attacked in this proceeding, but the names of such persons should have been stricken from the registration list as provided by section 107 of the Code of Virginia. The minority views, signed by Messrs. C. B. Hudspeth and A. L. Bulwinkle, assert in approval:

At practically every precinct in the district in respect to which evidence was taken concerning the action of the registrar at such precinct the registrar acted fairly and impartially and did not discriminate against either the contestant or the contestee, and that so far as registration is concerned the contestant has no ground of complaint. The registrars can not be criticized for their refusal to register any applicants for registration, and the contestant has no ground of complaint on that score. An examination of the record shows that the entire number of instances throughout the district where the registrars refused registration to applicants does not exceed 66, and such refusal was for the most part based upon the inability of the registrant to read or write, or to make any sort of application, or failure to have paid the requisite poll taxes or insufficient residence in the State or county. The only other ground for complaint against the action of the registrars must be based upon the contention of laxity or liberality on the part of registrars in registering persons not entitled to be registered. There is no evidence in the record to bear out this contention.

(2) Nonpayment of poll taxes:

The constitution and laws of the State of Virginia prescribe, as a qualification for voting, the payment of a poll tax. There was little disagreement as to findings of fact relating to charges that persons who had not paid such tax had been allowed to vote, and the majority say:

Both parties in the present case agree that the votes of persons who have failed to pay their poll taxes, as required by the constitution, should not be counted in determining the result of the election. Wb1le a great deal of space in the printed record and in the briefs is taken up with this question of poll taxes owing to the fact that both the contestant and the contestee in their pleadings, charged that a large number of persons were illegally permitted to vote who had not paid their poll taxes, the committee finds that the charges were sustained in only about a hundred cases. Where the evidence shows for whom the person voted deduction has been made from the vote of that particular candidate, and where there is no evidence how the party voted a deduction has been made pro rata, from the total vote of both candidates in the particular precinct.

The minority views, while concurring in a limited way in the findings of the majority, sustain the contention of the contestee, citing numerous authorities in support of that view and dissent from their decision rejecting such votes as follows:

Although in the inception of the case the contestant charged that 580 persons who had not paid their poll taxes voted for contestee, yet as the result of the evidence, in his reply brief, it is admitted that the total number of persons voting without payment of poll taxes in the city of Charlottesville and Albemarle and Clarke Counties amounted to 108, of whom 5 were shown to have voted for the contestant. The contestee, on the other hand, contends that the number of such persons who had not paid the requisite poll taxes was only 25, and in view of the rule that when a vote received without challenge at the ballot box is attacked in an election contest the contestant must remove the possibility that it was legal, and if he fails to do this it will be presumed that his failure to meet this essential requirement was due to his inability to do it, we agree with the contention of the contestee that the number of those who are shown not to have paid their poll taxes in the precincts complained of by the contestant does not exceed 25. Every reasonable intendment should be indulged in favor of the voter, and before a vote accepted by the judges of election can be thrown out it must be shown that it was illegal.

159. The case of Paul v. Harrison, continued.

In submitting evidence of illegal voting, parties to a contested election proceedings are confined to the names of alleged illegal voters set forth in the pleadings.

Instance wherein the report criticizes election laws of a State.

Where evidence shows for whom illegal votes were cast, deduction is made from the vote of that particular candidate; but where such evidence is lacking, deduction is made pro rata from the total vote of all candidates in that precinct.

Complete and reckless disregard for mandatory laws, involving the essentials of a valid election, requires rejection of entire returns of the precincts affected.

The minority also protest a preliminary ruling of the majority limiting the parties in their charges of illegal voting to names set forth in the pleadings.

On this question the minority say:

We cannot agree with the report of the committee that the parties to an election proceeding should be confined to the names of alleged illegal voters set forth in the pleadings. Such a view is not sustained by the decisions of the courts or the House of Representatives.

In 20 Corpus Juris, section 294, page 29, it is said:

"Where the ground of contest is the reception of illegal votes, the weight of authority is that, unless required by statute, it is not necessary to set out the names of the electors whose votes are alleged to have been improperly accepted or rejected; at least in the absence of a motion to make them more definite or specific * * *. And it seems settled in the House of Representatives

that it is not necessary in a notice of contest to give the names of illegal voters objected to or to furnish a list of them to the sitting Member."

In 20 Corpus Juris, section 307, page 233, it is said that the same rule applies to the answer of the contestee.

A number of court decisions and reports in contested election cams are referred to in support of this doctrine, and the minority views claim:

In taking his evidence the contestant did not confine himself to the names set out in the exhibits to his notice, but in many instances introduced evidence of alleged illegal registrations in respect to other persons whose names were not on the exhibit, and persisted in doing so over the objection of the contestee, yet when contestee attempted to follow the precedent set by the contestant the contestant objected thereto. The majority of the committee in considering the alleged illegal votes on account of no applications or applications where assistance was claimed to have been given, have taken into consideration names not on the original exhibit attached to the notice; but in the view that we take of this case this is immaterial, for as above seen the authorities are to the effect that neither party is confined to the names set out in the pleadings.

(3) The minority considered at length a number of issues raised by the contestant but not discussed in the majority report.

As to the failure to provide voting booths:

While at some of the precincts in question there was a failure to have booths, yet the evidence will show that the requirements in respect to booths, or what substantially constituted booths, were at a large number of precincts substantially complied with, and at only a few of the precincts was there not a substantial compliance with these requirements, and in all the precincts the voter had the opportunity to cast and did cast a full, free, and secret ballot. The authorities hold that the failure to have booths will not vitiate an election where there was no showing that anyone was intimidated or prevented from casting or failed to cast a free ballot because of the lack of secrecy at the polls.

As to failure to keep the ballot box in view:

The majority of the committee in its report comments upon the keeping of the ballot box in view. What is meant by this is not explained. The contestant in his brief contended that section 27 of the Virginia constitution requiring the ballot box "to be kept in public view during the election", means that it shall be kept in view of the public generally outside of the room in which the election is held. The contestee, however, took the position that it was sufficient if the ballot box be kept in view of the judges and clerks of election, and that it could not possibly have been intended that the law meant that the ballot box should be kept in the view of the public generally. Sections 161 and 167 of the Code of Virginia make it unlawful for persons other than election officials and the elector offering to vote to come within a certain distance of the polling place, and show that the construction contended for by the contestant cannot be correct. According to contestant's contention an election held on the second floor of a building would not meet with the requirements of the statute as to the ballot box being within public view, and a room having only a door in front and not having windows through which the public could look into the room would be an improper place to hold an election.

However, we do not consider the objection well taken, as in Suffolk Local Option case (17 Va. Law Register, 353) the fact that the ballot box was not in public view was held not to vitiate the election. (See also Augustin *v.* Eggleston, 12 La. 366.)

As to assistance rendered voters by judges in the preparation of ballots:

There remains but one other reason advanced by the majority for the rejection of the returns at the precincts in question, and that is the claim that the judges of election openly and flagrantly assisted a voters who desired it in the preparation of their ballots without regard to the date of their registration or without regard to whether they were physically disabled.

The evidence in respect, to assistance to voters was of the vaguest and most general character. The character of the assistance was not shown, and how. many persons were assisted does not appear. The testimony generally was to the effect that the judges of election would assist any persons who asked for assistance, but the number of persons who asked for assistance does not appear, and the contestant sought on such flimsy testimony to have rejected the vote at every precinct in respect to which this loose and general testimony was obtained. Certainly, in the absence of more effort on the part of the contestant to establish the number who were assisted, this objection should not be considered. The nature of the assistance, and the number of those assisted, were facts upon which there should be more evidence than there is in this record to warrant the rejection of the poll at any precinct. Especially is this true as at all the precincts a large per cent of the voters were entitled to assistance.

In summing up the case the majority comment upon the purpose and effect of the election laws of the State as follows:

No one can read the Virginia constitution of 1902 and the laws governing elections enacted in pursuance thereof without being convinced that its manifest purpose was to enable the dominant party to maintain its control of the State for all time through control of the election machinery. In justice to the people of the State of Virginia it ought to be stated that they were never given the opportunity to ratify the present constitution, that instrument having been proclaimed by the constitutional convention without submission to the electorate of the State.

Under this grossly unfair system the legislature elects the judges of the circuit court, all of whom are members of the dominant party, even in those circuits where a majority of the voters belong to the minority party. The decisions of these circuit judges in all election cases are final, there being no appeal to the appellate court, as in other States. These judges appoint, in each county and city, electoral boards of three members each, with no provision for minority representation, and these boards are almost invariably composed entirely of partisans of the dominant party. The electoral boards in turn choose the registrars, who are always members of the party in power, and also the judges and clerks of election. In the case of the latter the only provision for minority representation is the loosely drawn requirement that in the appointment of the judges of election representation "as far as possible" shall be given to each of the two major political parties, but in all cases the selection of the so-called minority member is exclusively in the hands of the electoral board, which, as mentioned above, is always in the control of the majority party.

The minority join issue on this view as follows:

The committee makes an attack upon the election laws of the State of Virginia. We understand that the precedents of the House of Representatives are to the effect that the mere fact that the election laws of a State do not conform to the ideas of what Congress considers to be model laws is no reason for unseating a person who has been elected as a Representative to Congress from such State.

The criticism by the majority of the committee of the constitution and laws of Virginia in respect to elections is of little relevancy in this case. The whole complaint resolves itself into the fact and to be based upon the ground that the majority of the people in the State of Virginia are Democrats and that consequently there is a Democratic legislature and Democratic judges are elected. There is not evidence to sustain or justify the contention that the judges in appointing members of the electoral board have been guilty of unfairness or made unwise selections, nor is there any evidence to the effect that the contestant ever requested that representation be given upon the electoral board in the county.

Rejecting the returns from precincts involved in their findings, the majority conclude that the contestant received a majority of the votes legally cast in the district, and recommend the following resolutions:

Resolved, That Thomas W. Harrison was not elected a Member of the House of Representatives from the seventh congressional district of the State of Virginia in this Congress and is not entitled to retain a seat herein.

Resolved, That John Paul was duly elected a Member of the House of Representatives from the seventh congressional district of the State of Virginia in this Congress and is entitled to a seat herein.

The minority contend that the findings of the majority are erroneous and that the official returns should not be disturbed, and recommend resolutions embodying statements to that effect.

The minority also dissent from the decision of the majority to reject the entire poll in certain precincts in which irregularities were found. The minority views contend:

In our opinion in order to warrant the rejection of the returns at any precinct it was incumbent upon the contestant to show facts which warranted the disenfranchisement of every voter at such precinct, or at least to make an effort to do so. In most of the precincts which were rejected only a relatively small portion of those registered were shown not to have complied with the constitutional requirements, and many of the voters necessarily need not have complied with such requirements.

From an examination of the facts and a consideration of the law we are of the opinion that the returns from the precincts rejected by the committee should not have been rejected and that the proper course to have been pursued would have been to apportion the illegal votes proved to have been cast. It is said in McCreary on Elections (sec. 523):

"The power to reject an entire poll is certainly a dangerous power, and though it belongs to whatever tribunal has jurisdiction to pass upon the merits of a contested-election case, it should be exercised only in an extreme case–that is to say, where it is impossible to establish with reasonable certainty the true vote."

In Paine on Elections (secs. 497 and 498), quoted with approval in same case, it is said:

"Ignorance, inadvertence, mistake, or even intentional wrong on the part of local officials should not be permitted to disenfranchise a district. * * * The rules prescribed by the law for conducting an election are designed chiefly to afford an opportunity for the free and fair exercise of the elective franchise, to prevent illegal votes, and to ascertain the certainty of the result. A departure from the mode prescribed will not vitiate an election if the irregularities do not deprive any legal voter of his vote or admit an illegal vote or cast an uncertainty on the result, and have not been occasioned by the agency of a party seeking to derive a benefit from it."

In the case of Chadwick *v.* Melvin (Brightley's Election Cases (Pa.), 251), it was held that there was nothing which will justify the striking out of an entire division but an inability to decipher the returns or the showing that not a single legal vote was polled, or that no election was legally held. Authorities might be multiplied to show that the action of the committee in rejecting the returns at precincts where many persons whose registration could not possibly have been complained of, and in respect to whom no complaint could be made on the score of assistance having been given, was erroneous. Certainly the votes of these persons should in any event have been counted, and the mere fact that the election officials were guilty of some technical irregularities should not destroy their votes, especially when, as in the case now under consideration, there is affirmative and uncontradicted evidence to the effect that the election was fairly and honestly conducted, and expressed the will of the voters, and there is no evidence to show that either the contestant was injured or the contestee benefited by the failure of the election officials to comply with all the constitutional and statutory requirements in respect to the conduct of the election. This is well established not only by the decisions of the House of Representatives. but also by the judicial decisions.

The ease was considered in the House on December 15.[1] After extended debate the previous question on the resolutions reported by the majority was ordered; yeas 203, nays 96.

On a division of the question, the fast resolution declaring the sitting Member not elected was agreed to, yeas 202, nays 100. The second resolution, declaring the contestant elected and entitled to the seat, was then agreed to, yeas 201, nays 99.

Mr. Paul then came forward and took the oath.

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[1] Fourth session Sixty-seventh Congress, Record, p. 531.

Chapter CLXXI.

GENERAL ELECTION CASES, 1923 TO 1925.

160. The New York election case of Chandler v. Bloom, in the Sixty-eighth Congress.

The House, overruling its committee, declined to reject the vote of precincts relative to which charges of fraud were not considered to have been substantiated.

Instances wherein the House declined to follow its committee in awarding the seat of a Member of the minority to a Member of the majority party.

Discussion of impartiality of the House as evidenced in the consideration and disposition of contested-election cases.

Failure of voters to comply with requirements of State election laws was held by an Election Committee to invalidate votes so cast.

The Elections Committee in an unsustained report held that illegal votes, the nature of which could not be ascertained, should be subtracted pro rata from the votes of the contestant and contestee.

An amended notice of contest having been filed by contestant was answered by contestee.

Instance in which the contestant in an election case was permitted to address the House in his own behalf, and closed the debate.

On February 28, 1924,[1] Mr. Richard N. Elliott, of Indiana, from the Committee on Elections No. 3, submitted the report of a majority of the committee in the New York case of Chandler *v.* Bloom. Samuel Marx, who had been elected to the House from the nineteenth district of the State of New York on November 7, 1922, died before Congress convened, and a special election was held on January 30, 1923, to fill the vacancy. The official returns gave the contestee 17,909 votes and the contestant 17,718 votes, a plurality for the former of 191 votes. An official recount of the ballots made pursuant to State law upon application of the contestant gave contestee 17,802 undisputed ballots and contestant 17,676 undisputed ballots, a majority for the former of 126.

[1] First session Sixty-eighth Congress, House Report No. 224.

The remaining ballots were canvassed by the committee of the House of Representatives, which awarded 55 additional votes to the contestee and 28 additional votes to the contestant, a net majority of 153 votes in favor of the sitting Member.

On March 3, 1923, the contestant served on the contestee a notice of contest setting forth numerous grounds of contest, and on May 10, 1923, an amended notice of contest setting forth additional grounds of contest. The grounds of contest as presented in both notices of contest were considered by the committee and may be divided into two classes, one relating to illegal voting by persons not properly registered or failing to comply with State election laws and the other to charges of frauds and irregularities in certain precincts designated in the notice of contest.

The election laws of the State of New York require registration of voters and provide for the transfer of voters removing from one precinct to another upon application to the board of elections. Fifteen voters were shown to have removed from the district in which they were registered and in which they had voted at the regular election, and to have voted in other precincts at the special election without having secured such transfers from the board of elections. The majority of the committee find:

> That of the 15 illegal votes cast by the voters who had lost their right to vote by moving to another precinct, 11 of them were cast for Bloom and should be deducted from his total vote, and that 3 were cast for Chandler and should be deducted from his total vote. The committee is unable to determine from the evidence for whom the other vote was cast and finds that it should be deducted pro rata from the votes of the contestant and contestee.

The election laws of the State of New York also require the signature of voters in the official registry before voting. It was shown that 6 voters failed to comply with this requirement of the law, and the majority find—

> That of the 6 votes cast by the voters who failed to sign their names in the official registry in the twenty-ninth election district of the eleventh assembly district, the evidence does not disclose for whom they were voted, and if they were rejected it would have no bearing upon this case on account of the fact that they should in that event be subtracted pro rata from the votes of the contestant and contestee; for this reason the committee does not feel that it is necessary to decide the question of the legality of said votes.

The minority fall to controvert either the findings of fact or the conclusions reached by the majority on these questions. On the remaining issues in the case, however, the majority and minority reports divide sharply.

The contestant contended that certain precincts of the eleventh and seventeenth assembly districts should be rejected because: 1. The board of inspectors was illegally constituted. 2. Unused ballots were stolen and substituted for voted ballots. 3. Illegal votes were counted. 4. Electioneering and pictures of the sitting Member were permitted within 100 feet of the polling place. 5. Unsworn persons handled the ballots. 6. Workers for contestant were intimidated and driven away. 7. Representatives of contestee were under the influence of liquor and assumed an attitude amounting to intimidation. 8. Ballots were improperly counted. 9. Inspectors failed to report unused ballots which were missing.

These charges are taken up by the minority report and denied in detail, both as unsupported by evidence and as being without material effect upon the validity

of the returns, and resolutions are recommended denying the election of the contestant and confirming the right of the sitting Member to his seat.

The majority report makes no detailed reference to specific charges preferred by the contestant but concludes:

> That in the twenty-third election district of the eleventh assembly district and in the thirtieth and thirty-first election districts of the seventeenth assembly district there was such an utter, complete, and reckless disregard of the provisions of the election laws of the State of New York involving the essentials of a valid election, and the returns of the election boards therein are so badly tainted with fraud that the truth is not deducible therefrom, and that it can be fairly said that there was no legal election held in the said election districts.
>
> Consequently in accordance with the universally accepted principles of the law governing contested elections and in conformity with a long line of congressional precedents, the committee is of the opinion that the entire returns of the twenty-third election district of the eleventh assembly district and the thirtieth and thirty-first districts of the seventeenth assembly district should be rejected.

Rejecting the returns from these three precincts, and deducting from the total vote of the contestant the three votes illegally cast for him, and from the total vote of the contestee the 11 votes illegally cast for him in the remaining precincts, the majority conclude that the contestant received 17,504 votes and the contestee 17,280 votes, a majority of 224 votes for the contestant.

The majority of the committee therefore recommend to the House the adoption of the following resolutions:

> *Resolved,* That Sol Bloom was not elected a Member of the House of Representatives from the nineteenth congressional district of the State of New York in this Congress and is not entitled to retain a seat herein.
>
> *Resolved,* That Walter M. Chandler was duly elected a Member of the House of Representatives from the nineteenth congressional district of the State of New York in this Congress and is entitled to a seat herein.

The report was debated at length in the House on April 10.[1] On motion of Mr. Elliot, by unanimous consent, the Members in charge of the time allotted for debate were permitted to yield time to the contestee and the contestant, respectively, and the latter closed the debate.

In the course of the debate emphasis was laid upon the fact that the New York delegation in the House was almost equally divided politically and the unseating of the sitting Member would change the political complexion of the delegation by a majority of one Member, a situation which might prove material from a political point of view in event of the pending presidential election being thrown into the House by the failure of the Electoral College to make a choice. Excerpts from circular letters by both party whips urging members of their respective parties to be present in the House when the case was to be decided were read, and the impartiality of the House in deciding past election contested-election cases without regard for party considerations was discussed at length.

The question being first taken on the substitute proposed by the minority, the substitute was agreed to, yeas 210, nays, 198. The resolution as amended by the substitute was then agreed to, yeas 209, nays 198.

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[1] Record, p. 6034; Journal, p. 419.

It is to be noted that Mr. Bloom, the sitting Member whose title to his seat was thus sustained, was a member of the minority party in the House, while Mr. Chandler, the unsuccessful contestant was a member of the majority party.

161. The Georgia election case of Clark v. Moore, in the Sixty-eighth Congress.

No evidence having been adduced to sustain any allegation of contestant, the House confirmed the title of the sitting Member.

Instance in which an elections committee recommended that unwarranted contests be discouraged.

On March 26, 1924,[1] Mr. John M. Nelson, of Wisconsin, from the Committee on Elections No. 2, submitted the report of the committee on the Georgia case of Don H. Clark *v.* R. Lee Moore.

The following statement of the case appears in the report:

> At the election held in the first congressional district of the State of Georgia on November 7, 1922, according to the official returns R. Lee Moore, the contestee, who was the Democratic candidate, received 5,579 votes; P. M. Anderson, running as a Republican candidate, received 426 votes; Don H. Clark, running as a Republican candidate, received 196 votes. As a result of these returns R. Lee Moore, the contestee, was declared elected and a certificate of election was duly issued him by the proper State officials.

The contestant in his notice of contest alleged various errors, frauds, and irregularities, including the burning of ballots, failure to open the polls, and conspiracy to prevent his name from appearing on the ballot.

The committee, considering each charge separately, are unanimous in reporting that no evidence was adduced in support of any charge set forth in contestant's brief.

After quoting excerpts from contestant's brief, the committee recommend:

> The above quotations are typical of the nature of the contestant's brief in this case, and your committee is of the opinion that such loose, extravagant, and unfounded charges being made the basis for an election contest with the consequent expense to the Government should be discouraged in the future.

The committee therefore find that the contestee was duly elected and submit resolutions declaring contestant not elected and confirming the title of the sitting Member to his seat.

The report was called up in the House on June 3,[2] 1924, and agreed to without debate or division.

162. The Illinois election case of Gorman v. Buckley, in the Sixty-eighth Congress.

A contestant having failed to take or file testimony within the time required by law, the House without further examination confirmed returned Member's title.

Form of motion to strike depositions from the record.

Instance wherein the House declined to seat a contestant belonging to the majority party in the House.

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[1] First session Sixty-eighth Congress, House Report No. 367.

[2] Record p. 10323; Journal, p. 369.

Application of a rule of the Committee on Elections.

On May 13, 1924,[1] Mr. Richard N. Elliott, of Indiana, from the Committee on Elections No. 3, submitted the report of the committee on the Illinois case of John J. Gorman *v.* James R. Buckley.

At this election there were three candidates, but the contest was between contestant and the sitting Member, who had been returned by a plurality of 42 votes. Contestant served notice of contest on January 2, 1923, alleging error, mistake, and irregularity, to which contestee answered January 27, 1923.

Following the printing of testimony and filing of briefs, the contestee filed the following motion to strike depositions from the record:

To the honorable the House of Representatives of the Sixty-eighth Congress of the United States:

Now comes James R. Buckley, contestee herein, by William Rothman, his attorney, and moves that the depositions herein and each of them filed herein by the commissioners respectively designated by the parties to hear and take the testimony be stricken from the record, on the ground that said commissioners failed to file the said depositions with the Clerk of this House, "without unnecessary delay" after the taking of the same was completed as required by section 127 of the Revised Statutes as amended, in that the same were not filed within 30 days after the completion of the taking of mid testimony as required by the rules of the Committee on Elections of this honorable House; and in this connection the contestee respectfully represents that the taking of testimony herein was completed on April 28, 1923, at the hour of 12:30 o'clock p.m., at which time the further hearing of the said cause was adjourned sine die; that the only further proceedings had in said cause subsequent to said April 28, 1923, were hearings which were had before his honor, Judge Wilkerson, in the United States district court, which were had on June 2 and June 4, 1923; and that no further proceedings of any kind or nature were had in the said cause subsequent to said June 4, 1923; and that the depositions filed herein by the commissioner designated by the contestant were filed with the Clerk of this honorable House on, to wit, November 5, A.D. 1923, more than 191 days following the completion of the taking of testimony and more than 154 days after the date when the last proceedings of any sort were had in said contest.

Dated at Chicago, Ill., November 20, 1923.

The committee report as findings of fact:

The contestee's answer was served on contestant January 27, 1923. The act of Congress approved March 2, 1875 (U. S. Stat. L., vol. 18, ch. 119, p. 338), provides that in all contested-election cases the time allowed for taking testimony shall be 90 days, and the testimony shall be taken in the following order: The contestant shall take testimony during the first 40 days, the returned Member during the succeeding 40 days, and the contestant may take testimony in rebuttal only during the remaining 10 days of said period.

In this case, therefore, the contestant, under said law, was allowed until March 9 in which to take his testimony in chief and the law required that the taking of all testimony should be completed on April 27, 1923. As a matter of fact, however, the contestant took only a part of his testimony in chief in the first 40 days, which expired on the 9th day of March, 1923. The contestee took no testimony in the next 40 days. During the 10-day period at the end of the 90 days the contestant took some additional testimony, which was not in rebuttal, but was intended as testimony in chief. The testimony in this case was filed with the Clerk of the House of Representatives, on the 5th day of November, 1923.

After citing the Federal statute providing that all testimony in contested-election cases shall be taken within 90 days and forwarded "without unnecessary delay" to the Clerk of the House, and quoting rule 8 of the Committee on Elections,

[1] First session Sixty-eighth Congress, House Report No. 722.

construing the phrase "without unnecessary delay" to mean within 30. days of completion of taking testimony, the committee reports:

> Your committee finds that the contestant in this case ignored the plain mandate of the law and the rules of the Committees on Elections of the House and that he has no standing as a contestant before the House of Representatives.

In conclusion the committee find—

> That the contestant, not having complied with the provisions of the law governing contested-election cases, has no case which can be legally considered by the committee or by the House of Representatives.

The committee therefore recommend the adoption of resolutions declaring the contestant was not elected, and confirming the title of sitting Member to his sent, which were unanimously agreed to by the House, June 3, 1924, without debate.

163. The New York election case of Ansorge v. Weller in the Sixty-eighth Congress.

The House sustained a recount authorized by and conducted pursuant to State laws.

Objections by contestee that notice of contest was insufficient were disregarded by the elections committee.

Form of resolution providing for inspection of contested ballots.

Form of resolution providing program of procedure in recount of contested ballots.

While not considering the committee bound by stipulations and agreements of parties, such agreements were substantially sustained by the committee.

On May 14, 1924,[1] Mr. Clint R. Cole, of Ohio, from the Committee on Elections No. 1, submitted the report in the New York case of Martin C. Ansorge *v.* Royal H. Weller.

Sitting Member had been returned by an official plurality of 245 votes, which the contestant attacked on the grounds that—

> The count, canvass, and handling of the ballots in the election districts of the said congressional district were not conducted in the lawful, orderly, and proper manner provided for by the election law to prevent fraud and unintentional error.

A motion by contestee that contestant's petition be dismissed for the reason that his notice of contest was—

> insufficient in that it contained no facts or proof whatsoever to raise any presumption whatever of mistake, irregularity, or fraud in the original count or canvass,

was disregarded by the committee.

A recount of the ballots, made by both parties, pursuant to the election laws of the State of New York, gave the contestant a plurality of 115 votes over the contestee on conceded ballots, with 820 ballots remaining in dispute.

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[1] First session Sixty-eighth Congress, House Report No. 756.

On March 31, 1924,[1] the following resolution providing for a recount of the 820 disputed ballots was agreed to by the House:

Resolved, That John Voorhis, Charles E. Heydt, James Kane, and Jacob Livingston, constituting the board of elections of the city of New York, State of New York, their deputies or representatives, be, and they are hereby, ordered to appear by one of the members, the deputy, or representative, before Elections Committee No. 1 of the House of Representatives forthwith, then and there to testify before said committee or a subcommittee thereof, in the contested election case of Martin C. Ansorge, contestant, *v.* Royal H. Weller, contestee, now pending before said committee for investigation and report; and that said board of elections bring with them all the disputed ballots marked as exhibits cast in every election district at the general election held in the twenty-first congressional district of the State of New York on November 7, 1922. That said ballots be brought to be examined and counted by and under the authority of said Committee on Elections in said case; and to that end, that the proper subpoena be issued to the Sergeant at Arms of this House commanding him to summon said board of elections, a member thereof, or its deputy or representative, to appear with such ballots as a witness in said case; and that the expense of said witness or witnesses, and all other expenses under this resolution, shall be paid out of the contingent fund of the House, and that said committee be, and hereby is, empowered to send for all other persons or papers as it may find necessary for the proper determination of said controversy; and also be, and it is, empowered to select a subcommittee to take the evidence and count said ballots or votes, and report same to Committee on Elections No. 1, under such regulations as shall be prescribed for that purpose; and that the aforesaid expense be paid on the requisition of the chairman of said committee after the auditing and allowance thereof by said Committee on Elections No. 1.

The ballots in question having been brought before the committee, counsel for contestee submitted a program of procedure which was agreed to by all parties and adopted by the committee, as follows:

Resolved, That in order to expedite the work of the committee, counsel for the respective candidates be, and they hereby are, instructed, during the next hour, to arrange the various ballots which have been brought from New York to Washington into the following piles:

1. Ballots marked otherwise than with a pencil having black lead—that is, ballots marked in ink or with a blue crayon or with an indelible pencil, etc.
2. Ballots bearing a mark for the office of Congressman challenged on the ground that the lines of the alleged cross mark do not cross—i.e., alleged y's, v's, and t's.
3. Ballots bearing a cross mark where the lines cross but challenged because of extra lines forming part of the cross, or because of other irregularities in character or form of the mark.
4. Ballots bearing a cross mark outside of the voting squares.
5. Ballots bearing two cross marks for the office of Congressman, irrespective of whether such marks were made by the voter or claimed to be reprints or impressions.
6. Ballots bearing erasures, smudges, or ink marks.
7. Ballots bearing any name written on the ballot.
8. Ballots challenged because they appear to have been torn by some one.
9. Ballots other than the above which are challenged by either party because of extra lines, dots, and dashes disconnected with the cross mark.
10. All other ballots.

During the argument before the committee counsel for both parties agreed as to a number of the ballots in dispute as belonging to one party or the other, or as being void or remaining in dispute.

Upon the close of argument the committee proceeded, in executive session, to divide the ballots into the 10 groups agreed upon and 2 additional groups.

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[1] Record, p. 5271.

As to weight accorded stipulations by parties and their counsel, the report says:

While not considering that the committee was bound by the stipulations and agreements of counsel as to good, void, and protested ballots, the members of the committee have substantially sustained the agreements of counsel.

The final canvass by the committee is tabulated as follows:

	Good ballots for contestant.	Good ballots for contestee.
Class 1	17	8
Class 2	12	20
Class 3	12	7
Class 4	.....	1
Class 5	2	33
Class 6	30	43
Class 7	2	2
Class 8	.....	1
Class 9	5	15
Class 10	29	70
Class 11	7	29
Class 12	64	69
Envelopes	7	14
Total	187	312
New York recount totals	31,892	31,777
Grand total	32,079	32,089

The sitting Member having received a plurality of 10 votes thus tabulated, the committee recommended the adoption of the following resolutions:

Resolved, That Martin C. Ansorge was not reelected a Representative from the twenty-first congressional district of the State of New York and is not entitled to a seat herein.

Resolved, That Royal H. Weller was duly elected a Representative from the twenty-first congressional district of the State of New York and is entitled to retain a seat herein.

On May 27, 1924,[1] the resolutions were unanimously agreed to by the House without debate.

164. The New York election case of Frank v. LaGuardia, in the Sixty-eighth Congress.

Contestant failing to take testimony within time provided by law, the House discharged the committee from further consideration of the case.

Laches of contestant in prosecuting contest having rendered impossible the submission of final report by elections committee within time provided by rule of the House, the committee declined to consider the merits of the case and were discharged.

Stipulation by parties in the nature of an agreement can not waive plain provisions of the statutes.

Procedure to be followed where parties require time beyond that provided by law.

While constitutional provisions exempt the House from the operation of the law relating to the taking of testimony in election cases, such law is binding upon the parties thereto.

[1] Journal, p. 593; Record, p. 9631.

Effort by opposing counsel to profit by laches authorized in void stipulations, to which he was himself party, were criticised as unethical.

In the absence of evidence of fraud or irregularities, proof of which would change the result of the election, the committee declined to subpoena ballots.

The House and its committees are not to be considered boards of recount, and returns made by boards, charged with that duty by the State in which the election is held, are presumed correct until impeached by proof of irregularity or fraud.

On January 7, 1925,[1] Mr. John M. Nelson, of Wisconsin, from the Committee on Elections No. 2, submitted the report of the committee in the New York case of Henry Frank *v.* Fiorello H. LaGuaxdia.

The official returns gave contestee 8,492 votes, contestant 8,324 and all other candidates a total of 5,358 votes, a plurality of 168 votes for the sitting Member.

On December 28, 1922, the contestant served notice of contest setting forth numerous grounds for contest of a general nature. The taking of testimony in behalf of contestant began February 23, 1923, and continued until November 30, 1923.

Taking of testimony by contestee began on December 20, 1923, and was concluded on March 1, 1924. The case was reported by the Clerk of the House to the Speaker on June 3, 1924, and briefs were filed, the first on June, 30 and the last on August 28, 1924.

On March 1, 1923, the parties entered into stipulation as follows:

> It is stipulated by and between the parties hereto, through their respective attorneys and counsel, that the time limit as fixed by the rules of the House of Representatives and the statues of the United States governing contested elections shall be deemed as directory and not mandatory, and that either party may have more than the period of time allotted and fixed therein within which to present his respective case in this proceeding, and both sides waive specifically any right to object that they may have under the law with respect to the time so fixed.

In repudiation of this stipulation the committee hold:

> A stipulation by parties in the nature of an agreement can not waive the plain provision of the statutes.

Indicating proper procedure to have been followed where further time was required, the committee quote:

> If either party to a case of contested election should desire further time and Congress should not then be in session, he should give notice to the opposite party of a procedure to take testimony and preserve the same and ask that it be received, and upon good reason being shown, it doubtless would be allowed.

The committee add:

> It is to be noted that Congress was in session from December 3, 1922, to June 7, 1924, but parties did not ask the consent of Congress either to extend the time or to validate the stipulation even in the face of a special rule of the House that cases must be disposed of within six months after the opening of the Congress.

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[1] Second session Sixty-eighth Congress, House Report No. 1082.

The law providing for the taking of evidence has been held to be not binding upon the House. It has been correctly stated, "That the House possesses all the power of a court having jurisdiction to try to the question who was elected. It is not even limited to the power of a court of law merely, but under the Constitution clearly possesses the functions of a court of equity also."

The law, however, is binding upon the parties, as evidenced by the use of the mandatory word "shall". The House alone, upon proper application, may grant a further extension of the time for taking evidence for cause shown as a matter of equity but not of right, or to protect the rights of the people of a district.

In confirmation of this interpretation, the committee cites precedents in which the House has granted or refused extension of time on application, and differentiates between instances in which the merits of the case warranted or did not warrant such extension.

Agreement of contestee's attorney to the stipulation is not considered by the committee to mitigate contestant's laches. The report says:

While the contestee's attorney joined in the stipulation to waive the requirements of the law, indeed, himself dictated it and was afterwards guilty of a breach of legal ethics when he raised the point of lack of diligence, nevertheless, it is incumbent upon the contestant to prosecute his case speedily. The contestee holds the certificate of election. His title can only be overturned upon satisfactory evidence that he was not elected. His seat in this body can not be jeopardized by the faults of others. It has been held that the House has no right unnecessarily to make the title of a Representative to his seat depend upon the acts, omissions, diligence, or laches of others.

However, Mr. John L. Cable, of Ohio, a member of the committee concurring in the conclusions of the committee, files additional views on this point in which he adds:

Neither is contestee without fault. His counsel prepared and entered into a stipulation with contestant's attorney that the rules of Congress and the laws of the United States should not be binding and that—

"either party may have more than the period of time allotted and fixed therein within which to present his respective case in this proceeding, and both sides waive specifically any right to object that they may have under the law with respect to the time so fixed."

Contestee's counsel now raises the issue of delay. In his brief he claims:

"The contestant has thoughout deliberately ignored the limitations and abused the privileges imposed and granted by the act."

He also contends:

"The contest should be dismissed because the contestant, without consent of the House or its proper committee, did not take and state his proof within the time limited by act of Congress."

He seeks to profit by a violation of his own agreement; to win his client's cause by the disregard of the laws of Congress, of which he also is guilty; to benefit from a situation he aided and assisted in creating; to use the violation of the law as a weapon of offense and defense—as a shield and a sword.

This action on the part of contestee's attorney is neither ethical nor professional. It is particularly a subject of condemnation. Contestee should not have permitted such a claim to be presented in his brief.

A few days before the case came up for hearing counsel for contestant requested that subpoenas issue for the production of 82 ballots in dispute. The committee gave as its reasons for denying this request:

The record is bare of any evidence or proof to sustain the general allegations of intimidation, fraud, or of other misconduct alleged in the notice of contest.

Contestant's counsel by failing to stress at all these contentions in the argument conceded that such allegations could not be sustained.

The record fails to reveal any real ground for contest other than the hope that a recount of the ballot might overturn the narrow majority of 168 by which the election of the contestee had been certified by the secretary of state.

But there is nothing in the record at all persuasive that a recount would change the result. The ballots said to be in dispute involve merely considerations of the kind of lead pencil used by voters, hair lines seen on the face of the ballots, and alleged erasures. There is no question involved of fraud or of other serious irregularities.

In the further support of its refusal to subpoena ballots for recount the committee asserts that the House and its committees are not boards of recount and quotes with approval the following statement of counsel in the case of Amsorge *v.* Weller:

It has been said again and again by the House, by the courts, by every tribunal that has this duty of passing upon contested elections, that the returns which are made by the inspectors, regularly appointed by the laws of the State where the election is held, are presumed to be correct until they are impeached by proof of irregularity and fraud, and that the House will not erect itself, nor will it erect its committees as mere boards of recount. It is conceived that when the statutes of the State have set up these bipartisan boards and made due and proper provision for their selection, that it is, a matter of public policy, wise and right that their conclusions shall be accepted by the parties to the election, by the public, and by any board charged with the duty of passing on the result, until such time as such irregularities and frauds are proved as to raise a fair presumption that their duties were not honestly performed.

The principal issue, however, on which the committee decides the case, is the failure of contestant to complete and file testimony within the time required by law and contemplated by the rules of procedure approved by the rules of procedure approved by the election committees and by clause 58 of Rule X1 of the rules of the House. The committee say:

The controlling factors, however, in our minds in reaching the conclusion in this case, were the imperative necessity of safeguarding the printed rules unanimously approved by the three election committees, a special rule of the House recently adopted, the plain and explicit provisions of a law of Congress, and a long and unbroken line of House precedents.

The rules of the election committees were carefully prepared and unanimously adopted by the three election committees.

They were prepared specifically to expedite the determination of election case. The contestant's attorney admitted that he had not brought himself within these rules.

Citing clause 58 of Rule XI, the committee quote a statement in debate on the adoption of the clause by the chairman of the then Committee on Rules: [1]

Everyone is opposed to allowing contested election cases to run along until the last day of the session, as is often done, and we can see no good reason for doing so. * * * But with that rule enforced, we thought we could hurry them up and get better action from the election committees than we have had in the past.

Citing section 107 of the Revised Statutes, the committee quote statements in debate on the enactment of the law by the then chairman of the Committee on Elections: [2]

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[1] First session Sixty-eighth Congress, Record, p. 950.

[2] Second session Thirty-first Congress, Globe, p. 108.

I have had during this Congress considerable experience of the difficulty under which the House and the Committee on Elections labor in determining upon those cases of contested elections which are brought before it. I have determined during the last session of Congress that I would endeavor to promote such a bill as would remove most of the evils and enable the House to dispose of those cases without such great consumption of its time but without suffering the evils under which it has labored in past years.

If this bill is approved, the result will be that instead of several months' delay, as has been the case heretofore, the testimony will be in the hands of the printer the very first day of the session, and the decision of the House will be made before the 1st day of January in every session.

And by another member of the Elections Committee: [1]

This thing of contesting the right to a sitting Member on this floor has become the greatest of all humbugs in this age of humbugs. A — comes here and claim that he is entitled to the seat of the person in it under proper authority of the State. The consequences is that during a long nine-mouth session the Member retains his seat, but at the close of the session the House decides that he is not entitled to it and is turned out after having exercised the conventions of an office nine months to which he had not been entitled, and although the contestant and the sitting Member are paid full wages of Members of Congress.

As to failure of contestant to comply with express provisions of the statute and the rules of the committee and of the House, the committee conclude:

The record reveals the fact that the contestant had permitted the contest to drag along up to within a few months of the termination of the Congress to which he claimed election; that the recount, even if successful for the contestant, would still further reduce the value of it for him to the nominal distinction of having been declared elected, but of course he would get the substantial emoluments of salary and clerk hire for two years.

The precedents of the House have recently been very specific and direct in holding that parties guilty of laches would have no standing before the House unless sufficient cause was disclosed for delay.

These precedents are well fortified by a long line of decisions in election cases.

The committee therefore recommended the adoption of the following resolution:

Resolved, That the Committee on Elections No. 2 shall be, and is hereby, discharged from further consideration of the contested-election case of Henry Frank *v.* Fiorello H. LaGuardia from the twentieth congressional district of New York.

165. The Senate election case of Peddy v. Mayfield in the Sixty-eighth Congress.

A memorial, having been filed charging conspiracy and excessive expenditure of money in the election of a Senator, the Senate by resolution authorized an investigation.

Discrepancies in returns disclosed by a recount and reported by the committee as insufficient to change the result of the election were not further examined by the Senate.

Failure to comply with statutory requirements in the signing, numbering, and stamping of ballots was disregarded by the Senate.

The Senate recognizes the power of the party or the State to provide regulations governing party primaries.

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[1] Second session Thirty-first Congress, Globe, p. 109.

Discussion of litigation in State courts to place names of candidates on the ballot.

Excessive and unlawful amounts of money spent without the knowledge or consent of the candidate do not warrant the sustaining of a contest.

In the Sixty-eighth Congress [1] the Senate considered the case of George E. B. Peddy *v.* Earle B. Mayfield, of Texas.

The credentials of Mr. Mayfield as a Senator from the State of Texas were presented December 3, 1923, at the beginning of the first session of the Sixty-seventh Congress, and being in due form he took his seat in the Senate.

Subsequently: [2]

George E. B. Peddy (contestant) filed with the Senate February 22, 1923, a petition contesting the election of Earle B. Mayfield (contestee) as Senator from Texas in the general election of November 7, 1922, and a protest both against the election and the qualification of the contestee. A first and second supplemental petition were filed by the contestant and an answer was filed by the contestee.

The charges alleged by the contestant were:

1. That illegal votes were counted for Mr. Mayfield and that legal votes were not counted for contestant.

2. That undue advantage and illegal discrimination in favor of contestee was such as to invalidate his election.

3. That the primary elections, both the first primary election and the second, or run-off primary election were illegally controlled by secret influences, by fraud, by excessive use of money, and by lawlessness in the interests of contestee and against the rights of contestant.

4. That there was a general conspiracy between the Knights of the Ku-Klux Elan and the contestee of a character and result that invalidated the election of contestee.

5. That contestee was disqualified for membership in the Senate of the United States largely because of the alleged "illegal practices that were directly or indirectly connected with his election."

6. Contestant asked for a recount and recanvass of the votes cast at the general election and claimed in his first supplemental petition that he, contestant, was entitled to the office.

The memorial with accompanying papers was referred to the Committee on Privileges and Elections. After consideration the committee reported a resolution authorizing an investigation by the Committee on Privileges and Elections which was Weed to by the Senate on January 3, 1924.[3]

Under authority conferred by the resolution:

The ballots were gathered in the State of Texas through the office of the Sergeant at Arms and were transmitted in sealed pouches by the Post Office Department under lock and key, with every safeguard against possible tampering. The recount, conducted in the Senate Office Building, was begun on February 18, 1924, and was completed on April 8, 1924. The official return from the State of Texas as taken from the county clerks' records shows the following result:

Mayfield	266,307
Peddy	132,529
Total	398,836

The total number of votes which were brought to Washington were $67,513, of which 28,319 were no votes. The result of the recount of these ballots showed that—

[1] Second session Sixty-eighth Congress, Senate Report No. 973.

[2] First session Sixty-eighth Congress, Record, p. 317.

[3] Record, p. 488.

Mayfield received 221,596
Peddy received 117,599

The inspection of the ballots also disclosed—

many irregularities and discrepancies and clear violations of law in connection with the casting of the ballots, as, for example, the laws of Texas provide that the ballots shall be signed by the judge of election.

30,209 Mayfield ballots were not thus signed.
14,609 Peddy ballots were not thus signed.
The law provides that the ballots shall be numbered.
1,723 Mayfield ballots were not numbered.
1,021 Peddy ballots were not numbered.
The law provides that the ballots that are cast shall be stamped "voted."
187,387 Mayfield ballots were not thus marked.
92,192 Peddy ballots were not thus marked.

As to the effect upon the validity of the election of these discrepancies in the count and the failure to comply with the statutory requirement specified, the committee in its report submitted January 3, 1924,[1] hold:

These are illustrations of the irregularities, discrepancies, and violations of law, but no one of them, nor all of them together, in the judgment of your committee, either did or ought to change the result.

As to the power of a party or a State to provide regulations governing party primaries within the State, the committee conclude:

The contestant complained of the law and practice in Texas which prevented any member of a party from voting at a primary election who had not voted, if he voted at all, for the regular party ticket at the last preceding general election.

It was claimed by the contestant that except for this rule Mayfield would not have been nominated at the primary. Similar regulations are in force in other States, and your committee has no doubt as to the power of a party or of a State to make such regulations if they see fit so to do.

The committee further determine:

The contestant alleged that there was a general conspiracy between the Knights of the KuKlux Klan and the contestee in order to bring about the election of the contestee and that pursuant to this conspiracy unlawful sums of money were spent in favor of contestee and that the Knights of the Ku-Klux Klan, a corporation, were prohibited by law from contributing to or interfering in their corporate capacity with elections, and also that intimidation was resorted to in the interest of the contestee.

The evidence does not, in the opinion of your committee, show that excessive and unlawful amounts of money were spent, and certainly not with the knowledge or consent of Senator Mayfield, nor do they find from the evidence that there was any such lawlessness or conspiracy in connection with the Ku-Klux Klan or otherwise as would in their judgment warrant the sustaining of the contest.

In conclusion, the committee say:

Undoubtedly there were, particularly in the primary election, and in the general election as well, acts of omission and commission in violation of express statutes, and some of them doubtless

[1] Record, p. 489.

were intended to unlawfully produce a desired result in the election, but the evidence from the beginning to the end of it does not show either a knowledge or a consent of Senator Mayfield in these matters, nor are they of a character or extent which in the judgment of your committee warrant either the sustaining of the contest or the protest against the seating of Senator Mayfield.

The report also recounts at length the course of litigation in the State courts over the placing of names of candidates on the ballot.

The committee therefore:

unanimously recommend that the contest in this case be dismissed and the protests against the seating of Senator Mayfield be overruled.

The Senate, without debate or division, agreed [1] to the report.

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[1] Second session Sixty-eighth Congress, Record, p. 2929.

Chapter CLXXII

GENERAL ELECTION CASES, 1926 TO 1930.

166. The Pennsylvania election case of Bailey v. Walters, in the Sixty-ninth Congress.

In order to secure a recount before an elections committee, it is necessary to produce tangible evidence to show likelihood of such recount changing the result of the original returns.

Returns made by duly appointed officials are presumed to be correct until impeached by proof of such irregularity and fraud as to raise the presumption of incompetency or dishonesty, and the House will not constitute itself a mere board of recount.

Illegal ballots are subtracted from the vote of the candidate for whom cast and when the candidate for whom cast can not be ascertained are subtracted from the vote of all candidates in accordance with the pro rata share of the total vote obtained by each candidate in the precinct in which cast.

Under a decision of the Supreme Court an American-born woman married to a foreigner prior to the passage of the Cable Act and continuing residence in the United States does not lose citizenship or right to vote by such marriage.

Form of resolution authorizing production of ballots for recount by committee.

A State law providing for custody of ballots was held to be directory and not mandatory.

A question relating to votes cast by unregistered voters was not finally passed upon.

On June 10, 1926,[1] Mr. Bird J. Vincent, of Michigan, from the Committee on Elections No. 2, submitted the report of the committee in the Pennsylvania case of Warren Worth Bailey *v.* Anderson H. Walters.

At the general election held November 4, 1924, the contestee had a majority of 63 votes over the contestant and received the certificate of election.

[1] First session Sixty-ninth Congress, House Report No. 1450.

However, the law of the State of Pennsylvania approved May 19, 1923, provided:

> And in case the returns of any election district shall be missing when the returns are presented, or in case of complaint of a qualified elector, under oath, charging palpable fraud or mistake, and particularly specifying the alleged fraud or mistake, or where fraud or mistake is apparent on the return, the court shall examine the return.

In compliance with this law, electors in 12 precincts presented petitions charging fraud or mistake and praying for an examination of the ballots of certain precincts, and the case being heard before the three judges as provided by law, the court rendered this opinion:

> The judges who heard this case are equally divided in opinion on the question as to whether or not the votes in the ballot box of St. Michael district could legally be counted by the computing board. When these ballots are counted Bailey is entitled to the certificate of election, but when not, Walters is entitled to receive it. The court being divided on the question of the legal right to count the votes considered, it follows that the order appealed from must stand and the certificate issued to Anderson H. Walters. It is so ordered.

A petition for a rehearing was denied and the contestant applied to the Supreme Court for a writ of certiorari which was also denied. Thereupon the contestant filed a notice of contest in the House.

The first question discussed by the committee report is the application of the contestant for a general recount of all the votes of all the precincts of the congressional district. The majority of the committee find that:

> No testimony nor proof casting suspicion upon any ballot boxes in the district, nor[4] the returns from them, was produced except as to the 21 ballot boxes which have been recounted.

and agree that:

> As to the petition for a general recount, it seems to be in accordance with a long line of precedents in Congress that in order to secure a recount, before an elections committee, that tangible evidence must first be produced tending to show that such recount will probably change the result of the original returns from such ballot boxes, and that in the absence of such tangible evidence or testimony recounts will be refused.

Accordingly, the committee reaffirm the statement made in the case of Ansorge *v.* Weller to the effect that:

> It has been said again and again by the House, by the court, by every tribunal that has this duty of passing upon a contested election that the returns which are made by the inspectors, regularly appointed by the laws of the State where the election is held, are presumed to be correct until they are impeached by proof of irregularity and fraud, and that the House will not erect itself, nor will it erect its committees as mere boards of recount. It is conceived that when the statutes of the State have set up these bipartisan boards and made due and proper provision for their selection, that it is, as a matter of public policy, wise and right that their conclusions shall be accepted by the parties to the election, by the public, and by any board charged with the duty of passing on the result, until such time as such irregularities and frauds are proved as to raise a fair presumption that their duties were not honestly performed.

The committee therefore conclude that no cause had been shown why a general recount should be ordered outside of the 21 precincts about which the testimony centers.

The committee having decided to recount the ballots in these precincts, Mr. Bird J. Vincent, of Michigan, by direction of the committee, offered the following resolution in the House:

Resolved, That Logan M. Keller, sheriff of Cambria County, State of Pennsylvania or his deputy, be, and he is hereby, ordered to appear by himself or his deputy, before Elections Committee No. 2, of the House of Representatives forthwith, then and there to testify before said committee in the contested-election ease of Warren Worth Bailey, contestant, against Anderson H. Walters, contestee, now pending before said committee for investigation and report and that said sheriff or his deputy bring with him all the ballots cast in the sixteenth ward of the city of Johnstown, Pa., and in Westmont Borough No. 2, of Cambria County, Pa., at the general election held in the twentieth congressional district of the State of Pennsylvania on November 4, 1924. That said ballots be brought to be examined and counted by and under the authority of said Committee on Elections in said case, and to that end that the proper subpoena be issued to the Sergeant at Arms of this House, commanding him to summon said sheriff, or his deputy, to appear with such ballots as a witness in said case, and that the expense of said witness, and all other expenses under this resolution, shall be paid out of the contingent fund of the House; and that the aforesaid expense be paid on the requisition of the chairman of said committee after the auditing and allowance thereof by said Committee on Elections No. 2.

The resolution was accorded immediate consideration as privileged and was agreed to, and the ballots having been recounted in the sixteenth ward of Johnston City, were found to sustain the contention of the contestant. Accordingly 16 additional votes were allotted to the contestant.

The contestant also claimed 40 additional votes in the St. Michael district, which, in alleged violation of the Pennsylvania law, had been left at the polling place instead of with "the nearest justice of the peace," as required by statute. The committee found, however, that the law was directory and not mandatory and as the ballots were found intact in the box allotted them to the contestant.

The dispute as to votes cast at Westmont Borough hinged on the allegation that ballots had been marked by a peculiar cross different from other crosses on the ballots and the contention that they had been placed on numerous ballots by the same person. On examination of the ballots the committee sustained the contention and recounted the ballots with a resulting gain of 76 votes for the contestee.

As to the allegation that unnaturalized voters had participated in the election, the committee found that women had voted who had married aliens prior to the passage of the Cable Act, September 22, 1922, and who had not taken out naturalization papers to regain their citizenship and therefore rejected such votes.

In cases where such voters when questioned testified as to the candidate for whom they had voted the vote was subtracted from the total vote of that candidate. Where such voters refused to testify for whom they had voted, the subtraction was made by reducing the vote of each candidate in the precinct where the illegal votes were shown to be cast in accordance with the pro rata share of the total vote obtained by each candidate in that particular precinct.

In this connection the contestant, through his counsel, claimed that an American-born woman who had married a foreigner prior to the Cable Act, but who continued to reside in the United States, did not lose her citizenship thereby. However, as the Supreme Court has passed upon this question, the committee in accordance with that decision rejected such alien votes.

The last question in the contest related to ballots cast by unregistered voters. Proof was submitted that 586 illegal votes had been cast which should not have been counted because vitiated by the law of the State of Pennsylvania denying the right

of franchise to unregistered voters. It was conceded that the law was mandatory and that under the rule fixed by the precedents in Congress such ballots could not be counted if proof was established. But as there was a difference of opinion in the committee as to whether the methods of proof were proper and sufficient, and as the contestee already had sufficient votes for election without such additional votes as might accrue from this source, the committee refrained from expressing an opinion on the question.

Summing up the change of votes resulting from the determination of the various questions involved in the case, the committee found that the contestee had received a majority of 51 votes and recommended the adoption of the following resolutions:

Resolved, That Warren Worth Bailey was not elected a Member of the House of Representatives in the Sixty-ninth Congress from the twentieth congressional district of the State of Pennsylvania and is not entitled to a seat herein.

Resolved, That Anderson H. Walters was duly elected a Member of the House of Representatives in the Sixty-ninth Congress from the twentieth congressional district of the State of Pennsylvania and is entitled to retain his seat herein.

The case was debated at length in the House on June 15,[1] when the resolutions recommended by the committee were agreed to without division.

167. The Florida election case of Brown v. Green, in the Sixty-ninth Congress.

The contestant having withdrawn from the contest, the committee reported a resolution confirming the right of the incumbent to his seat.

On February 24, 1926,[2] Mr. Charles L. Gifford, of Massachusetts, from the Committee on Elections No. 3, submitted the unanimous report of the committee in the case of H.O. Brown *v.* Robert A. Green.

The committee reported that the contestant had withdrawn from the contest by a letter duly subscribed and sworn to before a notary public and submitted the following resolution:

Resolved, That Hon. Robert A. Green was duly elected as Representative from the second congressional district of Florida to the Sixty-ninth Congress and is entitled to his seat.

The report was considered on March 12[3] and the resolution was agreed to without debate or division.

168. The Georgia election case of Clark v. Edwards, in the Sixty-ninth Congress.

The contestant failing to file a brief within the time required by the rules of the House, the committee construed the laches as an abandonment of the contest.

The committee having reached the conclusion that the contestant was not acting in good faith in bringing the contest announced that it would decline to authorize payment of any expense incurred by the contestant therein.

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[1] Record, p. 11307.

[2] First session Sixty-ninth Congress, House Report No. 359.

[3] Record, p. 5471.

On June 10, 1926,[1] Mr. Bird J. Vincent, of Michigan, from the Committee on Elections No. 2, presented a report in the case of Don H. Clark *v.* Charles G. Edwards, of Georgia.

According to the official returns the contestee, as the Democratic candidate, had received 14,694 votes; Herbert G. Aarons, as the Republic candidate, had received 627 votes; and the contestant, appearing on the ballots in the various counties under such headings as "Independent Party" or "Independent Republican Party," had received 448 votes.

The contestant alleges that he was the duly nominated Republican candidate but that he was wrongfully denied that designation on the ballots.

The committee find, however:

> That Herbert G. Aarons was the regularly nominated Republican candidate and that the contestant was not. It seemes to the committee that in securing the placing of his name upon the ballots under the party designations used contestant was accorded at least all that he was entitled to.

Further charges by the contestant are set forth in the report, as follows:

> The contestant charges further that the entire election was illegal, false, and fraudulent, because of the existence of a political oligarchy and general conspiracy throughout the district.
>
> As to this the committee finds no testimony worthy of credence to sustain such charge.
>
> The contestant further charges the public officials of the congressional district with skillfully, flagrantly, and criminally violating the provisions of the Neil Act, which is a late election law of Georgia.
>
> The committee finds this charge not to be sustained by the evidence.
>
> The contestant in bombastic and reckless language makes other charges of crime, fraud, deceit, and conspiracy in the district, none of which charges the committee finds to have been supported by evidence.

The failure of the contestant to file a brief, as required by the rules of procedure, is thus reported and pawed on:

> In an endeavor to support his contest the contestant took testimony throughout the district, which testimony has, with some exceptions, been returned to the House of Representatives and delivered to this committee in the form of a record. Although notified by the Clerk of the House of Representatives in due time as to the requirement of the rules of the House and the law governing contests, as to when he should file his brief, the contestant has not filed any brief up to this time, and has taken no action in the further prosecution of his case since the settlement of the record. As the time has long gone by in which he is permitted to file a brief, the committee assumes that he has abandoned his contest. Whether this be true or not, however, the committee finds that there is absolutely no merit in his contest.

So impressed are the committee with the lack of merit in the contentions of the contestant and his delay in the prosecution of his claims that they conclude:

> The Committee on Elections No. 2 in the present case not only finds that the present contest is not grounded in any merit, but also finds that the contestant is not acting with bona fides in bringing it; and it desires to announce to the House of Representatives that, unless otherwise directed by the House, it will decline to authorize the payment by the Government to the contestant in this case of any expense incurred by him in bringing the present contest.

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[1] First session Sixty-ninth Congress, House Report No. 1449.

The committee therefore recommend resolutions reciting that the contestant was not elected and that the contestee was duly elected, which were adopted by the House on June 15,[1] without debate or division.

169. The New York election case of Sirovich v. Perlman, in the Sixty-ninth Congress.

It being admitted that the contestee had a majority of the votes cast, the committee declined to pass on disputed ballots submitted for their consideration.

The contestant having failed to exercise due diligence in securing evidence within the time allotted, the committee overruled his application that the case be reopened to permit him to adduce further testimony.

On April 12, 1926[2] Mr. Don B. Colton, of Utah, from the Committee on Elections No. 1, submitted the report of that committee in the case of William I. Sirovich *v.* Nathan D. Perlman.

According to the official returns the sitting Member had received a plurality of 126 votes. The contestant, however, served notice of contest on numerous grounds, which are summarized by the committee as follows:

That the State board of canvassers of New York and the board of elections of the city of New York, in their canvass and return of the votes cast at said election, had erred in declaring Nathan D. Perlman, the contestee herein, elected, and in issuing to him a certificate of election based upon said canvass and return.

That if contestee did receive an alleged majority of votes it was because of the frauds practiced by said contestee on the electorate on the day of election and prior thereto, and as a result of a conspiracy on the part of eontestee to commit a fraud, which was carried out, upon the electorate on the day of election.

That the contestee entered into a conspiracy with one George Rosken and one Abe Lewis to falsify the tally sheets in the twentieth and in the twenty-third election districts.

The contestee having answered with a general denial, the committee subpoenaed the disputed ballots and counted them. At the close of the count so small a number remained in dispute that the committee concluded:

The committee was not called upon to determine whether these disputed ballots were bona fide votes. It was admitted at the close of the count that contestee had a majority of the votes cast. They were used merely as exhibits in the argument to show fraud and conspiracy.

During the proceedings, the counsel for the contestant made application for the reopening of the case to take further testimony.

The application was denied for the reason that:

The committee found that the contestant had not used due diligence in securing the proper evidence at the time of making his case in chief and therefore did not feel justified in asking the House for authority to reopen the case.

The majority therefore sum up the case:

Your committee finds after a careful analysis of the testimony and argument, and in conformity with a long line of congressional precedents, that the proof presented before the committee by the contestant did not sustain the charges made against the contestee by the contestant.

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[1] Record, p. 11312.

[2] First session Sixty-ninth Congress, House Report No. 858.

The minority members of the committee, while refraining from submitting minority views, declined to vote to approve the conclusions reached by the majority, for the reason as explained by Mr. C. B. Hudspeth, of Texas, during the debate on the report in the House on April 15.[1]

In this contest the contestant did not ask that he be given the seat in the fourteenth congressional district, but his prayer was that the seat now held by Mr. Perlman be declared vacant and void and another election held. I want to state to you frankly, Mr. Speaker, the case was not properly prepared before it was presented to the committee of Congress. I think every man on that committee will agree to that, and counsel for the contestant asked for additional time to produce additional testimony, but under the rules governing contested-election cases and the law it could not be granted.

At the conclusion of the debate, however, the resolutions reported by the majority, declaring that the contestant had not been elected and confirming the title of the contestee to his seat, were adopted without division.

170. The Senate election case of Bursum v. Bratton, from New Mexico, In the Sixty-ninth Congress.

A general recount of ballots is unwarranted without preliminary evidence tending to cast doubt on the accuracy of the official returns.

Counsel for the contestant having conceded that a recount of the ballots was all that was relied on and that if a recount did not overcome the contestee's plurality the contest would be dismissed, the committee held it was not warranted on the pleadings in recounting the ballots but permitted an amendment of pleadings to justify recount.

An instance wherein the committee, overruling a demurrer conceded to be well taken, elected to decide the ease on the pleadings, aff1davits, exhibits, and statements of counsel and parties.

In 1926,[2] the Senate investigated the case of Holm O. Bursum. *v.* Sam G. Bratton, of New Mexico.

In the election held November 4, 1924, the official returns gave the contestant 54,558 votes and the contestee 57,335, a plurality of 2,797 votes for the contestee.

The petition in contest contained general averments as follows:

That various employees of the Government and the State, as well as others, voted without possessing the requisite residential qualifications; that residents of the State who were attending schools and colleges therein voted at the places they were attending school instead of their home precincts; that aliens, minors, and ex-convicts were permitted to vote and certain Indians denied the right; that in one county the county clerk failed to comply strictly with the law in the preparation of the official ballots; and that martial law was improperly declared in one county. A general allegation was made that votes cast for contestant, as well as the candidate on the Progressive ticket, were counted for contestee. Other averments of incidental importance were made.

However, in a hearing before the subcommittee, and later before the committee en banc, the attorney for the contestant made the statement:

That a recount of the ballots was all that was relied upon; that the pleading tendered other issues, but that he did not rely upon them, and that if a recount of the ballots did not totally or substantially overcome the contestee's plurality the protest would be dismissed.

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[1] Record, p. 7533.

[2] First session Sixty-ninth Congress, Senate Report No. 724.

On the strength of this statement the subcommittee concluded that:

The pleading filed by the contestant failed to state grounds justifying the committee in taking steps to impound, open, and recount the ballots cast throughout the State, or for further proceedings, but that the matter should be submitted to the full committee for its consideration.

The committee adopted the views of the subcommittee but held that the contestant could, if he so desired, amend his pleading in order to set forth a bill of particulars showing fraud in the count or any pertinent facts expected to be proved sufficient to warrant a recount.

The contestant availed himself of this permission and seven affidavits were presented, together with certain documents, much of which was foreign to the subject and related to matters which could not be determined by a recount of the ballots. Two of such affidavits tended to show fraud committed in three precincts in Curry County. When the substance of the two is combined they charge that in precinct 13, 10 votes were cast for the contestant and counted for the contestee; that in precinct 1, 122 Progressive ballots were scratched for the contestant but counted for the contestee; that in said precinct 85 Democratic ballots were scratched for the contestant but counted for the contestee; that the tallies in said precinct were kept on separate paper from the official poll books; that there is confusion and doubt with reference to the variance between the tallies and the certificate, under one view such variance reaches the maximum of 225, under another view it is 75; that in precinct 9 of said county 50 ballots cast for the contestant were counted for the contestee and that 45 were declared to be mutilated when they should have been counted for the contestant. One of these affiants undertook to state facts occurring in the count at three separate precincts. The other does not purport to know any facts except as to one precinct. This is the only attack made upon the entire State, consisting of 31 counties and approximately 715 precincts.

To these allegations the contestee interposed a demurrer on the ground that, granting they were true, they could not change the result of the election but could only increase the size of his plurality:

Notwithstanding the conceded merit of this contention, the report recites that:

Upon the entire record thus presented the committee concluded to overrule the demurrer and to decide the contest upon the pleadings, affidavits, documents, photographs, admissions, and statements of counsel and the parties.

The committee then conclude:

That under the contention of either party, the contestee has a plurality of the vote east for the office in question. According to the contestant's contention, and giving him credit for everything claimed, such plurality is 1,220; that according to the contestee's contention the facts pleaded by contestant show that such plurality is approximately 2,300.

That all other matters set forth in said contest are of such character that a recount of the ballots would have no bearing whatsoever. Contestant having waived and abandoned an such issues, there remains no other question to be determined.

That the prevailing rule of law throughout the country with regard to a general recount of ballots without some preliminary evidence tending to cast doubt or suspicion upon the correctness of the official returns may be seen from the following, which are merely a part of the many authorities upon the subject.

The report incorporates numerous citations from authorities in support of its conclusions and closes with the finding:

That Sam G. Bratton received a plurality of the votes cast in the election held in the State of New Mexico on November 4, 1924, for the office of United States Senator from said State for a term of six years beginning March 4, A. D. 1925, and is entitled to hold said office and exercise the functions thereof.

On April 30, 1926,[1] the report was considered by the Senate and the recommendation of the committee was approved without debate.

171. The Senate election ewe of Johnson v. Schall, of Minnesota, in the Sixty-ninth Congress.

The Senate is judge of the election and qualification of its Members and judgments of State courts while persuasive are not binding.

On June 7, 1926[2] Mr. Charles S. Deneen, of Illinois, submitted the report of the Committee on Privileges and Elections "in the matter of the contest and protest in connection with the election of United States Senator from the State of Minnesota, 1924."

The committee reported that at the general election held November 4, 1924, Thomas D. Schall received 388,594 votes, Magnus Johnson received 380,646 votes, and three other candidates received a nominal number of votes.

Subsequently Mr. Johnson filed with the Senate a petition contesting the election of Mr. Schall and incorporating allegations which are summarized by the committee as follows:

(1) That certain violators of the liquor laws were induced to contribute money for the expenses of contestee's campaign by certain persons who were either employed by or were constant visitors at the "Schall political headquarters "at the West Hotel in Minneapolis.

(2) That sums in excess of the amount permitted to candidates for the United States Senate were expended by contestee in violation of the statutes of the United States and of the State of Minnesota.

(3) That false statements about contestant were made by contestee during the campaign for election in violation of the Corrupt Practices Act of Minnesota. That contestee caused the publication of 450,000 copies of a paper called the Minnesota Harpoon, and caused said Harpoon to be unlawfully mailed as second-class matter in the United States post office at Minneapolis.

(4) That said contestee violated the franking law privilege in sending through the mails "millions of copies of speeches and extensions of remarks."

(5) That contestee promised offices and positions for influence and support in his campaign.

(6) That contestee conspired to expend a sum of money in excess of $50,000 in procuring the election of said contestee.

The committee having subpoenaed witnesses and taken testimony, reported its findings on these charges in this form:

In the opinion of the committee:

(1) The evidence does not show that any violators of the liquor laws were induced to contribute money or did contribute any money for the expenses of contestee's campaign for election or that the contestee received or expended any such funds.

(2) There was no testimony offered to show that contestee expended any money during his campaign for election as United States Senator, or in the primary which preceded it. There was

[1] Record, p. 8482.

[2] First session Sixty-ninth Congress, Senate Report No. 1021.

no testimony to show that contestee received any money during the campaign preceding the election of November 4, 1924, or at the primary immediately before it.

(4) No testimony was offered in support of the allegation that the franking privilege had been abused.

(5) The testimony does not show that any promises were made of offices or positions in return for influence or support by contestee in his campaign for nomination or election.

(6) The testimony does not support the allegation that contestee conspired to expend a sum of money in excess of $50,000 or any sum in securing the election of contestee.

As to the third item in the contestant's arraignment charging violation of the corrupt practices act of the State of Minnesota, the committee tabulate the provisions of that law:

(3) Your committee states that said statutes,

(*a*) Prohibit certain acts and made them grounds for contest or annulment of election.

(*b*) Give to the defeated candidate or to 25 voters the right to bring an action to contest or annul the election.

(*c*) Require that such action be brought within 30 days after election.

(*d*) Require such action to be brought in the district court of the county where contestee resides.

(*e*) Require such action shall be tried according to law.

(*f*) "If a candidate for United States Senator be adjudicated guilty, the court, after entering such adjudication, shall forwith transmit to the presiding officer of the Senate a certificate setting forth such adjudication of guilty."

The committee then find that no contest contemplated by the statute has been filed in the district court of Minnesota where the contestee resides, and further holds that:

The Senate is a judge of the election and qualification of its members and a judgment of a court under the provisions of the Minnesota law referred to would not be binding upon the Senate, but it would have great weight. It should not be expected that the Senate act as a substitute for a district court of that State.

With reference to the allegations relating to the publication of a paper claimed to have been mailed in violation of the postal laws the committee say:

Regarding the publication of the Minnesota Harpoon, the testimony does not support the allegation that contestee published the paper or knew the contents of contestant's Exhibit No. 2; or mailed or caused to be mailed the paper of which contestant's Exhibit No. is a copy, or knew that it was mailed.

Furthermore, the testimony submitted does not create any issue upon the alleged false statements made in speeches or published in the Minnesota Harpoon.

In conclusion the committee unanimously recommend:

That the contest in this case be dismissed and that the protest against the seating of Thomas D. Schall be overruled.

The Senate considered the report on June 16, 1926,[1] and after debate, including a discussion of the case by the contestee, declared Mr. Schall to be "a duly elected Senator of the United States from the State of Minnesota."

172. The Senate election case of Steck v. Brookhart, of Iowa, in the Sixty-ninth Congress.

[1] Record, p. 11351.

Instance wherein a stipulation was entered into under which all votes cast at an election were brought to Washington and recounted.

On a recount by the committee the question of rejecting ballots is properly raised when they are received in Washington and before recounting or at least when tabulated, and the motion comes too late after the record has been made and argument heard.

Denial of charges of irregularity or fraud places the burden of proof of such charges on the proponents.

A State law requiring the transportation and preservation of ballots under seal was held to rebut the unsustained presumption that ballots received with broken seals had been tampered with.

In determining issues in a contested election all cases of doubt were resolved in favor of the incumbent, for the reason that he had received the certificate of election.

In 1926[1] the Senate investigated the case of Daniel F. Steck *v.* Smith W. Brookhart, of Iowa.

The State canvassing board found that Mr. Brookhart had received 450,099 votes, a plurality of the votes cast, and a certificate of election was issued to him and he was seated by the Senate.

Three notices of contest or protest were filed—one by Luther A. Bruewer, who received 862 votes in the election and who took no further steps in the contest; one by the Republican State central committee of Iowa, who alleged that the incumbent had obtained votes under a fraudulent representation that he was a Republican, and that he had not been elected; and one by Daniel F. Steck, who filed formal allegations that ballots were cast for him and not counted, that ballots were cast for him and counted for the incumbent, and that illegal votes were counted for the incumbent.

The incumbent answered denying specifically all material charges set out in the various petitions and, the issues being joined, a stipulation for a recount of all the votes cast in the election was entered into by counsel for contestant and incumbent, respectively, as follows:

STIPULATION.

In the Senate of the United States. In the matter of the contest of Daniel F. Steck *v.* Smith W. Brookhart.

Come now the parties to the above-entitled contest, namely Daniel F. Steck, contestant, and Smith W. Brookhart, contestee, and stipulate and agree as follows:

(1) That the above-entitled contest may be immediately referred to the Committee on Privileges and Elections of the Senate of the United States.

(2) That the said contestant and contestee are and will be throughout the course of the Said contest represented by their respective counsel, viz, J. M. Parsons of Des Moines, Iowa, on behalf of the contestant, Daniel F. Steck; and J. G. Mitchell of Des Moines, Iowa, on behalf of the contestee, Smith W. Brookhart.

(3) That certain voters at the general election held on the 4th day of November, A. D. 1924, at which the said contestant and contestee were candidates for the office of Senator of the United States for the State of Iowa in certain counties, hereinafter more specifically enumerated, recorded their votes in mechanical devices known as voting machines.

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[1] First session Sixty-ninth Congress, Senate Report No. 498.

(4) That voting machines were employed for the said purpose in 18 counties of the said State, viz, Benton, Boone, Calhoun, Clay, Crawford, Des Moines, Dickinson, Dubuque, Franklin, Hardin, Iowa, Jackson, Johnson, Mahasaka, Marshall, Muscatine, Pocahontas, Polk, Scott, Story, and Webster:

(5) That the said voting machines and each and all of them have been kept locked in order that the evidence of the votes cast by means of said machines shall be preserved for the purposes of the said contest, and that the Senate of the United States, through its Committee upon Privileges and Elections, may inform itself as to the verity or otherwise of the returns made by the several election officials, and the regularity or otherwise of the election in so far as it may be determined by the canvass of the votes cast by means of said voting machines.

(6) That it is necessary, in order that the said voting machines may be employed at elections to be held shortly in said counties, and in order further that certain voting machines which are not the property of certain counties, but have been used under a rental contract, may be released, that the add machines be examined at the earliest possible date by a committee appointed by and under the supervision of the Committee on Privileges and Elections of the United States Senate, and to this end it agreed, subject to the approval of the Committee on Privileges and Elections, that three persons shall examine the said voting machines forthwith and report their findings to the said committee, so as to show the votes cast in each precinct, and identify the machine used in each precinct, and the vote shown by each machine.

(7) That a city and school election will be held in the city of Dubuque, county of Dubuque, in said State, on the 7th day of March, A. D. 1925, and that for the purpose of making examination and reporting the votes cast and such other findings by the parties appointed for the said purpose in the said county of Dubuque, and in view of the fact that the Senate is now in session and will be unable to delegate one of the members of the Committee on Privileges and Elections to supervise the examination of the voting machines in the said county of Dubuque, the following persons, representing, respectively, the contestant and contestee, shall, subject to the approval of the said Committee on Privileges and Elections, constitute the counting board authorized to make the said examination in the said Dubuque County—for the contestant, Maurice P. Cahill, of Cedar Rapids; and for the contestee, Louis H. Cook, of the city of Des Moines, Polk County, Iowa.

(8) That the said Maurice P. Cahill and Louis H. Cook may appoint a third member of the said counting board, but if unable to agree upon such member on or before the 28th day of February, A. D. 1925, shall immediately proceed to the examination of the said machines and the counting of the votes therein and make separate report thereof to the Committee on Privileges and Elections of the United States Senate.

(9) That immediately upon the adjournment of the present session of the Senate of the United States, there may be appointed by the Committee on Privileges and Elections one of the members of the said committee, or such other persons as said committee may select, who shall supervise the examination of the said machines and the counting of the votes cast by means thereof, and who shall be present at the opening of each machine for the said examination and counting: *Provided, however,* That the presence of said member of the said committee shall not be necessary at the examination of and counting of the ballots cast by means of machines in Dubuque County.

(10) That the report of each and all the committees or boards appointed for the purpose of examining the said machines, and the counting of the votes cast thereby, shall include any other matters or conditions which may in the opinion of the board or either of its members affect the regularity of the votes cast on the machines themselves.

(11) That there shall be subpoenaed to Washington all absentee ballots, cast by means of said voting machines and rejected ballots, and all registration books, poll books, and other books and documents of every character or kind whatsoever used in connection with the voting machines at the said election.

(12) That the counting board shall, with the county auditor, in each of said counties voting by machines identify each and all of the packages of ballots and the books and other documents so subpoenaed and transmitted, which said identification shall be evidence thereof.

(13) That there shall be subpoenaed and transmitted to the Sergeant at Arms of the Senate of the United States all paper ballots from each and every precinct of the State of Iowa where such

ballots were employed in their original packages as are now in the possession of the several county auditors, together with all registration books, poll books, tally sheets, and other books and documents of every kind and character whatsoever used or employed in connection with the general election held on the 4th day of November, A.D. 1924, aforesaid.

(14) That the packages of ballots and each and all of them transmitted to the Sergeant at Arms shall be identified by the auditor of each and every county and may be further identified by two assistants, one of whom shall represent the contestant and the other the contestee, and the said registration books, poll books, tally sheets, and other books and documents so transmitted shall be similarly identified.

DANIEL F. STECK, *Contestant.*
J. M. PARSONS, *Counsel for Contestant.*
SMITH W. BROOKHART, *Contestee.*
J. G. MITCHELL, *Counsel for Contestee.*

Subsequently this was supplemented by the following second stipulations.

STIPULATION FOR SUBPEONA OF BALLOTS

In the Senate of the United States. In the matter of the contest of Daniel F. Steck against the seating of Smith W. Brookhart in the United States Senate as Senator from Iowa

To the Senate of the United States:

It is hereby stipulated and agreed by and between the parties to the above-entitled contest as follows:

(1) That the Sergeant at Arms of the Senate of the United States shall forthwith address a subpoena to each and all the county auditors of each and every county of the State of Iowa, a list of which said counties with the county seats thereof, the said county seats being the official residences of the said county auditors, is hereto attached, marked "Exhibit A," and made a part hereof.

(2) That the said subpoena shall provide:

(*a*) That the said county auditors and each of them are commanded to transmit unto the said Sergeant at Arms all of the following books, papers, and documents in their custody used in their respective counties and in each and every precinct thereof in connection with and for the purposes of the general election held in the said State of Iowa on the 4th day of November, A. D. 1924, viz: All registration books, poll books, official canvass books, tally-sheet books, and other books of every kind or character; all paper ballots and their envelopes or other containers; all absentee ballots, together with affidavits made by persons casting their votes by means of such absentee ballots; and all other papers and documents of every kind and character and their envelopes or other containers:

(*b*) That the said county auditors, so long as the said books, papers, and documents remain in their possession, shall take full charge and custody thereof, and restrain and prevent any and all persons from in any manner interfering or tampering therewith, except as is hereinafter specifically provided:

(*c*) That immediately prior to the transmission of the said books, papers, and documents the envelopes and containers thereof shall be examined by the county auditor in the presence of a representative of each of the contesting parties, who shall be designated for that duty by the respective counsel for the said parties, and the said examiners and county auditor shall sign their names on each and every envelope or container, which shall be sealed in such manner that they may not be tampered with or opened except by authority of the Committee on Privileges and Elections of the United States Senate without evidence of such tampering or opening appearing thereon. Should there appear any evidence of opening or tampering with any original package prior to the said examination by said county auditor and examiners, notation of the character thereof shall be made upon the envelope or container by the said county auditor and examiners, or either of them.

(*d*) That the said books, papers, and documents shall, immediately upon their certification as provided in the immediately preceding paragraph (*c*), be securely packed in substantial cases, the said cases and each of them to be certified in manner and form, so far as applicable, as provided

for individual envelopes and containers, and thereupon forwarded by express to the said Sergeant at Arms at the city of Washington, D. C.

Dated this 30th day of March, A. D. 1925.

DAN F. STECK,
By J. M. PARSONS, *of Counsel*
SMITH W. BROOKHART
By J. G. MITCHELL, *of Counsel.*

Under these stipulations and subsequent agreements all ballots cast in the election were brought to Washington and recounted.

One of the questions rising out of the recount was the charge by the incumbent that ballots reaching Washington with broken seals were subject to the presumption of having been tampered with.

On this contention the committee find as to fact:

It is true that some reached Washington in packages the seals to which had been loosened or broken, but evidently and conclusively this occurred in transporting in the mails. It is contended, however, by counsel for incumbent, that even this condition raised a presumption that they might have been tampered with, or could have been tampered with, and, therefore, that they could not be received.

The committee take the position, however, that:

Inasmuch as the law of Iowa required the election officials to seal and transmit all the ballots, poll books, and tally sheets to the county auditors, and required that the county auditors should keep and preserve them after they were received, it seemed to your committee that this presumption would rebut and overcome the presumption suggested by counsel for incumbent.

In this connection the question as to the burden of proof is thus treated by the committee:

The committee calls attention to the denial in the response of incumbent to all acts of irregularity and fraud set up in the petition of contestant. Therefore, any facts relied upon by incumbent would have to be affirmatively shown.

No evidence was offered to support the suggestion of the incumbent. No acts of fraud were alleged or proved, or were sought to be proved. No witness was introduced to establish such an issue, nor were any pretended to be available.

In fact, counsel for incumbent admitted that he knew of no acts or circumstances, other than the unsealed packages, to sustain such a presumption.

Obviously no burden rested upon the contestant to refute the suggestion of counsel for incumbent. This view is sustained by not only the courts of Iowa but by those of most of the jurisdictions of the United States.

Numerous authorities are cited by the Committee in support of this position and the report continues:

These cases answer the contention of incumbent regarding the absence of proof that the ballots were legally preserved.

A substantial compliance with the laws of Iowa has been shown in this, that the ballots were found in the custody of the various county auditors, the legal custodians of the ballots, and that out of the large number of Iowa precincts in only two do the county auditors show, in compliance with the stipulation of the parties, that there was any defect in the envelopes in which the ballots were contained. This showing makes a prima facie case, and no effort was made by incumbent to amend his pleading or to overturn this presumption.

Under the Iowa law it was not open to incumbent to suggest the existence of a mere possibility that the ballots were tampered with, but he would have been compelled to offer evidence.

showing that the ballots had been in actual point of fact tampered with. That he did not offer to do.

This position is vigorously combated by the minority who insist:

The burden of proof is on the contestant to show that the ballots, when they reached here, were in the same condition as they were in when the judges of election delivered them to the county auditors. This is not a technical objection. It is based upon the statute referred to with reference to the duty of the county auditor in preserving ballots, upon the stipulations agreed upon by the parties, and upon well-known principles of law.

Unless the contestant meets this burden, the official count made by the returning officers, upon which a certificate of election was given to Brookhart, must stand. The certificate of election gives him a prima facie right to a seat in the Senate, and that prima facie right can be overturned only upon positive proof that he did not receive a plurality of the votes.

It is apparent from the face of the record that the law was not complied with in many instances. Two county auditors made a notation on the bags containing the ballots to the effect that they were unsealed at the time they prepared them for mail. Sixty-seven bags of ballots came to Washington unsealed. There were 1,068 precincts in which there was a discrepancy between the number of names on the polling list and the number of ballots found in the boxes when they were counted here. In one precinct, there were 198 missing ballots; in another precinct there were 20 ballots missing. Later, a batch of ballots were sent from that precinct to the committee, thus showing conclusively that the ballots at that precinct had not been kept together and safely preserved as required by statute. These instances of discrepancies and shortages of ballots are referred to, in this connection, only to show that the law was not complied with with reference to the preservation of ballots.

In these circumstances, it can not be said that the contestant has met the burden the law places upon him to prove that the ballots were kept as required by statute and that they are the identical ballots cast at the election. Because of the failure to make such proof, a recount of the ballots should not have been made.

The majority and minority further disagree as to the doctrine of intention of voters. The majority adopt this policy:

In determining for whom the votes included under the remaining classes should be counted, your committee sought to ascertain the true intent of the voters. In reaching. this conclusion, it took into consideration every circumstance that might shed any possible light upon such intent. It disregarded all claims put forward to disfranchise the voter, either by a contention that certain marks were distinguishing marks, or that the voter had not complied technically with the provisions of the statute.

And in ascertaining the intent of the voter they are guided by the further rule that:

In any and all cases of doubt the advantage was given the incumbent, because he had the certificate of nomination.

The minority, while tacitly concurring as to the rule followed by the majority in case of doubt, dissent from the "rule of intention of voters" promulgated by the majority:

It is contended by the majority that the "rule of the intention of the voter" should be followed. Grant that, but how is "the intention of the voter" to be determined? The intention of the voter must be found by an examination of his ballot, viewed in the light of the law of the State informing the voter how to mark his ballot.

The majority do not agree to this opinion, and proceed to reach a conclusion without regard to the law aliende the ballot.

The true rule of law is that if the intention of the voter is manifest from what appears on the face of his ballot, in the light of the law under which it was cast, it must be counted for the candidate for whom it appears to have been cast.

No evidence is permissible to explain a ballot which is unambiguous on its face. Ballots that are ambiguous may be explained by extrinsic evidence.

It will likely be admitted by each member of the majority that under the law of Iowa, these 1,344 votes should be counted for Brookhart. But they are not counted for him because of disaffection in the Republican Party in Iowa and cordial dislike of Brookhart by many members of that party.

So, the majority decided that it had a right to take into consideration this condition and to refuse to count a ballot for Brookhart, which under the law of Iowa he was entitled to have counted for him.

No voter of any of these ballots had testified as to his intention. The majority entered into the broad field of surmise and speculation, and in the face of the law, declared that the voter, although he marked his ballot under the provisions of the law and thus cast a vote for Brookhart, did not intend to do so.

Text writers on "Elections" and cases almost without number support the contention that is made with reference to the legal propositions advanced here. It is not deemed necessary to cite them. Indeed, it is to be doubted whether there can be found any respectable authority to the contrary.

It was stated by the majority in the consideration of the matter in the committee that many of these 1,344 ballots are what is called a "mixed ballot." That does not prevent those from being counted for Brookhart. Sections 812, 814, and 815 of the Iowa Code settle this in his favor.

It is only by holding that a State has no right to pass any law on the subject of voting for a Senator, or if it does enact any such law it shall not be given consideration by the Senate, that the 1,344 votes can be denied Brookhart. Being unable to agree to any such doctrine and being unwilling to disfranchise a voter of Iowa who has followed the law of his State in marking his ballot, I contend that a grave injustice will be done, not only to Brookhart, but to the voters themselves, and that a precedent will be established that may rise up in later times to haunt us and produce a harmful and disastrous effect upon many States to the end that such States may be denied rights given under the Constitution of the United States.

The minority views conclude:

Reviewing the whole matter, it appears:

1. That if no recount should be had, on the face of the returns Brookhart has a plurality.

2. That if a recount should be had in the machine counties and in the precincts where the ballots corresponded with the names on the polling lists, Brookhart has a plurality, irrespective of the 1,344 votes that the committee refused to count for him.

3. That on a proper count of the legal ballots before the committee, in the light of the law of Iowa, Brookhart has a plurality.

Therefore, it is respectfully submitted that he should be declared to be entitled to a seat in the United States Senate as a Senator from the State of Iowa

However, the majority maintain:

Your committee, having found that the contestant, Daniel F. Steck, received a plurality of all the votes cast for United States Senator in the State of Iowa at the election held on November 4, 1924, and that the incumbent, the Hon. Smith W. Brookhart, did not receive a majority of the votes cast at said election, it therefore recommends that the Senate shall declare that the Hon. Smith W. Brookhart was not elected a Senator from the State of Iowa at the election held

on November 4, 1924, and is not entitled to a seat as a Senator from said State, but that the Hon. Daniel F. Steck did receive a plurality of the votes cast for United States Senator from said State at the said election, and is entitled to a seat as a Senator from said State.

In conformity with this finding the following resolution was offered in the Senate, and taken up for consideration on April 6.[1]

Resolved, That Daniel F. Steck is hereby declared to be a duly elected Senator of the United States from the State of Iowa for the term of six years, commencing on the 4th day of March, 1925, and is entitled to be seated as such.

To this resolution the following substitute was proposed:

Resolved, That Smith W. Brookhart is hereby declared to be a duly elected Senator of the United States from the State of Iowa for the term of six years, commencing on the 4th day of March, 1925, and is entitled to a seat as such.

Debate continued intermittently until April 12, when the substitute was rejected and the resolution was agreed to without amendment, yeas 45, nays 41.

173. The Senate election case of Gerald P. Nye, from North Dakota, in the Sixty-ninth Congress.

Instance wherein the Senate, overruling the recommendation of its committee, seated a Senator designate whose credentials the committee had reported to be invalid.

The sufficiency of authorization conferred by a State statute on the State executive to appoint a United States Senator under the provisions of the seventeenth amendment to the Constitution.

A resolution determining title to a seat in the Senate raises a question of the highest privilege and takes precedence over any other order.

On January 4, 1926,[2] Mr. Guy D. Goff, of West Virginia, on behalf of the Committee on Elections and Privileges, proposed to submit the following resolution:

Resolved, That Gerald P. Nye is not entitled to a seat in the Senate of the United States as a Senator from the State of North Dakota.

Mr. C. C. Dill, of Washington, rising simultaneously, claimed the floor in debate.

The Vice President[3] recognized Mr. Goff and said:

The Secretary will read the resolution reported by the Senator from West Virginia. It relates to a question of the highest privilege and takes precedence over any other order.

Mr. Nye had presented credentials in regular form certifying to his appointment by the Governor of the State of North Dakota to fill a vacancy, and the question in the case turned on the governor's authority to fill the vacancy under the State law, and the interpretation of the provisions and requirements of the seventeenth amendment to the Constitution of the United States in construing that law.

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[1] Record, pp. 6859–7281.

[2] First session Sixty-ninth Congress, Record, p. 1408.

[3] Charles G. Dawes, Vice President.

The act of March 15, 1917, chapter 249 of the Laws of the State of North Dakota, provided:

Be it enacted by the Legislative Assembly of the State of North Dakota:

(1) That section 696 of the Compiled Laws of North Dakota for 1913 be amended and reenacted to read as follows:

696. Vacancies, how filled: All vacancies, except in the office of a member of the legislative assembly, shall be filled by appointment as follows:

1. In the office of State's attorney in which a vacancy has occurred by reason of removal under section 695 of the Compiled Laws of North Dakota for the year 1913, by the board of county commissioners by and with the advice and consent of the governor.

2. In county and precinct offices by the board of county commissioners, except vacancies in such board.

3. In offices of civil townships, by the justices of the peace of such township, together with the board of supervisors or a majority of them, and if a vacancy occurs from any cause in the board of supervisors, the remaining member of the board shall fill such vacancy.

4. In State and district offices by the governor.

(2) All sets or sections in conflict herewith are hereby repealed.

In the report of the Committee on Privileges and Elections, filed on December 16, 1925,[1] the majority took the view that the authority conferred by the statute was insufficient.

The majority say:

The act of March 15, 1917, supra, does not refer expressly or by implication to the office of United States Senator, and does not in the language used, in the light of the history of the act, disclose a clear legislative intent to incorporate into the laws of the State of North Dakota the provisions of the seventeenth amendment to the Constitution of the United States. Nowhere is express reference made to the Constitution of the United States, and nowhere in said act does the language used indicate that the Legislature of the State of North Dakota had the seventeenth amendment to the Constitution of the United States in mind when the act of March 15, 1917, supra, was passed. Certainly the reasonable presumption is that if the Legislature of North Dakota had intended to incorporate into the act of March 15, 1917, supra, the provisions of the seventeenth amendment to the Constitution of the United States, it would have given the executive of that State the power, as the seventeenth amendment provides, to make a temporary appointment only, until the people should fill the vacancy by election, and would not have given the executive power to fill the vacancy. The act of March 15, 1917, supra, in so far as it can be held by construction and intendment to confer upon the executive of the State of North Dakota, the power to make a temporary appointment, is in conflict with the seventeenth amendment to the Constitution of the United States, because it expressly, if it confers any power in the case of a United States Senator, confers the power to fill a vacancy, not the power to make a temporary appointment. It is only reasonable to assume that the Legislature of North Dakota would have noted the language employed in the applicable provisions of the seventeenth amendment to the United States Constitution and would, by the use of apt language, have conferred upon the executive the power to make temporary appointments in the case of a vacancy in the office of United States Senator and would not have premeditatedly exceeded the authority delegated and the power conferred to fill vacancies.

The majority also fail to find authorization for the appointment of a United States Senator in the constitution of the State of North Dakota. The report says:

Obviously it can not be logically and legally asserted that the affirmative legislation contemplated by the seventeenth amendment can be found in the provisions of a constitution adopted and

[1] First session Sixty-ninth Congress, Senate Report No. 3.

ratified in 1889, approximately 24 years before the adoption of the seventeenth amendment to the United States Constitution. Then, again the power of the executive under section 78 of the constitution of North Dakota is limited to cases where "no mode is provided by the constitution or law for filling such vacancy." A mode for filling a senatorial vacancy, assuming the constitutional provision to be applicable, has been expressly provided by the seventeenth amendment to the Constitution of the United States, which is concededly the supreme law of the land, and which the Governor of the State of North Dakota is compelled to support. This amendment, in the absence of legislative action empowering him to make a temporary appointment, commands him to issue writs of election.

The majority therefore conclude:

It is therefore respectfully submitted that neither section 78 of the constitution of North Dakota nor the act of March 15, 1917, conferred any authority upon the executive of North Dakota either to make a temporary appointment or to fill a vacancy in the office of United States Senator by appointment; and that the Legislature of the State of North Dakota has not by due legislation conferred upon the governor of that State such appointive power as was delegated to it by the seventeenth amendment to the United States Constitution.

The minority, while dissenting sharply from the conclusion of the majority, differ as to the line of reasoning leading to that opinion.

Debate on the resolution continued on January 7, 8, 9, 11, and 12, when the Senate agreed, yeas 41, nays 39, to a substitute proposed by Mr. Hubert D. Stephens, of Mississippi, in the following form:

Resolved, That Gerald P. Nye is entitled to a seat in the Senate of the United States as a Senator from the State of North Dakota.

Thereupon Mr. Nye took the oath and assumed his seat in the Senate.

174. The election case of James M. Beck, of Pennsylvania, in the Seventieth Congress.

The right of a Member elect to take the oath being challenged, the Speaker directed him to stand aside temporarily.

The oath having been administered to other members elect, a resolution relating to the election of a Member elect temporarily denied administration of the oath was entertained as a matter of the highest privilege.

Discussion of the term "inhabitant" as a constitutional qualification for membership in the House.

Instance wherein the question of qualification was passed on after a Member elect had been sworn in on his prima facie showing.

A Member renting an apartment June 1, 1926, in the State from which elected November 6, 1926, and occupying it "one or more times each week" was held to be qualified, although owning at the time a summer home in another State and owning and maintaining a residence in the District of Columbia.

On December 5,1927,[1] the Speaker[2] directed the Clerk to call the roll by States for the administration of the oath of office to Members and Delegates.

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[1] First session Seventieth Congress, Record, p. 8.

[2] Nicholas Longworth, of Ohio, Speaker.

The State of Pennsylvania had been reached and the name of Mr. James M. Beck, of Pennsylvania, was called, when Mr. Finis J. Garrett, of Tennessee, rising in his place said:

Mr. Speaker, I object to the oath at this time being administered to Mr. James M. Beck, a Representative elect from the State of Pennsylvania, upon the ground that there is a question as to his eligibility under the Constitution of the United States, there being a question as to whether he was an inhabitant of the State of Pennsylvania at the time of his election, as is required by the Constitution. Later I shall present a resolution upon the subject.

The Speaker directed:

The Chair asks the gentleman from Pennsylvania to temporarily step aside.

The call of the roll having been resumed and completed, Mr. Garrett offered as privileged, the following resolution:

Whereas it is charged that James M. Beck, a Representative elect to the Seventieth Congress from the State of Pennsylvania, is ineligible to a seat in the House of Representatives for the reason that he was not at the time of his election an inhabitant of the State of Pennsylvania in the sense of the provision of the Constitution of the United States (par. 5 of sec. 2, Art. I) prescribing the qualifications for Members thereof; and whereas such charge is made through a Member of the House and on his responsibility as such Member, upon the basis, as he asserts, of records and papers evidencing such ineligibility:

Resolved, That the question of the prima facie right of James M. Beck to be sworn in as a Representative from the State of Pennsylvania of the Seventieth Congress, as well as of his final right to a seat therein as such Representative, be referred to Committee on Elections No. 2; and until such committee shall report upon and the House decide such question and right, the said James M. Beck shall not be sworn in nor be entitled to the privileges of the floor; and said committee shall have power to send for persons and papers and examine witnesses on oath relative to the subject matter of this resolution.

After debate Mr. Garrett moved the previous question on the resolution, and the yeas and nays being ordered, it was decided in the negative, yeas 159, nays 245. So the previous question was refused.

Mr. Bertrand H. Snell, of New York, then proposed as a substitute:

Resolved, That the gentleman from Pennsylvania, Mr. Beck, be now permitted to take the oath of office.

The substitute was agreed to and, the resolution as amended having been adopted, Mr. Beck came forward and took the oath.

Following the organization of the House, Mr. Garrett offered this resolution which was entertained as privileged and agreed to:

Whereas it is charged that James M. Beck, a Representative elect to the Seventieth Congress from the State of Pennsylvania, is ineligible to a seat in the House of Representatives for the reason that he was not at the time of his election an inhabitant of the State of Pennsylvania in the sense of the provision of the Constitution of the United States (par. 5 of sec. 2, Art. I) prescribing the qualifications for Members thereof; and

Whereas such charge is made through a Member of the House, and on his responsibility as such Member upon the basis, as he asserts, of records and paper evidencing such ineligibility:

Resolved, That the right of James M. Beck to a seat in the House of Representatives of the Seventieth Congress be referred to the Committee on Elections No. 2, which committee shall have power to send for persons and papers and examine witnesses on oath relative to the subject matter of the resolution.

On March 17, 1928,[1] Mr. Bird J. Vincent, of Michigan, from the Committee on Elections No. 2 submitted its report.

The report points out that the sole question raised is whether Mr. Beck at the time of his election was an inhabitant of Pennsylvania within the purview of paragraph 2 of section 2, Article I of the Constitution of the United States. No other issued is involved.

The report finds as to facts that Mr. Beck was born in Pennsylvania and resided there continuously until 1900 when he removed to Washington, D. C., and later to New York City, returning in 1920 to Washington where he established his residence and purchased a home which he still owns. On June 1, 1926, he leased an apartment in Philadelphia, which he "occupied one of more times each week."

The report also shows that from 1924, when he voted in New York, he did not vote again until in Philadelphia in September, 1927; that he paid a poll tax of 25 cents in Philadelphia in September, 1927, but has paid his income taxes in Washington; that he has maintained membership in social and civic organizations in Pennsylvania but is carried on the roll of all but one as a nonresident member; that he has registered in hotels as residing at Washington and that his automobiles carry license plates issued by the District of Columbia.

The report quotes the entire debate from the Madison Papers attending the adoption of the clause requiring residence in the State as a qualification for membership in Congress, and deduces:

> It is evident that in this debate the framers of the Constitution were seeking for a nontechnical word, the main purpose of which would be to insure that the Representative, when chose, from a particular State should have adequate knowledge of its local affairs and conditions. Mr. Madison, Mr. Wilson, and Mr. Mercer, all emphasized that it was not desired to exclude men who had once been inhabitants of a State and who were returning to resettle in their original state, or men who were absent for considerable periods on public or private business. The convention by vote deliberately declined to fix any time limit during which inhabitancy must persist.

The majority hold:

> To be an inhabitant within the Constitution, it seems clear that one must have, first, as a matter of fact, a place of abode, and, second, that this place of abode be intended by him as his headquarters; the place where his civic duties and responsibilities center; the place from which he will exercise his civic rights. We think that a fair reading of the debate on this paragraph of the Constitution discloses that it was not intended that the word "inhabitant" should be regarded in a captious, technical sense. Can it be that the fathers intended that to determine whether one was an inhabitant of a particular place that the number of days which he actually spent there in a given period should be counted and his absences balanced against the periods of his physical presence? Can it be that the fathers intended that the tenure of his holding of a particular abode, whether it be by fee-simple title or by leasehold, should govern the question as to whether it was the place of inhabitance? We feel positive that such a construction would in no sense carry out the meaning which the framers of the Constitution regarded as contained in this word. Further, such a technical attempt at construction would result in the very confusion which the debate showed the framers hoped to avoid by the rejection of the word "resident." We think that a fair interpretation of the letter and the spirit of this paragraph with respect to the word "inhabitant" is that the frames intended that for a person to bring himself within the scope of its meaning he must have and occupy a place of abode within the particular State in which he claims inhabitancy,

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[1] House Report No. 975.

and that he must have openly and avowedly by act and by word subjected himself to the duties and responsibilities of a member of the body politic of that particular State.

The majority therefore conclude:

We do not think that the framers of the Constitution intended by the use of the word "inhabitant" that the anomalous situation might ever arise that a man should be a citizen, a legal resident, and a voter within a given State and yet be constitutionally an inhabitant elsewhere. If any such conclusion could be reached we might have the peculiar result in this country of a man being a resident, a citizen, and a voter in a given State, and yet within the constitutional sense barred from the right of representing a district in that State in Congress, but having the right to represent a district in another State in Congress. No such interpretation can fairly be read into this provision. We think that Mr. Beck having legally subjected himself to the duties and responsibilities of a citizen and an inhabitant of Pennsylvania, having maintained an habitation there, and having occupied the same regularly, though not continuously, is also entitled to the rights of a citizen and an inhabitant of Pennsylvania. We think that such a finding is entirely within the meaning, the spirit, and the letter of the Constitution.

The minority place an entirely different interpretation on the account given in the Madison papers and note that:

On the 8th of August, 1787, in the Constitutional Convention, the committee of detail struck out of the text at this place the word "resident" and substituted the word "inhabitant." The motion was made by Mr. Sherman and seconded by Mr. Madison, who thought the latter less vague, and would permit absence for a considerable time on public or private business without disqualification. They were trying to get away from the abuse being made of the loose construction of "resident" by personal enemies of those who sought to qualify. There is no suggestion of an uncommon meaning to be given the word in their use of it here. The construction placed on these statements of Mr. Madison and others by Mr. Beck is to apply it to his case wherein he was absent from Pennsylvania 23 years, under his own admission, and yet he would not be disqualified on the grounds of inhabitancy.

Continuing its application to the pending case, the minority say:

The word was substituted for "resident", and the reason clearly given by the great Madison was to allow a temporary absence from a true domicile, not to place it on a casual presence in a temporary domicile.

Mr. Beck was not a qualified elector of the State of Pennsylvania at the time he voted in the primary of September 1927, nor at the time of his election to Congress. The constitution of that State requires that an elector must be a "resident" of the State for 6 months next before voting in his case, and 12 months for one who has never before been a citizen of Pennsylvania. And the courts of that State have repeatedly and uniformly held as in Fry's election case:

"When the Constitution declares that the elector must be a resident of the State for one year, it refers beyond question, to the State as his home or domicile, and not as the place of a temporary sojourn."

The report was taken up for consideration in the House on January 8.[1] At the conclusion of the debate a substitute resolution offered by Mr. Gordon Browning, of Tennessee, denying Mr. Beck's title to his seat was rejected, yeas 78, nays 248, and the resolution, declaring him "entitled to a seat in the Seventieth Congress as a Member of the House of Representatives from the first congressional district of the State of Pennsylvania", was agreed to.

175. The Kansas election case of Clark v. White, in the Seventieth Congress.

[1] Record, p. 1351.

Contestant having failed to serve notice of contest within the prescribed time, the committee recommended that the case be dismissed.

The committee exercises its discretion as to the amount of fees allowed in contested-election cases.

On February 21, 1928,[1] Mr. Don B. Colton, of Utah, presented the report of the Committee on Elections No. 1 in the Kansas case of W. H. Clark *v.* Hays B. White.

The official returns gave contestant 31,065 votes and contestee 31,159 votes, a plurality of 94 votes for the sitting Member.

The pleadings in the case are summarized in the report as follows:

> The contestant served on the contestee a notice of contest, a copy of which notice and attached petition was in due course filed with the Clerk of the House of Representatives.
>
> To said notice and petition the contestee filed his answer setting forth that "by his laches, delay, and failure to comply with the statute promulgated in this behalf by the Congress, or to serve on the contestee any notice of intention to contest prior to December 11, 1926, the contestant is precluded from asserting or proceeding with said contest, and that said contest be dismissed.
>
> Thereafter nothing was done except that the attorneys for the parties appeared before your committee and made brief statements and requested that the contest be dismissed.

The committee therefore finds:

> Your committee therefore finds, after a careful analysis of this case and in conformity with congressional precedents, that this contested-election case should be dismissed,

and recommend the usual resolutions declaring that the contestant was not elected and that the contestee was elected and is entitled to his seat.

In the course of the debate on the report in the House on February 23[2] Mr. Colton, the chairman of the committee, referred to the fees asked in the case and said:

> The committee feels that we should take this occasion to say that the fees in this ease are allowed as we believe a fair and impartial judge would allow such fees for the actual services rendered. In this case, particularly on one side, there appears to have been very little work done, and yet a claim was submitted for more then the entire amount authorized by Congress. The committee has not allowed the amount that was claimed. We went over the matter carefully and allowed what we believed was a fair compensation for the work which was done; in fact, I believe it is a generous allowance, and yet it is less than one-half of the amount that was claimed. We expect to follow the practice of allowing a reasonable fee only, and that for service actually rendered.

Mr. Edward E. Eslick, of Tennessee, the ranking minority member of the committee, corroborated:

> We took up the question of fees and costs, as the chairman has said, just as an impartial judge would. This case was not viewed from the political standpoint, but in order that fairness might be done between the Government on the one hand and the contestant and the contestee on the other, both as to fees and expense account.
>
> There was no difference of opinion between the individual members of the committee and after going over and carefully investigating the expense items and the labor performed by the attorneys, this report comes to the House as a unanimous report, both on the seating of Mr. White and on the question of expenditures.

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[1] First session Seventieth Congress. House Report No. 717.

[2] Record, p. 3546.

The resolutions recommended by the committee were unanimously agreed to.

176. The New York election case of Hubbard v. LaGuardia, in the Seventieth Congress.

The contestant having withdrawn from the contest by letter duly certified, the committee reported a resolution confirming the title of the sitting Member.

On February 28, 1929,[1] Mr. Don B. Colton, of Utah, from the Committee on Elections No. 1, submitted the report of that committee on the case of Hubbard v. LaGuardia, in form, as follows:

The Committee on Elections No. 1, which has had under consideration the contested election case of H. Warren Hubbard *v.* Fiorello, H. LaGuardia, from the twentieth district of New York, reports as follows:

The contestant having withdrawn from the contest by a letter of abatement duly subscribed and sworn to before a notary public, we submit the following resolution for adoption:

Resolved, That Hon. Fiorello H. LaGuardia was duly elected a Representative from the twentieth congressional district of the State of New York to the Seventieth Congress and is entitled to his seat.

On March 1[2] the resolution was agreed to by the House without debate or division.

177. The West Virginia election case of Taylor v. England, in the Seventieth Congress.

An instance wherein irregularity of pleading as to time of filing was waived by consent of other party.

The House in adjudicating contested-election cases is not bound by State statutes prescribing details of election procedure.

On April 9, 1928[3] Mr. Charles L. Gifford, of Massachusetts, submitted the report of the Committee on Elections No. 3, in the election case of J. Alfred Taylor *v.* E. T. England, of West Virginia.

On the basis of the official returns, the incumbent had received a plurality of 217 votes.

The grounds of the contest as set forth by the contestant and briefed by the committee were—

(a) That several hundred ballots were cast which did not bear the signature of the clerks of election written in the manner prescribed by the West Virginia statute governing election procedure and which the election officials refused to canvass, tabulate, or count, although said ballots expressed the clear intent of the voter and consequently should have been counted, his contention being that if the ballots so rejected were to be counted they would give him a majority of the votes cast.

(b) That fraud was exercised by the proponents of the contestee in precinct no. 27, known as the Triangle precinct, and that all the votes cast in said precinct, which gave a majority therein of 385 for the contestee, should be rejected.

Irregularity in the pleadings is thus treated in the report:

Evidence was taken by depositions, the contestee's brief was filed on the 31st of December, 1927, and thereafter, to wit, on the 10th day of February, 1928, the contestant filed his reply brief,

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[1] First session Seventieth Congress, House Report No. 787.

[2] Record, p. 3862.

[3] First session Seventieth Congress, House Report No. 1181.

said brief being submitted after the expiration of the 30-day period prescribed for the filing thereof, but being accepted by your committee with the consent of the contestee.

After a full consideration of the issues thus presented the committee agreed unanimously that—

(1) The House of Representatives should not consider itself obligated to follow the drastic statute of the State of West Virginia, under the provisions of which all ballots not personally signed by the clerks of election in strict compliance with the manner prescribed had been rejected, but should retain the discretionary right to follow the rule of endeavoring to discover the clear intent of the voter. However, your committee further found that the contestant had not substantiated his allegation that if all the votes which had been rejected by the election officials on the ground stated were to be counted the result would be a majority in his favor.

(2) That neither the contestant nor the contestee had presented sufficient evidence to establish their mutual contentions that fraud had been practiced in various precincts, including the so-called Triangle precinct, the rejection of the votes cast in which would have been necessary if the contestant were to prevail, and that no votes should be thrown out because of fraud.

In accordance with these findings the committee agree:

That the contestant has not sustained the contentions which were the basis of his contest and begs to submit for adoption the following resolution:

"Resolved, That E. T. England was duly elected a Representative from the sixth district of West Virginia to the Seventieth Congress, and is entitled to his seat therein."

The resolution submitted by the committee was unanimously adopted by the House on April 12,[1] without debate.

178. The Minnesota election case of Wefald v. Selvig in the Seventieth Congress.

Instance wherein the contestant having failed to file testimony, the case abated.

The contestant having failed to prosecute his case according to law or to take testimony, the House took no further notice of his claim.

On December 14, 1927,[2] the Speaker laid before the House a communication from the Clerk transmitting papers in the contested-election case of Knud Wefald *v.* C. G. Selvig, of Minnesota, as follows:

SIR: I have the honor to inform the House that in the ninth congressional district of the State of Minnesota, at the election held on November 2, 1926, C. G. Selvig was certified as having been duly elected as a Representative in the Seventieth Congress, and his certificate of election in due form of law was filed in this office. His right to the seat was questioned by another candidate, Knud Wefald, who served notice on the returned Member of his purpose to contest the election. A copy of this notice, together with the reply of contestee, were filed in the office of the Clerk of the House, who also received the affidavit of contestee and of his counsel to the effect that no notice of taking depositions or of the introduction of proof of any kind was served upon contestee or upon his attorneys, and that more than 40 days elapsed from the date of service of contestee's answer. No testimony has been filed with the Clerk. The contest, therefore, appears to have abated.

The case was referred to the Committee on Elections No. 2, and no further record appears.

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[1] Record, p. 6298.

[2] First session Seventieth Congress, Record, p. 664.

179. The Senate election case of Frank L. Smith, of Illinois, in the Seventieth Congress.

Refutation of the doctrine that neither the Senate nor its committees have jurisdiction to pass upon the qualifications of a Senator elect prior to the administration of the oath of office.

Instance wherein the Senate declined to seat one whose election was declared to be tainted with fraud and corruption.

A candidate in whose behalf exorbitant sums of money were received and dispensed by personal agents and representatives with his knowledge and consent was held to be disqualified.

Instance wherein a Senator rising in his place objected to the swearing in of a Senator elect and offered resolution authorizing appointment of a committee to determine his qualifications and eligibility.

On December 16, 1926,[1] Mr. Henry F. Ashurst, of Arizona, rising in his place in the Senate, said:

Mr. President, I send to the desk a resolution and I ask that the same be read. Telegraphic dispatches announce that the Governor of Illinois has appointed Mr. Frank L. Smith to be a Senator of the United States from the State of Illinois to fill the vacancy created by the death of former Senator William B. McKinley. It is difficult to believe that Mr. Smith, under the circumstances, and in view of the testimony and record in the case, will accept this appointment.

I ask that the resolution be read and lie on the table.

The Clerk read:

Resolved, That the qualifying oath be not administered to Hon. Frank L. Smith, the Member designate, and that the special committee appointed under and by authority of Senate Resolution 195, Sixty-ninth Congress, first session, be, and it hereby is, directed to report to the Senate at the earliest convenient date such recommendations in the premises as may to said special committee seem warranted.

The resolution was ordered to lie on the table.

On January 18, 1927[2] Mr. Charles S. Deneen, of Illinois, sent to the desk the credentials of Mr. Smith certifying to his appointment as Senator from the State of Illinois by the governor of that State to fill a vacancy and submitted the following resolutions:

Whereas Frank L. Smith, claiming to be a Senator from the State of Illinois, has presented his credentials, which are regular and in due form, and there being no contestant for the seat: Therefore be it

Resolved, That the oath of office be now administered to the said Frank L. Smith: Be it further

Resolved, That his credentials and all charges which may be filed against him and all objections that may be raised as to his right to a seat in the Senate be, and the same are hereby, referred to the Committee on Privileges and Elections, and that committee is hereby directed to hear and determine all charges and objections which may be submitted and to report to the Senate after due inquiry and as early as convenient.

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[1] Second session Sixty-ninth Congress, Record, p. 554.

[2] Record, p. 1911.

In support of the resolution Mr. Deneen argued that in accordance with the precedents a Senator designate presenting proper credentials must be sworn in before consideration could be given to any question of qualifications.

However, after extended debate, the Senate overruled that contention and agreed to a substitute proposed by Mr. James A. Reed, of Missouri, in the following form:

Resolved, That the question of the prima facie right of Frank L. Smith to be sworn in as a Senator from the State of Illinois, as well as his final right to a seat as such Senator, be referred to the Committee on Privileges and Elections; and until such committee shall report upon and the Senate decide such question and right, the said Frank L. Smith shall not be sworn in or be permitted to occupy a seat in the Senate.

The said committee shall proceed promptly and report to the Senate at the earliest possible moment.

The report [1] of the committee was submitted on the last day of the session and reported briefly that:

Owing to the illness of Mr. Smith, the committee was unable to complete its hearings and the matter is now pending before your committee.

On the first day [2] of the succeeding Congress, when Mr. Smith, having filed credentials certifying to his election, presented himself to take the oath, Mr. George W. Norris, of Nebraska, objected and offered resolutions concluding with the following:

Resolved, That the claim of the said Frank L. Smith to a seat in the United States Senate is hereby referred to the said special committee of the Senate, with instructions to grant such further hearing to the said Frank L. Smith, and to take such further evidence on its own motion as shall be proper in the premises, and to report to the Senate at the earliest possible date; and that until the coming in of the report of said committee and until the final action of the Senate thereon the said Frank L. Smith be, and he is hereby, denied a seat in the United States Senate: Provided, That the said Frank L. Smith shall be accorded the privileges of the floor of the Senate for the purpose of being heard touching his right to receive the oath of office and to membership in the Senate.

After debate extending through several days the Senate agreed to the resolutions on December 7, 1927—yeas 53, nays 28.

Mr. Reed, from the special committee to which the case was thus referred, submitted the report of the committee on January 17, 1928.[3]

The report thus tersely disposes of the question of jurisdiction of the Senate prior to the administration of the oath of office:

The attorney general of Illinois, State Senator Dailey, and Mr. Smith all took the position that until and unless Mr. Smith was sworn in as a United States Senator neither the special committee nor any regular committee of the Senate, nor the Senate itself, had the power or jurisdiction to pass upon the qualifications of Mr. Smith, or to take any action whatsoever in relation to his claim to a seat.

It will be observed that nothing was presented by Mr. Smith or on his behalf which has not in substance been heretofore presented upon the floor of the Senate. He offered no new evidence; he presented no new argument; he simply stood upon the claim that the committee and the Senate were alike without jurisdiction to consider and pass upon his right to a seat in the Senate until it shall have first seated him as a Senator.

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[1] Second session Sixty-ninth Congress, Senate Report No. 1717.

[2] First session, Seventieth Congress, Record, p. 3.

[3] First session, Seventieth Congress, Senate Report No. 92.

The committee disregard this contention and recommend the adoption of resolutions which after slight modification, were agreed to by the Senate on January 19, 1928, as follows:

Whereas on the l7th day of May, 1926, the Senate passed a resolution creating a special committee to investigate and determine the improper use of money to promote the nomination or election of persons to the United States Senate, and the employment of certain other corrupt and unlawful means to secure such nomination or election.

Whereas said committee in the discharge of its duties notified Frank L. Smith, of Illinois, then a candidate for the United States Senate from that State, of its proceeding, and the said Frank L. Smith appeared in person and was permitted to counsel with and be represented by his attorneys and agents

Whereas the said committee has reported

That the evidence without substantial dispute shows that there was expended directly or indirectly for and on behalf of the candidacy of the said Frank L. Smith for the United States Senate the sum of $458,782; that all of the above sum except $171,500 was contributed directly to and received by the personal agent and representative of the said Frank L. Smith with his full knowledge and consent; and that of the total sum aforesaid there was contributed by officers of large public service institutions doing business in the State of Illinois or by said institutions the sum of $203,000, a substantial part of which sum was contributed by men who were nonresidents of Illinois, but who were officers of Illinois public-service corporations.

That at all of the times aforesaid the said Frank L. Smith was chairman of the Illinois Commerce Commission, and that said public-service corporations commonly and generally had business before said commission, and said commission was, among other things, empowered to regulate the rates, charges and business of said corporations.

That by the statutes of Illinois it is made a misdemeanor for any officer or agent of such public-service corporations to contribute any money to any member of said commission, or for any member of said commission to accept such moneys upon penalty of removal from office.

That said Smith has in no manner controverted the truth of the foregoing facts, although full and complete opportunity was given to him, not only to present evidence but arguments in his behalf; and

Whereas the said official report of said committee and the sworn evidence is now and for many months has been on file with the Senate, and all of the said facts appear without substantial dispute Now therefore be it

Resolved, That the acceptance and expenditure of the various sum of money aforesaid in behalf of the candidacy of the said Frank L. Smith is contrary to sound public policy, harmful to the dignity and honor of the Senate, dangerous to the perpetuity of free government, and taints with fraud and corruption the credentials for a seat in the Senate presented by the said Frank L. Smith; and be it further

Resolved, That the said Frank L. Smith is not entitled to membership in the Senate of the United States, and that a vacancy exists in the representation of the State of Illinois in the United States Senate.

180. The Senate election case of William B. Wilson v. William S. Vare, of Pennsylvania, in the Seventieth Congress.

A Senator elect, challenged as he was about to take the oath, stood aside upon the suggestion of the Vice President.

An instance wherein the Senate declined to permit the oath to be administered to a Senator-elect pending the examination of his qualifications.

The right of a Senator elect to take the oath having been denied pending an investigation, the Senate by resolution conferred on him the privilege of appearing on the floor in his own behalf.

The consideration of an election case is a matter of the highest privilege.

Instance wherein the Senate condemned the excessive use of money in a primary election.

The Senate, as a continuing body, may continue its committees through the recess following the expiration of a Congress.[1]

A select committee created during a previous Congress was declared by resolution to have continued in full force and operation during the interim between the two Congresses.

On May 19, 1926,[2] the Senate agreed to a resolution providing for the appointment of a select committee to investigate expenditures in Senatorial primaries and general elections. This resolution[3] was subsequently supplemented by the passage of the following:

Whereas William B. Wilson, of the State of Pennsylvania, has presented his petition to the Senate of the United States contesting the election of William S. Vare as a Senator from Pennsylvania in the election held on the 2d day of November, 1926; and

Whereas the said William B. Wilson charges in his petition fraudulent and unlawful practices in connection with the nomination and in connection with the alleged election of the said Vare as Senator from the State of Pennsylvania, and that unless preserved for the use of the Senate certain evidence relating to said charges and said election will be lost or destroyed; and

Whereas the special committee of five organized under Senate Resolution Numbered 195, Sixty-ninth Congress, first session, by direction of the Senate has entered upon an investigation pertaining to alleged corrupt practices in the election held November 2, 1926, and in the primary preceding it in the State of Pennsylvania: Therefore be it

Resolved, That the special committee of five constituted under Senate Resolution Numbered 195, Sixty-ninth Congress, first session, in addition to and not in detraction from the powers conferred in said resolution, be, and it is hereby, authorized and empowered:

(1) To take possession, in the presence of the said William S. Vare or his representative if the said William S. Vare desires to be present or to have a representative present, and preserve all ballot boxes and other containers of ballots, ballots, return sheets, voters' check lists, tally sheets, registration lists and other records, books, and documents used in said senatorial election held in the State of Pennsylvania on the 2d day of November, 1926.

(2) To take and preserve all evidence as to the various matters alleged in said petition, including any alleged fraud, irregularity, unlawful expenditure of money, and intimidation of voters or other acts or facts affecting the result of said election. Sixty-ninth Congress, first session, with respect to the subject matter of that resolution.

(3) That said committee is hereby vested with all powers of procedure with respect to the subject matter of this resolution that said committee possesses under Resolution Numbered 195.

(4) That the Sergeant at Arms of the Senate and his deputies axe directed to attend the said special committee and to execute its directions. That the said special committee may appoint subcommittees of one or more members with power and authority to act for the full committee in taking possession of evidence and in the subpoenaing of witnesses and taking testimony.

Resolved further, That the expenses incurred in carrying out this resolution shall be paid from. the contingent fund of the Senate upon vouchers ordered by the committee or any subcommittee thereof and approved by the chairman of the committee, the cost of same not to exceed $15,000 in addition to the moneys heretofore authorized to be expended.

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[1] See see. 4544 of Hinds' Precedents.

[2] First session Sixty-ninth Congress, Record, p. 9677.

[3] Second session Sixty-ninth Congress, Record, p. 1413.

The committee thus created failing to conclude its investigations, and a question having arisen as to the continuance of the authority of the committee beyond the expiration of the Congress, Mr. James A. Reed, of Missouri, on December 12, 1927,[1] offered the following resolution, which was agreed to, yeas 58, nays 21:

Resolved, That Senate Resolutions Numbered 195, 227, and 258 of the Sixty-ninth Congress, first session, and Senate Resolution Numbered 324 of the Sixty-ninth Congress, second session, be, and they hereby are, continued in force during the interim between the Sixty-ninth Congress and the Seventieth Congress and thereafter until the 30th day of December, 1927.

That the special committee created pursuant to Senate Resolution Numbered 195 of the Sixty-ninth Congress, first session, is authorized in its discretion, and/or at the request of either William S. Vare or William B. Wilson, to open any or all ballot boxes and examine and tabulate any or all ballots and scrutinize all books, papers, and documents which are now in its possession, or any that shall come into its possession, concerning the general election held in the State of Pennsylvania on the 2d day of November, 1926.

On December 5, 1927[2] while Senators were being sworn in, the name of Mr. Vare was called, whereupon Mr. George W. Norris, of Nebraska, rising to a question of privilege, objected to administration of the oath to Mr. Vare and offered, as privileged, a resolution declaring him not entitled to a seat in the Senate.

Mr. Charles Curtis, of Kansas, having requested that Mr. Vare stand aside until the oath should have been administered to Senators against whom there were no objections, the Vice President[3] said:

Without objection, the resolution will lie over, and the Senator elect from Pennsylvania win stand aside.

The resolutions proposed by Mr. Norris were considered at intervals and on December 9,[4] were agreed to in the following form:

Whereas on the 17th day of May, 1926, the Senate passed a resolution creating a special committee to investigate and determine the improper use of money to promote the nomination or election of persons to the United States Senate, and the employment of certain other corrupt and unlawful means to secure such nomination or election; and

Whereas said committee, in the discharge of its duties, notified William S. Vare, of Pennsylvania, then a candidate for the United States Senate from that State, of its proceeding and the said William S. Vare appeared in person and by attorney before said committee while it was engaged in making such investigation; and

Whereas the said committee has reported the evidence which without substantial dispute shows that at the primary election at which the said William S. Vare is alleged to have been nominated as a candidate for the United States Senate, there were numerous and various instances of fraud and corruption in behalf of the candidacy of the said William S. Vare, and that there was spent in behalf of the said William S. Vare in said primary election, by the said William S. Vare and his friends, a sum of money exceeding $785,000; and

Whereas the said William S. Vare has in no manner controverted the truth of the foregoing facts, although full and complete opportunity was given him, not only to present evidence but arguments in his behalf; and

Whereas the said official report of said committee and the sworn evidence taken by said committee is now and for many months has been on file in the Senate, and all of the said facts appear without substantial dispute; and

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[1] First session Seventieth Congress, Record, p. 488.

[2] First session Seventieth Congress, Record, p. 4.

[3] Charles G. Dawes, of Illinois, Vice President.

[4] First session Seventieth Congress, Record, p. 337.

Whereas on the 10th day of January, 1927, there was filed in the Senate an official communication from the then Governor of Pennsylvania, made and delivered to the Senate in pursuance of law, the following certificate:

COMMONWEALTH OF PENNSYLVANIA,
GOVERNOR'S OFFICE,
Harrisburg, January 8, 1927.

The PRESIDENT OF THE SENATE OF THE UNITED STATES,

Washington, D.C.

SIR: I have the honor to transmit herewith the returns of the election of United States Senator held on November 2, 1926, as the law of this Commonwealth directs.

I have the honor also to inform you that I have to-day signed and by registered mail delivered to Honorable William S. Vare a certificate which is as follows:

"To the PRESIDENT OF THE SENATE OF THE UNITED STATES:

"This is to certify that on the face of the returns filed, in the office of the secretary of the Commonwealth of the election held on the 2d day of November, 1926, William S. Vare appears to have been chosen by the qualified electors of the State of Pennsylvania a Senator from said State to represent said State in the Senate of the United States for the term of six years beginning on the 4th day of March, 1927."

The form of words customarily used for such certificates by the governors of this Commonwealth and the form recommended by the Senate of the United States both include certification that the candidate in question has been "duly chosen by the qualified electors" of the Commonwealth.

I can not so verify, because I do not believe that Mr. Vare has been duly chosen. On the contrary, I am convinced, and have repeatedly declared, that his nomination was partly bought and partly stolen, and that frauds committed in his interest have tainted both the primary and the .general election. But even if there had been no fraud in the election, a man who was not honestly nominated can not be honestly entitled to a seat.

The stealing of votes for Mr. Vare, and the amount and the sources of the money spent in his behalf, make it clear to me that the election returns do not in fact correctly represent the will of the sovereign voters of Pennsylvania.

Therefore, I have so worded the certificate required by law that I can sign it without distorting the truth.

I have the honor to be, sir,
Very respectfully yours,

GIFFORD PINCHOT, *Governor.*

Now, therefore be it

Resolved, That the expenditure of such a large sum of money to secure the nomination of the said William S. Vare as a candidate for the United States Senate prima facie is contrary to sound public policy, harmful to the dignity and honor of the Senate, dangerous to the perpetuity of a free ,government, and, together with the charges of corruption and fraud made in the report of said committee, and substantiated by the evidence taken by said committee, and the charges of corruption and fraud officially made by the Governor of Pennsylvania, prima facie taints with fraud and corruption the credentials of the said William S. Vare for a seat in the United States Senate; and be it further

Resolved, That the claim of the said William S. Vare to a seat in the United States Senate is hereby referred to the said special committee of the Senate, with instructions to grant such further hearing to the said William S. Vare and to take such further evidence on its own motion as shall be proper in the premises, and to report to the Senate within sixty days if practicable; and that until the coming in of the report of said committee and until the final action of the Senate thereon the said William S. Vare be, and he is hereby, denied a seat in the United States Senate: *Provided,* That the said William S. Vare shall be accorded the privileges of the floor of the Senate for the purpose of being heard touching his right to receive the oath of office and to membership in the Senate.

The special committee thus authorized submitted a partial report on December 22, 1926,[1] and on February 22, 1929[2] after lengthy investigations, presented a final report which charged fraud and concluded:

It is respectfully submitted that the evidence as to fraud and corruption in the primary election stands as it did when the committee filed its partial report with the Senate; and that Mr. Vare and his attorneys have failed to rebut the findings of the committee touching the election records.

In the meantime, on January 8, 1927[3] and again on March 4[4] William B. Wilson had protested the election of Mr. Vare and the contest had been referred to the Committee on Privileges and Elections, which submitted a majority report on December 4, 1929,[5] declaring Mr. Wilson was not elected and that Mr. Vare had—

received a plurality of the legal votes cast at the general election held on November 2, 1926, for the office of the United States Senate from the State of Pennsylvania.

The report was filed and no further action was taken thereon.

On September 9, 1929,[6] Mr. Norris proposed a resolution reviewing the proceeding and denying the contestee a seat in the Senate.

Mr. James E. Watson, of Indiana, raised a question as to the privilege of the resolution.

The Vice President[7] held:

If the question were submitted to the Chair, the Chair would hold that the matter is of the highest privilege, and under the rule should be disposed of at once.

The resolution was exhaustively debated and on December 6, 1929,[8] was agreed to, yeas 58, nays 22, in this form:

Whereas on the 17th day of May, 1926, the Senate passed a resolution creating a special committee to investigate and determine the improper use of money to promote the nomination or election of persons to the United States Senate and the employment of certain other corrupt and unlawful means to secure such nomination or election; and

Whereas said committee, in the discharge of its duties, notified William S. Vare, of Pennsylvania, then a candidate for the United States Senate from that State, of its proceedings, and the said William S. Vare appeared in person and by attorney before said committee while it was engaged in making such investigation; and

Whereas the said committee, in its report to the Senate (Rept. No. 1197, pt. 2, 69th Cong.), found that the evidence, without substantial dispute, showed that at the primary election at which the said William S. Vare was alleged to have been nominated as a candidate for the United States Senate there were numerous and various instances of fraud and corruption in behalf of the candidacy of the said William S. Vare; that there was spent in behalf of the said William S. Vare in said primary election, by the said William S. Vare and his friends, a sum of money exceeding $785,000; and that the said William S. Vare had in no manner controverted the truth of the foregoing facts, although full and complete opportunity had been given him not only to present evidence but arguments in his behalf; and

[1] Second session Sixty-ninth Congress, Senate Report No. 1197, part 2.

[2] Second session Seventieth Congress, Senate Report No. 1858.

[3] Second session Sixty-ninth Congress, Record, p. 1259.

[4] Record, p. 5895.

[5] Second session Seventy-first Congress, Senate Report No. 47.

[6] First session Seventy-first Congress, Record, p. 3413.

[7] Charles Curtis, of Kansas as, Vice President.

[8] Second session Seventy-first Congress, Record, p. 197.

Whereas in the consideration of said report, on the 9th day of December, 1927, the Senate, by solemn declaration declared "that the expenditure of such a large sum of money to secure the nomination of the said William S. Vare as a candidate for the United States Senate prima facie is contrary to sound public policy, harmful to the dignity and honor of the Senate, dangerous to the perpetuity of a free government, and, together with the charges of corruption and fraud made in the report of said committee, and substantiated by the evidence taken by said committee, prima facie taints with fraud and corruption the credentials of the said William S. Vare for a seat in the United States Senate"; and thereupon the Senate referred the claim of the said William S. Vare to a seat in the United States Senate to the said committee, with instructions to grant such further hearing to the said William S. Vare and to take such further evidence on its own motion as it deemed proper in the premises; and

Whereas the said committee, having complied with the direction of the Senate, has made a further report to the Senate (Rept. No. 1858, 70th Cong., 2d sess.) of its doings in the premises. From said report and the evidence taken by the committee it appears that the evidence as to fraud and corruption in said primary election has not been refuted and the same stands as it did when the committee filed its partial report to the Senate (Rept. No. 1197, 69th Cong); and

Whereas the said committee, from the foregoing facts and conclusions, including those previously reported in regard to said primary election, has reported to the Senate (Rept. No. 1858, 70th Cong., 2d sess., p. 15) that the said William S. Vare is not entitled to a seat in the United States Senate; and

Whereas the Senate has delayed action upon said report on account of the illness of the said William S. Vare; and

Whereas the said William S. Vare has recovered from said illness and no further reason exists for longer delay on the part of the Senate: Therefore be it

Resolved, That the said report (S. Rept. No. 1858, 70th Cong., 2d sess.) be, and the same is hereby, approved and adopted; and be it further

Resolved, That the said William S. Vare be, and he is hereby, denied a seat in the United States Senate.

The Senate then [1] agreed to the following resolution without debate or record vote:

Resolved, That William B. Wilson was not elected and is not entitled to a seat in the United States Senate from the State of Pennsylvania.

On November 12, 1929,[2] the Senate adopted resolutions authorizing the reimbursement of Mr. Wilson and Mr. Vare for expenses incurred in the contest.

181. The Texas election case of Wurzbach v. McCloskey, in the Seventy-first Congress.

The sitting Member having appeared before the committee and conceded the election of the contestant and withdrawn all pleadings, the committee expurgated its findings of fraud and confined its report to the brief statement that the contestant was entitled to be seated.

A resolution directing county officials to produce election records, in effect a subpoena duces tecum, was accorded high privilege.

On February 10, 1930,[3] Mr. Willis G. Sears, of Nebraska, from the Committee on Elections No. 3, submitted the report of the committee in the Texas case of Harry M. Wurzbach *v.* Augustus McCloskey.

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[1] Ibid.

[2] First session Seventy-first Congress, Record, p. 5476.

[3] Second session, Seventy-first Congress, House Report No. 648.

In response to allegations of gross fraud the committee determined to examine election records and recount sundry ballots cast in the election, and on January 7, 1930,[1] Mr. Sears, by direction of the committee, requested immediate consideration for the following resolution:

Resolved, That Jack R. Burke, county clerk, or one of his deputies, Perry Robertson, county judge, or one of his deputies, and Lamar Seeligson, district attorney, all of Bexar County, State of Texas, are hereby ordered to appear before Elections Committee No. 3, of the House of Representatives as required then and there to testify before said committee in the contested-election case of Harry M. Wurzbach, contestant, versus Augustus McCloskey, contestee, now pending before said committee, for investigation and report; and that said county clerk or his deputy, said county judge or his deputy, and said district attorney bring with them all the election returns they and each of them have in their custody, control, or/and possession, returned in the said county of Bexar, Tex., at the general election held on November 6, 1928, and that said county clerk also bring with him the election record book for the said county of Bexar, Tex., showing the record of returns made in the congressional election for the fourteenth congressional district of Texas, for the said general election held on November 6, 1928, and to that end that the proper subpoenas be issued to the Sergeant at Arms of this House commanding him to summon all of said witnesses, and that said county clerk, said county judge, and said district attorney to appear with said election returns, as witnesses in said case, and add county clerk with said election record book; and that the expense of said witnesses and all other expenses under this resolution shall be paid out of the contingent fund of the House; and that said committee be, and hereby is, empowered to send for all other persons or papers as it may find necessary for the proper determination of said controversy.

The circumstances attending the preparation of the report were explained by Mr. Sears in the course of the debate in the House:

As a matter of fact, the committee sat—and, I think, patiently—for about 10 days, and the committee unanimously was satisfied that Mr. Wurzbach had been elected and that his grave charges of fraud were true. Every member of the committee would have said that. At that stage of the proceedings, the contestee, Mr. McCloskey, appeared and said, in effect, "I am satisfied that I was not elected and that Mr. Wurzbach was elected, and I am contending no further in this matter."

The previous question being ordered, the resolution was unanimously agreed to and Mr. Wurzbach appeared and took the oath.

Mr. William H. Stafford, of Wisconsin, having reserved a point of order as to its privilege, the Speaker[2] said:

The resolution not only provides for the presence of witnesses, but also provides for bringing before them the ballot boxes, and so forth. The Chair thinks it would be necessary to have such a resolution to bring that about.

The Chair can not recall an immediate precedent, but would think this is the proper way to cover the appearance of witnesses under the circumstances set forth.

The Chair would think that the committee might have adopted other methods, but thinks that this is clearly in order.

Extended hearings were held and preparations were made to indite a report, when the sitting Member appeared before the committee and conceded the nomination of the contestant and announced his withdrawal from the contest.

The committee accordingly submitted a brief report reading in full:

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[1] Record, p. 1236.

[2] Nicholas Longworth, of Ohio, Speaker.

To the Speaker and the House of Representatives:

Your committee begs leave to report, that after a full hearing, we find that Harry M. Wurzbach, contestant, is entitled to be seated as Member of the House of Representatives, from the fourteenth congressional district of Texas, and that Augustus McCloskey is not entitled to retain his seat in said body.

WILLIS G. SEARS, *Chairman.*
CHARLES L. GIFFORD,
CHAS. BRAND,
ALBERT R. HALL,
ED. H. CAMPBELL,
JOHN W. MCCORMICK,
JOHN H. KERR,
BUTLER B. HARE.

182. The Maryland election case of Hill v. Palmisano, in the Seventy-first Congress.

A point of order being raised challenging the validity of a report on a contested-election case presented for filing, the Speaker directed that the report be printed with a reservation of the point of order.

Consideration of the point of order that the report on a contested-election case was not submitted within the time specified by the rules of the House.

On June 14, 1930,[1] Mr. Randolph Perkins, of New Jersey, submitted the report of the majority of the Committee on Elections No. 2 in the Maryland case of John Philip Hill *v.* Vincent L. Palmisano. According to the report, the contestant was credited by the official returns with having 27,047 votes and the contestee 27,377 votes, a majority of 330 votes for the latter.

The contestee having been seated, the contestant filed his notice of contest challenging the election returns, denying the validity of the election certificate, and assigning numerous grounds for the contest.

The proceedings of the committee are epitomized in the minority report as follows:

First, At its meeting on June 6, 1930, the committee unanimously decided that aside from charges pertaining to the fourth precinct of the third ward in the city of Baltimore, there was nothing in the record authorizing interference with the result of the election as certified by the proper officials of the State of Maryland.

Second, By a vote of 5 to 3, the committee decided that the evidence did not justify throwing out the returns of said precinct.

Third, The effect of these findings being necessarily a conclusion that the contestant did not receive a majority of the votes cast at the election, the committee voted, 5 to 3, that the contestant was not elected and is not entitled to a seat in this House.

Fourth, A motion then being offered to the effect that the contestee was not elected and is not entitled to a seat in the House, two members of the majority indicated their inability to support such a motion, and while no vote was taken, these members, with the minority members, constituted a majority of the committee.

Fifth, A motion then being offered to the effect that the contestee is not entitled to a seat in the House, was adopted, 5 to 3, and it was agreed to ask for an extension of time from the House in which to agree upon the form of resolution to be reported and upon the contents of the majority report.

[1] Second session Seventy-first Congress, House Report No. 1901.

The majority find that the issues presented by the case may be reduced to two questions, the conduct of the election in the fourth precinct of the fourth ward and the personal knowledge and conduct of the contestee.

In considering the first of these questions the majority report:

This committee finds that the election board in the fourth precinct of the third ward flagrantly disregarded every provision of the election laws of the State of Maryland with respect to the taking the ballots from the box, the counting, recording, and certification of the ballots in that precinct.

No attempt whatever was made by the election board to follow the law as to counting, recording, or certifying the vote in this precinct.

The law is clear in its provision that the judges shall open the ballots and that the ballots shall be canvassed separately by them, one by one. This was not done.

The majority therefore conclude:

We can not and do not place the seal of approval on the conduct of this election board in this precinct nor accept the ballots and returns as genuine, and this, when taken in connection with the personal conduct and knowledge of Palmisano hereinafter considered, requires us to report that he was not elected and should not retain his seat in this House.

As to the second question the majority report:

There were registered from Palmisano's house his brother-in-law, Vincent Fermes, and his wife, Anna, Fermes. The undisputed fact is that both Vincent and Anna Fermes resided in Hagerstown, Md., and had resided there for several years and were voters there.

The names of both Vincent and Anna Fermes were voted on from Palmisano's residence at the election on November 6, 1928. Vincent's name was voted on just before the polls closed, being the next to the last vote cast, and while Palmisano was at the polling place.

Palmisano knew that his brother-in-law and sister-in-law were not entitled to vote in his precinct and knew that they were not residing in his home. He knew that they actually lived in Hagerstown.

These votes so cast on the names of Vincent and Anna Fermes were illegal and fraudulent and in the judgment of your committee, were cast with the knowledge, consent, and approval of the contestee, Palmisano.

On this finding of fact the majority decide:

Having first determined that the conduct of the count, tally, and the certificate of the election officers was entirely contrary to law and that opportunity had been afforded by the election officers for partisan workers of the contestee to not only participate in the handling of the ballots, but in the removing from the ballot box, sorting, shuffling, and pretended count thereof, we have come to the conclusion that we can not say that the ballots counted by the committee were genuine ballots cast by the voters. For this reason, and in view of the committee's findings that Palmisano was personally chargeable with fraud, we find that he was not elected, and that he should not be permitted to retain his seat in the House.

The minority views dissent from the majority findings of fact, insisting that charges of fraud in the precinct in question have not been substantiated and that the vote of alleged relatives of the contestee illegally cast from his residence was by impersonation, and recommending the adoption of resolutions declaring that the contestant has not been elected and that the sitting member is entitled to his seat.

On presentation [1] of the majority report for filing, Mr. Malcolm Tarver, of Georgia, raised a point of order and said:

[1] Second session Seventy-first Congress, Record, p. 11199.

The report has not been authorized. I will state that on June 6, 1930, the Committee on Elections No. 2 held the last meeting it has held, and on that day voted 5 to 3 against seating contestant, John Philip Hill, and it voted 5 to 3 against throwing out the returns from the fourth precinct of the third ward in the city of Baltimore. The copy of the report that I hold in my hand is directly at variance with the action taken by the committee, in that the report finds that the returns from the fourth precinct in the third ward should be thrown out, when the committee voted that they should not be and further finds that the contestant, if this is done, would be entitled to his seat in the House, whereas the committee voted to the contrary.

There has been no meeting of the committee since then, and no resolution approved by the committee, although I presume that one that has been reported by the gentleman who is acting for the committee, except that the first portion of a resolution dealing with the rights of the contestant was approved by the committee by a vote of 5 to 3, finding that he was not entitled to his seat and had not been elected.

The second part of the resolution was never placed before the committee, but the members of the committee were unable to agree upon its verbiage, and the statement was made that another meeting of the committee would be held in order that its verbiage might be agreed upon. Notwithstanding that, the gentleman purports to report to the House this morning a report which includes, I presume, a resolution which was not acted upon by the committee as to the rights of the contestee.

Mr. Bertrand H. Snell, of New York, objected that the point of order was not properly presented at this time.

The Speaker [1] entertained the point of order and decided:

Under the circumstances the Chair thinks the fair thing to do, he not being apprised of all the facts in connection with the matter, is to permit the report now to be printed, and the gentleman from Georgia may reserve his point of order, and if the case is called up the Chair will give the matter consideration.

The Chair will permit the report to be received and printed at this time, but the gentleman from Georgia will have his full rights in the matter in case the report is called up.

Thereupon Mr. Fiorello H. LaGuardia, of New York, submitted the further point that the report was not in order for the reason that it was presented in violation of paragraph 47 of Rule XI.

The Speaker announced:

The gentleman from New York reserves a point of order.

183. The Missouri election case of Lawrence v. Milligan, in the Seventy-first Congress.

The accuracy of the count in a disputed precinct being challenged, the House ordered a recount.

On June 6, 1930,[2] Mr. Randolph Perkins, of New Jersey, from the Committee on Elections No. 2, presented the report of that committee on the contested-election case of H. F. Lawrence *v.* Jacob L. Milligan, of Missouri.

According to the returns originally certified the contestant had received 32,626 votes and the contestee 32,665, a majority of 39 votes for the sitting Member. On this return the certificate of election was issued to the contestee who was seated by the House.

In the hearing of the case it developed that the issue turned on the accuracy of the count of the vote cast in the northeast precinct of Liberty. Accordingly an

[1] Nicholas Longworth, of Ohio. Speaker.

[2] Second session Seventy-first Congress, Record, p. 1814.

order was secured from the House and the ballots in question were brought to Washington and counted by the committee who report the following finding:

After the regular hearing of this case upon the record and the argument of counsel it was apparent that the controversy turned largely on the vote cast in the northeast precinct of Liberty, Clay County, Mo., the contestant insisting that Jacob L. Milligan, the sitting Member and contestee, had been accredited with 125 more votes than he was entitled to in said precinct; the contestant insisting that the correct vote in this precinct as shown by return of precinct election officers was 173 votes for contestant and 345 votes for the contestee but that the returns certified by the county canvassing board of Clay County showed 173 votes for the contestant and 470 votes for the contestee.

The committee of its own motion directed that said original ballot box and ballots in said precinct be brought before the committee, that the count of the same might be made by said committee, which was accordingly done, and by said count as made by the committee it showed 170 ballots were cast for the contestant and 474 ballots were cast for the contestee.

The recount of this precinct gave the contestee a clear majority of 46 votes, and the report of the committee confirming his title to his seat was agreed to in the House on June 13,[1] without debate or record vote.

184. The Florida election case of Lawson v. Owen, in the Seventy-first Congress.

A woman who had forfeited her citizenship through marriage to a foreign subject and who later resumed it through naturalization less than seven years prior to her election was held to fulfill the constitutional requirements as to citizenship to a seat in the House.

On March 24, 1930,[2] Mr. Carroll L. Beedy, of Maine, presented the report of the Committee on Elections No. I on the Florida case of William C. Lawson *v.* Ruth Bryan Owen.

The official return gave the sitting Member a majority of 30,842 votes. There was no question of fraud and the only issue involved in the case was whether Mrs. Owen on the date of her election had been seven years a citizen of the United States within the meaning of paragraph 2 of section 2, Article I of the Constitution.

Mrs. Owen was born in the United States and remained a citizen until her marriage to Reginald Altham Owen, a British subject, on May 3,1910. Following her marriage she resided in England until May 30, 1919, when she and her husband returned permanently to the United States, where she made application for naturalization and was restored to citizenship on April 27, 1925. She was a candidate for Representative in Congress from the fourth congressional district of the State of Florida at the election held on November 6, 1928, and the petition in contest filed by the contestant cites numerous cases holding that votes cast for persons not in a position to serve have been construed as null and void.

In passing on this question the committee find:

An examination of all the precedents cited by counsel for the contestant reveals the fact that knowledge brought home to the voters respecting the ineligibility of candidates for office and for which candidates they voted despite their knowledge of ineligibility, is limited to cases involving ineligibility based on a palpable physical fact or on an established legal fact.

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[1] Second session Seventy-first Congress, Record, p. 11099.

[2] Second session Seventy-first Congress, House Report No. 968.

The committee agrees with counsel for the contestant that the case of State *v.* Frear and other cases cited in connection therewith are good authority for the proposition that where the ineligibility of a candidate is an established and unquestioned fact, and voters who with knowledge, willfully insist upon voting for a candidate physically or legally dead, they should lose their votes and that the remaining candidate although receiving only a minority of the votes cast, is in fact elected.

The committee then differentiate:

It is the judgment of the committee that the above cases are not applicable to the case of Mrs. Ruth Bryan Owen. The question of her citizenship and her incidental eligibility or ineligibility was a highly disputable question. It was not an established physical or legal fact.

The committee therefore conclude:

Your committee therefore concludes inasmuch as the voters of the fourth congressional district of Florida cast a majority of votes for Mrs. Owen in an election legally held, not in the face of an established fact of ineligibility but rather in the face of an opponent's contention as to ineligibility, that their votes were not thrown away. It is the view of your committee that the majority vote in question expressed a preference for Mrs. Owen, who was physically able to take a seat in the House of Representatives, and who could not legally be precluded therefrom except by action of the House of Representatives.

As to whether the contestee had been seven years a citizen prior to the election, the committee agree unanimously that the sitting Member is eligible to election but differ as to methods of reaching that conclusion.

Five members of the committee, without regard to political considerations—

arrive at their conclusion through a consideration of the constitutional provision alone. They believe that the 7-year period of citizenship is cumulative; that it was not the intent of the framers of the Constitution, and that it is not now to be construed as meaning that the seven years' citizenship qualification for a Representative in the House of Representatives is to be limited to the seven years next preceding the date of election.

They take the position that in construing any section of the Constitution, the ordinary meaning should be ascribed to its language and that when that meaning is apparent on the face of the instrument, the language used must be accepted both by legislatures and by courts, without adding to it or taking from it. Their view is that if the framers had intended the seven years' citizenship to have been limited to the seven years next preceding an election, they would have said so. Their final conclusion is that inasmuch as Mrs. Ruth Bryan Owen had been a citizen of the United States for 24 years and 7 months prior to her marriage, and for 3 years and 6 months subsequent to her naturalization, she enjoyed an American citizenship extending over a period of 28 years and 1 month, and is, therefore, eligible to a seat in the Federal House of Representatives.

The remaining four members of the committee reason that:

The 7-year period of citizenship required of eligibles to a seat in the House of Representatives must be construed as meaning seven years next preceding the date of election. Their view is that while Mrs. Owen lost her American citizenship under the expatriation act of March 2, 1907, by her marriage to an alien on May 3, 1910, she nevertheless regained her American citizenship through naturalization under the terms of the Cable Act of September 22, 1922. They concede that the Cable Act was not retroactive in the sense that its enactment, though it expressly repealed section 3 of the expatriation act of 1907, restored lost citizenship.

Their view is that the Federal Congress which had the power to deprive Mrs. Owen of her American citizenship under the expatriation act of 1907, also had the power to pass a law which set out the procedure by means of which she could recover her American citizenship. This she did when she became a naturalized American citizen under the provisions of section 2 of the Cable Act. They hold that though Mrs. Owen lost her United States citizenship under the

expatriation act of 1907 by reason of her marriage to an alien, she nevertheless regained it under the Cable Act which, in the concluding sentence of section 3, declares that—

"after her naturalization she shall have the same citizenship status as if her marriage had taken place after the passage of this act."

That status, say those of the committee who insist upon a 7-year period of American citizenship next preceding the election, is clearly set forth in the first sentence of section 3 of the Cable Act, which declares that—

"a woman citizen of the United States *shall not cease to be a citizen of the United States* by reason of her marriage after the passage of this act * * *."

They hold that the Cable Act passed subsequent to the adoption of the nineteenth amendment, which gave the ballot to the American women, should be viewed in the light of that amendment as but another step in extending the rights and privileges of American women. Their view is that it should be liberally construed as a measure intended to right an injustice done American women by the act of 1907, and to place her upon an equality with American men who never lost their American citizenship through marriage with an alien.

Their conclusion is that Mrs. Ruth Bryan Owen, through naturalization, enjoys the status as an American woman who marries an alien subsequent to the passage of the Cable Act, namely, the status of one who never loses her citizenship. In the terms of the Cable Act itself, hers is the status of a woman who—

"does not cease to be a citizen of the United States by reason of her marriage."

The committee therefore unanimously conclude that the sitting Member meets the constitutional requirements of eligibility as to citizenship, and recommend the adoption of the usual resolutions denying the election of the contestant and affirming the election of the contestee.

After brief debate the resolutions were agreed to in the House on June 6 [1] without division.

185. The Indiana election case of Updike v. Ludlow, in the Seventy-first Congress.

Instance wherein the time permitted by the rules in which the election committees of the House shall make final report on contested-election cases was extended by resolution.

On June 25, 1930,[2] on motion of Mr. Carroll L. Beedy, of Maine, from the Committee on Elections No. 1, the House agreed to the following resolution:

Resolved, That the Committee on Elections No. 1 shall have until January 20, 1931, in which to file a report on the contested-election case of Updike *v.* Ludlow, notwithstanding the provisions of clause 47 of Rule XI.

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[1] Second session Seventy-first Congress, Record, p. 10620.

[2] Second session Seventy-first Congress, Record, p. 11701.

Chapter CLXXIII.

GENERAL ELECTION CASES, 1931 TO 1933.

1. Cases in the Seventy-second Congress. Sections 186–189.

186. The Illinois election case of Kunz v. Granata in the Seventy-second Congress.

Failure of a candidate to receive a number of votes equal to the number of "straight" tickets cast in an election was held to constitute such conclusive evidence of fraud as to warrant a recount of the vote.

An officer legally designated to take testimony in a contested election case performs such duty as the representative of the Congress.

Authority conferred by a statute "To require the production of papers" was construed to confer Authority to require the production of ballots, in an election held under the Australian ballot system.

On March 11, 1932,[1] Mr. John H. Kerr, of North Carolina, from the Committee on Elections No. 3, submitted the report of the majority in the case of Kunz *v.* Granata, of Illinois.

The official returns gave Peter C. Granata 16,565 votes and Stanley H. Kunz 15,394, a majority of 1,171 for the sitting Member.

A contest having been filed, a notary public was appointed commissioner to take evidence for the contestant, pursuant to the provisions of the Federal statute.[2]

In response to a subpoena duces tecum, issued by this commissioner, the board of election commissioners produced the ballots and after a recount, beginning September 11, 1931, and closing October 10, 1931, submitted through the commissioner a return showing that Peter C. Granata had received 15,057 votes and Stanley H. Kunz had received 16,345, a majority for the contestant of 1,288 votes.

The action of the commissioner in ordering a recount of the ballots and the revised returns reported are justified and approved by the majority in the following language:

> We call the attention of the House to sections 10 and 11 of the city election act, a portion of the general election law of Illinois, under which law this election was held, in order that it may understand the method pursued in the counting and preservation of the ballots cast for contestant and contestee. The contestant was entitled to every *"straight ticket"* cast in this election; it was not a straight ticket unless his name was thereon unmolested along *with the other Democratic candi-*

[1] First session Seventy-second Congress, House Report No. 778.

[2] U. S. Code, section 206, p. 13.

dates. The fact that the contestant did not receive the straight-ticket vote in many of the precincts is conclusive evidence of fraud or gross irregularity and mistakes, this could only be corrected by resort to the ballot boxes and a recount of the vote; when this was done and the straight-ticket vote given contestant which he had received, he overcame the contestee's apparent majority of 1,171 votes and defeated the contestee by a majority of 1,288 votes.

The minority views dissent from this conclusion and refer to the recount as "alleged," "pretended," and "unauthorized," and assert that the recount should have been made by a committee of the Congress. In refutation of this contention the majority declare that the notary public designated as commissioner to take testimony in the case and under whose direction the recount was made was an officer of and the representative of the Congress for that purpose. In support of this position, the majority cite the following decision: [1]

Any one of the officers designated by Congress to take the depositions of such witnesses (whether he is appointed by the United States, such as a judge of a Federal court, or a register in bankruptcy, or by the State, such as a judge of one of its courts of record, a mayor or recorder of a city, or a notary public) performs this function, not under any authority derived from the State, but solely under the authority conferred upon him by Congress and in a matter concerning the Government of the United States.

It is further urged by the minority that the statute relied on by the contestant in procuring a recount, although providing for the production of "papers" by the officer or commissioner, does not authorize such commissioner to requisition "ballots." The minority quote the following excerpt from tle statute [2] in confirmation of this view:

The officer (notary public in this case) shall have the power to require the production of papers. * * * All papers thus produced, and all certified or sworn copies of official papers, shall be transmitted by the officer, with the testimony of the witnesses, to the clerk of the House of Representatives.

The minority views contend that—

There have been various decisions on the question as to whether papers used in this statute included ballots. In the contested election case of Rinaker *v.* Downing, the contestee procured an injunction in the Illinois court restraining the county clerk from opening the ballot boxes in response to a subpoena by a notary public. This is discussed in Two Hinds' Precedents, paragraph 1070. An able opinion of the attorney general of the State of Illinois held that ballots could not be produced under this statute.

The majority, however, hold:

We, the undersigned members of the committee, are of the opinion that "ballots" are papers pertaining to an election; in the instant case the election was held under the Australian ballot law in the State of Illinois.

The majority, therefore, submit a resolution seating the contestant as follows:

Resolved, That Peter C. Granata was not elected as Representative in the Seventy-second Congress from the eighth congressional district in the State of Illinois, and is not entitled to the seat as such Representative; and

Resolved, That Stanley H. Kunz was elected a Representative in the Seventy-second Congress from the eighth congressional district in the State of Illinois, and is entitled to his seat as such Representative.

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[1] 134 U. S. 372.

[2] U. S. Code, Sec. 219, p. 14.

The report was debated at length in the House on April 8.[1] At the conclusion of the debate Mr. Ed. H. Campbell, of Iowa, offered the following motion to recommit:

Resolved, That the contested-election case of Stanley H. Kunz *v.* Peter C. Granata be recommitted to the Committee on Elections No. 3, with instructions either to recount such part of the vote for Representative in the Seventy-second Congress from the eighth congressional district of Illinois as they shall deem fairly in dispute, or to permit the parties to this contest, under such rules as the committee may prescribe, to recount such vote, and to take any action in the premises, by way of resolution or resolutions, to be reported to the House or otherwise, as they may deem necessary and proper.

The question being taken on agreeing to the motion to recommit, and the yeas and nays being ordered, the yeas were 178, nays 186, and the motion was rejected.

Whereupon, Mr. Charles L. Gifford, of Massachusetts, offered a substitute for the pending resolution as follows:

Resolved, That Peter C. Granata was elected a Representative to the Seventy-second Congress of the eighth congressional district of the State of Illinois.

On this question, on a yea-and-nay vote, there were 170 yeas and 189 nays, and the substitute was defeated.

The question recurring on the original resolution reported by the majority, on demand of Mr. Harry A. Estep, of Pennsylvania, it was divided and the clerk read the first part, as follows:

Resolved, That Peter C. Granata was not elected as Representative in the Seventy-seeond Congress from the eighth congressional district in the State of Illinois and is not entitled to the seat as such Representative; and—

The section was agreed to, yeas 190, nays 163.

The clerk then read the second section, which was agreed to by a viva voce vote, and Mr. Kunz appeared and took the oath.

187. The Pennsylvania election case of Kent v. Coyle, in the Seventy-second Congress.

Where no proof was adduced to support in any substantial way the allegations made in the notice of contest, the committee recommended confirmation of the right of the sitting Member to his seat.

Neither Congress nor its committees is bound by act of a State judge in a contested election case.

A committee of the House in passing on an election contest expressed disapproval of the course of the contestant in applying to local courts when Congress was in session.

On May 7, 1932,[2] Mr. J. Bayard Clark, of North Carolina, from the Committee on Elections No. 1, submitted the unanimous report of that committee in the Pennsylvania case of Kent. *v.* Coyle.

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[1] First session, Seventy-second Congress, Record, p. 7490.

[2] First session, Seventy-second Congress, House Report No. 1264.

In this case the point at issue was chiefly confined to a question of fact involving the integrity of the count by local election officials of the votes cast in six election districts in one county. Certain citizens of these districts filed petitions with the county court alleging fraud in the computation of the returns and asked for a recount. In compliance with these petitions, under an act of 1927 of the Pennsylvania Legislature, the county court appointed a recount board and supervised a recount of the ballots, with the result that the amended returns showed a loss of 5 votes for the contestant and a gain of 13 votes for the contestee.

The contestant also took testimony before a notary public which related principally to the contract for printing the ballots and the manner in which the ballots were distributed, and charged undue delay on the part of the court in ordering the recount.

The report, however, recites that:

> Considering the dates on which the petitions were verified, the committee could see no just grounds for complaint.

The report expresses disapproval of the action of the contestant in filing his action with the local authorities instead of bringing it directly to the House, and says:

> The committee does not approve the manner in which the congressional vote was investigated, or placing in the record of this contest so much unnecessary data, including a tedious and argumentative opinion of the court as to who is entitled to the seat. But neither the committee nor Congress is bound in a matter of this kind by any act of a judge of a State court, whether within or beyond statutory authority.
>
> The committee does not concede any right of a party to an election contest to take proof in any manner other than that fixed by Congress, but feels that contestant is not in a position to raise that point in this contest, for the following reasons:
>
> In the first place the petitions were undoubtedly filed with contestant's consent and approval, by his supporters, and in the interest of his cause. Having filed notice of contest and taken testimony, he elected to go into the State court for a recount of ballots at a time when Congress was in session and this committee functioning.

In summarizing the contest, the committee conclude:

> The committee felt that considering all the testimony relating to the election districts therein, no proof was offered tending to support in any substantial way the allegations made in the notice of contestant.

In accordance with these conclusions the committee reported the following resolution:

> *Resolved,* That Everett Kent was not elected a Representative to the Seventy-second Congress from the thirtieth congressional district of the State of Pennsylvania, and is not entitled to a seat therein.
>
> *Resolved,* That William R. Coyle was a duly elected Representative to the Seventy-second Congress from the thirtieth district of the State of Pennsylvania, and is entitled to retain his seat therein.

The report was called up in the House on May 24,[1] and the resolution confirming the sitting Member in his seat was agreed to without debate or division.

[1] Record, p. 11055.

188. The Senate election case of Heflin v. Bankhead, of Alabama, in the Seventy-second Congress.

Instance of a contest inaugurated in the Senate by a petition sent to the desk by the contestant and read by the Clerk.

Form of resolution authorizing the Committee on Privileges and Elections to hear and determine a contested-election case and certify its conclusions to the Senate.

Instance wherein the committee rejected the majority report of its subcommittee and adopted the minority views.

On February 24, 1931,[1] in the Senate, Mr. J. Thomas Heflin, of Alabama, sent to the Clerk's desk a petition which was read by the Clerk as follows:

To the Senate of the United States:

Comes now J. Thomas Heflin and files this his contest for a seat in the United States Senate as Senator from the State of Alabama and contests the seat claimed by John H. Bankhead for the term beginning March 4, 1931, and as grounds for this contest shows to this honorable body that heretofore your petitioner, having been defrauded of the right to run in the regular Democratic primary held in the State of Alabama on the 12th day of August, 1930, the said John H. Bankhead was nominated in a primary known as the regular Democratic primary and held on the 12th day of August, 1930, and that said primary was reeking with fraud and corruption and that this fact was known to the said John H. Bankhead, and that as a result of said primary the said John H. Bankhead was known as the regular Democratic candidate for United States Senator from Alabama for said term, and that the said J. Thomas Heflin was nominated at a State convention held at Montgomery, in the State of Alabama, the 1st day of September, 1930, known as the Jeffersonian convention, and was known as the independent Democratic candidate on the Jeffersonian ticket. There were no other nominees on any ticket in the said State of Alabama as candidates for United States Senator from Alabama for said term.

That there are in the said State 67 counties, divided into about 1,400 election precincts, beats, or divisions; that the election for said office was held on the 4th day of November, 1930; that by the laws of the said State of Alabama the votes cast in the said various bests or precincts are canvassed and counted by the beat or precinct election officials in the respective beats or precincts in which the votes are cast; that said various election beat or precinct officials certify the results thereof to the various county canvassing boards composed in each county of the sheriff, judge of probate, and clerk of the circuit court, which board is authorized to receive such results in the counties in which the various beats or precincts are situated; that within brief interval thereafter the county boards of canvassers scrutinized such returns and in accordance with the laws of the State of Alabama an abstract of the various returns is made and certified to the secretary of the State.

That as a result of the canvass of the returns as certified to the secretary of state of Alabama it was declared that the said John H. Bankhead was shown by the returns to have received 150,985 votes for the said office of United States Senator at said election, and that the said J. Thomas Heflin had received a total of 100,969 votes for said office, the difference thus giving the said Bankhead an apparent plurality of 50,016 votes, and the said Bankhead claims his election on the basis of said apparent plurality and will probably present his claim upon the first convening of the Senate on or after March 4, 1931.

The petition then recited, in detail, matters relating to the primary and election on which the petitioner based his contest, and concluded:

Said contestant therefore comes to your honorable body with the sincere and profound belief that upon a fair and lawful recount of the ballots legally cast, and upon a complete audit of the

[1] Third session, seventy-first Congress, Record, p. 5834.

poll list of voters participating in said election, together with a full and accurate survey of the ballots rejected, and on the elimination of fraudulent returns and results he will be shown to be the duly and lawfully elected United States Senator from the State of Alabama; and for that purpose and for all the purposes of truth and justice he therefore prays that your honorable body will make a full and complete examination into the situation and will so decide.

J. THOS. HEFLIN, *Contestant.*

The petition was authenticated by the following jurat:

DISTRICT OF COLUMBIA, *ss.:*

J. Thomas Heflin, being first duly sworn, upon oath deposes and says that he is the contestant named in the foregoing matter; that he has read the foregoing statement and knows the contents thereof; that the matters and things as therein set forth are true except as to those matters stated on information and belief, and as to those matters he believes it to be true.

J. THOS. HEFLIN.

Subscribed and sworn to before me this the 24th day of February, 1931.
[seal.]

CHARLES F. PACE,
Notary Public, District of Columbia.

My commission expires February 12, 1936.

The petition was referred to the Committee on Privileges and Elections which, on February 28,[1] submitted a resolution authorizing the committee to hear and determine the contest and certify its conclusions to the Senate. The Committee to Audit and Control the Contingent Expenses of the Senate to which the resolution was referred reported it back after brief consideration and it was agreed to without amendment as follows:

Whereas on the 24th day of February, 1931, the Senate referred to the Committee on Privileges and Elections the pending contest between J. Thomas Heflin and John H. Bankhead involving the question whether the said Heflin or the said Bankhead, or either of them, is entitled to membership in the United States Senate as a Senator from the State of Alabama: Now, therefore, be it

Resolved, That the Committee on Privileges and Elections is hereby authorized to hear and determine said contest and to take such evidence as it may deem proper in order to determine the questions involved, and certify its conclusions to the Senate.

Said committee is authorized by itself or by any subcommittee to investigate the questions aforesaid, and shall have authority to act by or through such agents or representatives as it may see fit to designate.

Said committee or any subcommittee thereof shall have power to issue subpoenas and require the production of all papers, books, documents, or other evidence pertinent to said investigation, and said committee or any subcommittee thereof may sit during the sessions of the Senate and during any recess of the Senate or of the Congress, and to hold its Sessions at such places as it may deem proper.

It shall have authority to employ clerks and other necessary assistance and to employ stenographers at a cost not to exceed 25 cents per 100 words, and to cause to be taken and recorded all evidence received by the committee, and to have said evidence printed for the information of the Senate.

The Sergeant at Arms of the Senate and his deputies and assistants are hereby required to attend the Said Committee on Privileges and Elections or any subcommittee thereof, and to execute its directions.

The chairman of the committee and each and every member thereof is hereby empowered to administer oaths and generally have such powers and perform such duties as are necessary or incident to the exercise of the powers and duties imposed by this resolution.

[1] Record, p. 6462.

Said committee shall report to the Senate at the earliest practicable date.

The cost of investigations and proceedings in pursuance of the foregoing to be paid out of the contingent fund of the Senate and not to exceed $25,000 in addition to any unexpended balance of the sum previously appropriated in Senate Resolution 467.

Pursuant to this resolution, the Committee on Privileges and Elections referred the contest to a subcommittee which held extended hearings and impounded and counted the ballots. At the conclusion of the recount the majority of the subcommittee reported to the committee that the primary was illegal and the election chargeable with fraud, and recommended that the Senate be advised that in the judgment of the subcommittee there was no election. The committee, however, rejected the report of the majority and adopted the view's of the minority, holding that the contestee, John H. Bankhead, was duly elected a Senator from the State of Alabama, and was entitled to his seat.

188a. A party committee authorized under the State code to fix the qualification of candidates, may exclude candidates failing to meet such qualifications and the failure of the committee to fix similar qualifications for voters does not affect the legality of the primary for which such qualifications were established.

In the absence of Federal legislation on the subject, the legality of State primaries is governed by the State statutes and general principles of law as declared in judicial decisions.

Laches on the part of the contestant in attempting to prevent, by injunction or otherwise, the placing of the contestee's name on the ballot was held to waive any irregularity connected with the primary.

Voters are not required to determine the legal eligibility of candidates to a place on the ballot and an election otherwise valid will not be held invalid because the certificate of nomination of the successful candidate is defective through the omission of some detail.

Objections to irregularities in the nomination of a candidate for office must be made prior to the election, and come too late thereafter.

In the meantime,[1] when the Senate convened for the first session of the Seventy-second Congress, and Senators elect were requested to present themselves at the Vice President's desk to take the oath of office, Mr. Samuel M. Shortridge, of California, as chairman of the Committee on Privileges and Elections, informed the Senate that a contest was pending between J. Thomas Heflin and John H. Bankhead as to which was entitled to membership in the Senate as a Senator from the State of Alabama.

Mr. Shortridge added:

I have made this statement, Mr. President, in justice to the committee, and particularly the subcommittee, and to the end that all rights of the parties involved are not to be prejudiced by the proceedings further to be taken this day.

Whereupon, the oath of office was administered to Mr. Bankhead.

[1] First session Seventy-second Congress, Record, p. 3.

On April 18,1932,[1] Mr. Walter F. George, of Georgia, and Mr. Sam G. Bratton, of New Mexico, from the Committee on Privileges and Elections, presented the majority report of the committee. The report first discussed the contention of the minority that the primary in which the contestee was nominated was illegal for the reason that a resolution of the State Democratic Committee, calling the primary, fixed as one of the qualifications for candidates a test of party loyalty in the preceding presidential election but did not fix this test for voters. The majority report points out that this issue had been disposed of by a decision of the Supreme Court of Alabama, and relates that:

After the resolution of the committee in question a bill was filed by a taxpayer in an equity court of Alabama seeking to enjoin the payment of public money for holding the primary on the ground that the action of the committee in fixing qualifications for voters which differed from those fixed for candidates destroyed the legality of the primary. The lower court and the Supreme Court declined to take jurisdiction of this bill on the ground that it did not present matter within the equitable cognizance of the court[2]

In confirmation of this decision the report also cites the case of Lett *v.* Ennis,[3] decided by the same Court, in which M. F. Lett sought to become a candidate for a county office on the Republican ticket but declined to comply with a resolution of the Republican county committee requiring all candidates to state under oath how they voted in the general election of 1928. The county chairman refusing to certify his name unless he complied with this requirement of the committee, Lett instituted mandamus proceedings to compel certification.

On appeal, the Supreme Court of Alabama said in part:

We, therefore, conclude that the committee acted well within its authority, as expressly recognized by section 672 of the code, in prescribing the test oath of party loyalty, and that its action is not subject to the criticism that it was arbitrary or unreasonable.

As to the further question raised in the case relative to the right of the committee to fix differing qualifications for candidates and voters, the court said:

It is further suggested that under section 612 of the code the qua1ification of the voter is automatically fixed the same as the candidate, and that the resolution in question is violative thereof. But that section is not in any manner here involved, and a consideration of this insistence as to its proper construction is unnecessary. Petitioner seeks relief as a candidate and not otherwise. Any matter affecting those not candidates would in no wise alter petitioner's status. We have concluded the standard of qualification for the candidate is properly and legally fixed by the resolution, and petitioner's argument would but result in an enlargement, by alteration of law, of the qualifications of those not candidates. With this he is not concerned and is therefore in no position to question, as it would not affect the requirements of the resolution as to himself. His rights are to be determined by the fixed standard as to candidates, and the only statutory provision applicable thereto is section 672 of the code.

The majority report makes this application:

It is apparent that the contestant's situation with reference to the resolution of the Democratic committee is identical with that of Lett to the resolution of the Republican committee. The ruling of the supreme court of the State expressly deciding that Lett, being properly excluded by

[1] Senate Report No. 568.

[2] Wilkinson *v.* Henry, 211 Ala. 254.

[3] 221 Ala. 432.

reason of his failure to qualify under the rule of the committee, could not be heard to raise the question as to the qualifications fixed for voters, is necessarily a determination by the highest judicial authority of the State of Alabama that the contestant in this case being, as a candidate, disqualified by the resolution of the Democratic committee, passed under its legal powers, is not in a position to raise the question as to the legality of the action of the committee in fixing qualifications for voters. Having been properly excluded from the primary, he was not concerned with its legality, or with the rights which it accorded to or withheld from voters in that primary.

The report then calls attention to the absence of Federal legislation affecting primaries and the consequent necessity of determining all questions relating to State primaries in the light of the statutes and court decisions of such States.

In this connection the report says:

It may be well to direct attention at this point to the fact that whatever the powers of the Congress, since the adoption of the seventeenth amendment, may be to regulate primaries in which nominations for the United States Senate are made, that there is no congressional legislation attempting to exercise this power at this time.

No intention has been shown by any Federal legislation, since the original corrupt practices act was declared invalid in the Newberry case, to exercise jurisdiction over State primaries. The legality of the Alabama primary in question must, therefore, be determined in the light of the Alabama statutes and general principles of law as declared in judicial decisions.

The report also stresses the failure of the contestant to make an effort to prevent the certification of contestee's name as the party candidate for United States Senator or to prevent the placing of this name on the ticket to be voted in the general election. It relates that:

On the contrary, he organized, or took part in the organization of, a separate political party known as the Jeffersonian, or Independent Party, and accepted the nomination of its convention or mass meeting for the office of United States Senator, and elected to submit his claim to the voters of the State of Alabama.

The contestant took no steps, by injunction or otherwise, to keep contestee's name off the ballot, as such nominee, to be voted on in the general election. He was content to submit the issue between himself and the contestee to the people. The action of the people, in the general election, in choosing contestee, cures any irregularity or illegality in the primary which selected contestee as the Democratic candidate.

The majority therefore conclude:

We are clear in our opinion that the exclusion of the contestant as a candidate from the Democratic primary, by the Democratic committee, was an act entirely within the power of the committee, and that the contestant being properly excluded from the primary can not be heard to raise the question as to the legality of the action of the committee in fixing the qualifications for voters in the primary in which he could not take part as a candidate.

We are likewise clear to the point that the contestant failing to take any timely action to prevent the name of the contestee from being certified or placed on the ballot as the Democratic nominee, can not, after his defeat at the polls in the general election, raise the question as to the legality of contestee's name on the ballot.

In support of the doctrine that unless objection is made to nominations, any irregularities may be considered as waived, the report cites the rule [1]:

Objections relating to nominations must be timely made; otherwise they may be regarded as waived. It is too late to make them after the nominee's name has been placed on the ballot and he has been elected to office; his election can not be impeached on the ground that statutory

[1] 20 Corpus Juris, p. 132.

requirements regarding nominations were not complied with in his case, or that his nomination was procured by unlawful means.

It also quotes the general rule as laid down in the authorities [1]:

The general rule in determining the effect of irregularities in the conduct of elections on the result thereof is applicable when an attempt is made to contest an election by reason of some irregularity in the nomination of candidates. It is the duty of courts to uphold the law by sustaining elections thereunder that have resulted in a full and fair expression of the public will, and from the current of authority the following may be stated as the approved rule: All provisions of the election law are mandatory if enforcement is sought before election in a direct proceeding for that purpose; but after election, all should be held directory only, in support of the result, unless of a character to effect an obstruction to the free and intelligent casting of the vote or to the ascertainment of the result, or unless the provisions affect an essential element of the election, or unless it is expressly declared by the statute that the particular act is essential to the validity of an election, or that its omission shall render it void. Voters finding the ticket or the names of candidates on the official ballot are not required to determine whether they are entitled to a place thereon, but may safely rely on the action of the officer of the law and on the presumption that they have performed their duty. And so an election in which the voters have fully, fairly, and honestly expressed their will is not invalid because the certificate of nomination of the successful candidate is defective through the omission of some detail. Nor is the title of the successful candidate affected by a subsequent decision holding the law under which the nominations were made invalid.

The report then quotes from the decision in the case of Territory *v.* Kanealii,[2] in which the doctrine is thus summarized:

The American authorities are almost unanimous in holding that objections to irregularities in the nomination of a person for office must be taken prior to the election, and that thereafter it is too late.

188b. An investigation disclosing no evidences of bribery, the failure of a candidate to comply with a State statute in the itemization of expenditures in a primary, was held to be a matter for the consideration of the State authorities in determining whether his name should be placed on the ballot and whether, after election, a certificate of election should be issued, and not pertinent to the determination of an election contest in the Senate.

Although compilation of lists of registered voters was required by State law, the mere absence of names of voters from these lists was not considered sufficient grounds for holding such voters unqualified or their votes illegal.

Failure to comply with the law in one precinct does not necessarily disqualify the vote cast in another precinct in the same election.

A recount disclosing a decisive majority for the sitting member, the Senate confirmed his title to his seat.

In reviewing the decisions the report deduces:

The basic principle upon which the foregoing authorities are grounded, and which is patently and fundamentally sound, is that the will of the people must prevail and can not be set aside by reason of technical objections relating to the way the candidates' name got on the ticket. Since

[1] Ruling Case Law, Vol. 9, see. 161, p. 1172.

[2] 17 Hawaii 243.

the people had the right to choose, and did choose, between the two candidates, the method by which the candidates were presented for their choice is swept away by the action of the people.

The report thus takes up the charge of excessive expenditure of money.

We deem it important that there has been no finding, and could have been none from the evidence, that there was any excessive expenditure of money in the primary by Mr. Bankhead, or any conduct on his part in connection therewith that is subject to criticism.

We agree with the finding of the majority that no violation of the corrupt practices act of the State of Alabama, or of the United States, in the expenditure of money in excess of the amount allowed, has been shown.

The report of Mr. Bankhead of his expenditures, under the Alabama statute, has been criticized in that it is said that he did not comply with the statute in the proper itemization of some of his expenditures. This was a matter for the consideration of the State authorities in determining whether his name should go upon the ballot, and whether, after his election, a certificate of election should have been issued to him.

The subcommittee had reported that a large number of illegal votes were cast in the election and indicated that the conclusion that they were illegal was drawn from the fact that they were cast by voters who were not registered, and whose names did not appear on the list of qualified voters compiled by the probate judges of the several counties as required by State law.

The majority report dissents from this conclusion and holds:

No evidence has been offered to show that any of these persons were in fact not qualified voters. The chairman definitely assumes that they are all illegal voters merely because the name under which they voted as written on the poll list does not correspond with a similar name on the qualified list for that precinct.

The mere fact that the names of the voters casting these ballots were not found on the qualified list is not a sufficient basis for adjudicating them to be illegal votes.

It is our view that all of these ballots should be treated as legal until there is something more to show that they were cast by persons who were not qualified voters.

The report also takes issue with the proposition advanced by the minority to the effect that failure to comply with the law in isolated instances invalidated the election throughout the State. The report adds:

Nor does it follow, if the law was not fully complied with in any precinct in the State, that the vote cast at all the precincts, or at any of them, must be discarded.

In conclusion the majority announce:

Our conclusion and recommendation is that the contestee was duly elected a Senator from the State of Alabama in the election of November 4, 1930, and is entitled to his seat.

The case was debated at length in the Senate on April 21,[1] 22, 23, 25, 26, 27, and 28. On April 26,[2] in the course of debate, Mr. Park Trammell, of Florida, offered this motion:

Mr. President, I move that the contestant, former Senator J. Thomas Heflin, be permitted to address the Senate for not exceeding two hours in the pending contest.

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[1] Record, pp. 8579, 8673, 8765, 8865, 8918, 9020, 9110.

[2] Record, p. 8872.

Mr. Joseph T. Robinson, of Arkansas, raised a question of order against the motion:

In support of the motion Mr. Trammell cited precedents and referred to the following instances in which contestants had been permitted to address the Senate in their own behalf:

At the opening of this Congress, December 1, 1851,[12] the credentials of Stephen R. Mallory, of Florida, were read, and Mr. Mallory took the oath prescribed by law and took his seat in the Senate. Mr. D. L. Yulee contested his seat. The select committee having the case in charge reported (August 21, 1852) that Mr. Mallory was duly elected and entitled to the seat; and on August 27, the Senate, by a vote of 23 to 21, agreed to consider this report. The same day the Senate refused to grant leave to Mr. Yulee "to be heard in person at the bar of the Senate"; yeas 17, nays 29; but, when the resolution was amended, granting the contestant the leave to be heard "for two hours," it was agreed to by a vote of yeas 31, nays 21. Mr. Yulee then appeared at the bar of the Senate and was heard. The resolution reported by the select committee declaring Mr. Mallory duly elected was agreed to; yeas 41, nays 0.

[12] First session, Thirty-second Congress, Senate Journal, pp. 6, 622, 625, 648–650; Dec. 1, 1851, Aug. 21, 23, 27, 1852.

On February 25, 1892,[1] the Senate resumed the consideration of the report of the Committee on Privileges and Elections on the contested seat in the Senate from the State of Idaho. Mr. William H. Claggett, the contestant, was given permission to occupy the floor and was given the right to speak not exceeding two hours. The next day the limitation as to the time allowed the contestant, William H. Claggett, was withdrawn. Mr. Claggett occupied the floor part of two days in his own defense.

Mr. George W. Norris, of Nebraska, supported the point of order and in response to the citation of precedents said:

Since I have been a Member of the Senate I have never known in a contest case anyone who was not a Member of the Senate to be allowed to address the Senate on the controversy, except in the case of Mr. Vare. By unanimous consent he was permitted to speak. I thought at the time it was a bad precedent. It is true that I had the right to object, and did not; but the reason why I did not object was because I had been quite active in the matter—I was the author of the resolution that excluded him and I did not feel that I ought to put myself in the attitude of making an objection. Mr. Vare also held a certificate of election from the governor of his State. He was permitted to speak by unanimous consent.

Mr. Bratton and Mr. Borah argued that while contestants had been permitted to debate their own cases in the instances referred to, a point of order had not been made in any case and the question was now being raised for the first time.

The Vice President [2] ruled:

The Chair has examined the record of the two cases cited by the Senator from Florida, Mr. Trammell, and finds that the point of order was not raised in either of them. There is no rule of the Senate on the subject; and, therefore, the Chair submits to the Senate the question as to whether or not the motion of the Senator from Florida is in order.

Thereupon, Mr. Robinson withdrew the point of order, and the question recurring on the motion of the Senator from Florida, and the yeas having been ordered, there were 33 yeas and 31 nays, and the motion was agreed to.

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[1] First session Fifty-second Congress, Journal, pp. 125, 127, 130.

[2] Charles Curtis, of Kansas, Vice President.

On the following day,[1] pursuant to the order, Mr. Heflin was addressing the Senate and had consumed the major portion of the two hours allotted to him, when Mr. Norris proposed:

Mr. President, I ask unanimous consent that the limitation of two hours be dispensed with, and that Mr. Heflin be allowed to conclude his remarks.

There was no objection and Mr. Heflin concluded his remarks. All debate having been concluded, the question was taken on substituting for the pending resolution the following proposed by Mr. Daniel O. Hastings of Delaware:

Strike out all after the word "*Resolved*" in the pending resolution, and insert in lieu thereof the following:

That it is the sense of the Senate that there was no legal election for United States Senator in Alabama in 1930, and that the seat now held by John H. Bankhead is hereby declared vacant.

The substitute was rejected, yeas 19, nays 63, and the resolution reported by the majority committee was then agreed to, yeas 64, nays 18, as follows:

Resolved, That John H. Bankhead is hereby declared to be a duly elected Senator of the United States from the State of Alabama for the term of six years, commencing on the 4th day of March, 1931, and is entitled to a seat as such.

189. The Oklahoma election case of O'Connor v. Disney, in the Seventy-second Congress.

Affirmation of the doctrine that official returns are presumed to be correct until shown to be otherwise.

Affirmation of the rule that the burden of proof in contested-election cases rests with the contestant.

In order to justify a recount of the ballots in a contested-election case, evidence must be produced to indicate reasonable grounds for belief both that the returns are incorrect and that a recount would change the result.

The returns from a recount are neither conclusive nor persuasive unless the ballots have been so effectually safeguarded as to preclude opportunity for tampering.

Judicial decision holding that where ballot boxes have been exposed to molestation the returns of the judges are better evidence of the result of the election than the ballots.

On May 11, 1932,[2] Mr. Joseph A. Gavagan, of New York, from the Committee on Elections No. 2, reported on the contested-election case of O'Connor *v.* Disney. The official returns gave the sitting Member a majority of 240 votes. The contestant charged that election officials in two counties of the district had through "mistake, error, misconstruction of the law and fraud" failed to count 607 votes which had been cast for him in Ottowa County, and 155 which should have been counted for him in Tulsa County.

Following the filing of the contest, depositions of numerous witnesses were taken before a county judge designated by the contestee and a notary public designated by the contestee, sitting as magistrates pursuant to the laws of the State of Oklahoma.

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[1] Record, p. 8918.

[2] First session Seventy-second Congress, House Report No. 1288.

After reviewing the evidence thus adduced, the committee reduced the issue to two questions, first, whether there had been fraudulent errors which changed the result, and second, whether the ballots had been properly safeguarded.

The basis adopted by the committee for the consideration of these questions is thus set forth:

In the consideration of the evidence in the whole case, your committee has been guided by the following postulates deemed established by law and the rules and precedents of the House of Representatives:

"I. The official returns are prima facie evidence of the regularity and correctness of official action.

"II. The burden of coming forward with evidence to meet or resist the presumption of regularity rests with the contestant.

"III. That to entitle a contestant in an election case to an examination of the ballots, he must establish (*a*) that some fraud, mistake, or error has been practiced or committed whereby the result of the election was incorrect, and a recount would produce a result contrary to the official returns; (*b*) that the ballots since the election have been so rigorously preserved that there has been no reasonable opportunity for tampering with them."

As to the first question, relating to the possibility of mistake or misconstruction of the law, the committee decided:

The testimony conclusively established that the precinct boards were duly and properly instructed as to the election law of the State of Oklahoma; as to the manner and method of counting ballots and especially, split ballots; that in some instances questions arose when a counter would pick up a split ballot, and thereupon the judge of the board would consult the law and properly instruct the counters and watchers as to the principles governing the counting of the ballots. The evidence on this point is so overwhelming that the majority of your committee is convinced that all ballots were properly and duly counted, and that the contestant has wholly failed to establish the burden of proof of any mistake in the method of counting of the ballots.

With regard to the second question, pertaining to preservation and protection of the ballots, the majority of the committee concluded:

The evidence as to the lack of care and preservation of the ballots and ballot boxes for a period of nine days is so clear and undisputed that one is impelled to the inference that the ballots were in fact tampered with or that there existed a grave possibility of having been tampered with.

In corroboration of this conclusion, it was developed by the testimony that money had been proffered and accepted in furtherance of a plan to alter the ballots while thus exposed in order to change returns from the vote cast for a county candidate on the same ballot with the contestant and contestee.

In discussing the inferences to be drawn from neglect to safeguard the ballots, the committee quote the following excerpt from an opinion[1] rendered by the Supreme Court of New York:

They (the returns) may be impeached for fraud or mistake, but in attempting to remedy one evil we should be cautious not to open the door to another and far greater evil. After the election it is known just how many votes are required to change the result. The ballots themselves can not be identified. They have no earmark. Everything depends upon keeping the ballot boxes secure. * * * Every consideration of public policy, as well as the ordinary rules of evidence, require that the party offering this evidence should establish the fact that the ballots are genuine. It is not sufficient that a mere possibility of security is proved, but the fact must

[1] People *v.* Livingston, 79 New York 279.

be shown with reasonable certainty. If the boxes have been rigorously preserved the ballots are the best and highest evidence; but if not, they are not only the weakest, but the most dangerous evidence. * * * Where ballots in an envelope sealed with the village seal are put by the village clerk in an unlocked desk, containing also the village seal, and situated in a room exposed to the public, and the envelope is partly torn by some unknown person while it remained in such desk, the ballots are not better evidence of the result of the election than the returns of the judges.

In summing up the case the majority of the committee draw the conclusion that—

In the opinion of the majority of your committee the record in this case is barren of any competent proof tending to show or establish fraud, mistake, or error, in either the counting of the ballots cast or the official returns of the vote

The majority also express the opinion that—

said record is sterile of proof of the safeguarding of the ballots after the said election, but contrarywise, is pregnant with positive evidence that said ballots were, for a 9-day period subsequent to said election, available, accessible, and perhaps subjected to public interference or private tampering; that the proof of such accessibility is so compelling as to give rise to a reasonable presumption that the sanctity of said ballots was indeed violated, the true result of the election falsified, and the will of the electorate defeated, thwarted, or destroyed.

Having thus determined the two issues on which the contest turned, the majority of the committee recommended:

Consequently, the majority of your committee believes that a recount of ballots cast in the said election would destroy the will of the electorate, defeat the true result of said election, and visit grave injustice on the duly elected Representative from said district.

We therefore submit the following resolution:

"Resolved, That Wesley E. Disney was elected a Representative in the Seventy-second Congress from the first congressional district in the State of Oklahoma, and is entitled to a seat as such Representative."

Three members of the committee filed minority views dissenting from certain findings of fact but concurring in the recommendation that the contestee be confirmed in his seat.

The report was called up in the House by Mr. Gavagan, on May 24, 1932.[1] After debate the resolution reported by the committee was agreed to without a record vote.

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[1] Record, p. 11050.

Chapter CLXXIV.[1]

THE MEMBERS.

190. By rule the Member is restricted as to his movements during business or debate, and as to wearing his hat and smoking.

Members may not remain near the Clerk's desk during a vote.

The Sergeant at Arms and Doorkeeper are charged with the enforcement of certain rules relating to decorum.

On December 12, 1907,[2] the Speaker,[3] after directing the clerk to read section 7 of Rule 13, said:

The Chair has found it necessary to have the rule read, especially the clause relating to smoking, that Members may understand the rule and understand that it is the duty of the Sergeant at Arms and Doorkeeper to see that the rule is strictly enforced.

191. Before the adoption of rules, while the House was proceeding under general parliamentary law, the Speaker held that Members might not remain near the Clerk's desk during a vote.

Prior to the adoption of rules by the House, those rules which embody practices of long established custom will be enforced as if already in effect.

On March 15, 1909,[4] during a roll call, and prior to the adoption of rules by the House, Mr. Champ Clark, of Missouri, raised the point of order that Members congregated about the Clerk's desk should be required to be seated.

The Speaker[3] said:

The rules of the House, if we had rules, prohibit Members from standing at the Clerk's desk during a roll call, and the Chair will assume, analogous to those rules or following those rules or because of the practice of the House heretofore, in this instance that Members win not be at the Clerk's desk during a roll call.

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[1] Supplementary to Chapter XLL.

[2] First session Sixtieth Congress, Record, p. 304.

[3] Joseph G. Cannon, of Illinois, Speaker.

[4] First session Sixty-first Congress, Record, p. 21.

192. Officers and employees of the House may not remain near the Clerk's desk during a vote unless their duties so require.

On January 7, 1910,[1] Mr. Oscar W. Underwood, of Alabama, made the point of order that an officer of the House whose duties did not require his attendance at the desk remained there during a roll call.

The Speaker[2] said:

The rule is silent as to employees of the House; but the Chair believes that the employees of the House should not be at the Clerk's desk unless their duties require it.

Hitherto, so far as the Chair recalls, with some length of service, employees of the House, both of the majority and minority, have sometimes come to the desk during a roll call without protest; but if protest is made, as it is, the Chair will see, if his attention is brought to it, and even without that, if he notices it, that they do not come to the clerk's desk during a roll call.

193. Discussion of the importance of observing, the rule against remaining at the desk during roll call, and smoking in the Hall of the House.

In order to interrupt a Member having the floor, it is necessary first to address the Chair.

On May 23, 1912,[3] while there was no business pending before the House, the Speaker[4] said:

The Chair wishes to call the attention of Members to two or three rules that are constantly violated, thoughtlessly, no doubt, but the violation of which works absolute confusion. The Chair does this now when nobody is doing the particular thing of which Members complain.

Some of the Members are in the habit of crowding about the desk when a roll call is being called. That is absolutely forbidden by the rules. We got into considerable difficulty at the beginning of the Sixty-first Congress about that very thing.

There is a rule against smoking in the House. That ought to be enforced.

Further, the proper method of procedure when a gentleman has the floor and another desires to interrupt him is first to address the Chair. Of course, the Chair cares nothing about that, except that that is the way to preserve order and keep down dissension in the House.

194. Members may not personally address the clerks at the desk during roll call.

All requests by Members as to whether recorded or how recorded on a roll call are properly addressed to the Speaker from the floor and not to the clerks at the desk.

On March 14, 1914,[5] at the beginning of a roll call, the Speaker[4] said:

Before the Chair puts the motion to go into the Committee of the Whole House, inasmuch as there is quite a large attendance of the House this morning, the Chair desires to make a statement. It is against the rule for Members to come to the Clerk's desk during roll call, asking how they voted or trying to get their names in when they did not vote. Of course, Members do it out of no bad intention. It is more thoughtlessness than anything else, but it bothers the clerks, and it has been increasing in frequency, lately. The clerks do not want any trouble with Members of the

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[1] Second session, Sixty-first Congress, Record, p. 404.

[2] Joseph G. Cannon, of Illinois, Speaker.

[3] Second session, Sixty-second Congress, Record, p. 7022.

[4] Champ Clark, of Missouri, Speaker.

[5] Second session, Sixty-third Congress, Record, p. 4850.

House, and can not afford to have any. The rule prohibits any Members being around the Clerk's desk during roll calls.

195. On June 22, 1916[1] after the previous question had been ordered on the fortifications appropriation bill, the Speaker[2] said:

Before the votes are taken on the fortifications appropriation bill and the amendments thereto, with the consent of the House the Chair desires to make two or three remarks. There are rules in this House that are habitually violated, generally, the Chair thinks, without any intention of doing so. One of them is that Members shall not crowd about the Clerk's desk when the roll is being called. Members keep coming up and disturbing the Clerk during a roll call, asking whether they are recorded, or how they are recorded, or desiring to be recorded when they have no right to be recorded. It casts suspicion upon the integrity of the proceedings.

196. On March 3, 1919[3] Mr. James R. Mann, of Illinois, raised a question of order against Members approaching the desk and addressing the tally clerk while the roll was being called.

The Speaker[2] sustained the point of order.

197. Members may not introduce occupants of the galleries during a session of the House.

The Speaker is forbidden to recognize for motions to suspend the rule prohibiting the introduction of persons in the galleries.

Section 8 of Rule XIV provides:

It shall not be in order for any Member to introduce to or to bring to the attention of the House during its sessions any occupant in the galleries of the House; nor may the Speaker entertain a request for the suspension of this rule by unanimous consent or otherwise.

This rule was adopted, April 10, 1933,[4] to protect the House from the interruptions and confusion attending the introduction of visitors in the galleries by Members from the floor. The custom had long been a subject of criticism and Speaker Garner in former sessions[5] had made it a policy to decline recognition for that purpose.

198. The House has by resolution revoked all leaves of absence and directed the Sergeant-at-Arms to deduct from the salary of Members compensation for days absent without leave.

On August 25, 1914,[6] the House passed a resolution revoking all leaves of absence granted to Members, and directing the Sergeant-at-Arms to enforce the law requiring him to deduct from the salary of absent Members compensation for the days absent.

Following the passage of the resolution, Mr. Joseph W. Byrns, of Tennessee, asked, as a parliamentary inquiry, if the resolution revoked all previous leaves of absence, including those granted on account of sickness.

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[1] First session Sixty-fourth Congress, Record, p. 9790.

[2] Champ Clark, of Missouri, Speaker.

[3] Third session Sixty-fifth Congress, Record, p. 4914.

[4] First session Seventy-third Congress, Record, p. 1449.

[5] First session Seventy-second Congress, Record, p. 14051.

[6] Second session Sixty-third Congress, Record, p. 14229.

Mr. James R. Mann, of Illinois, contended that it revoked all leaves of absence in effect at the time of its passage, regardless of the cause for which granted.

The Speaker [1] sustained Mr. Mann's contention, and said:

That is true. The Chair will state his recollection for the benefit of other Members, a great many of whom never had anything to do with it, that in the Fifty-third Congress, in the summer of 1894, this statute was enforced, and I paid $28 and some cents myself to go down in Virginia to make two speeches. But my recollection about it is that the Sergeant at Arms had some kind of a document down there that you had to sign, and you certified how many days you had been absent. If you did not make the certification you would have been here every day.

Speaker Reed sneered at the statute as "a police court regulation." Nevertheless it had the effect of keeping a quorum here.

Mr. Sereno E. Payne, of New York, added:

Mr. Speaker, my recollection about the enforcement of that statute is that there was a certificate gotten up by the Sergeant at Arms which the Members of the House were required to sign, and most of them certified that they were present during the whole time. I think there were only about half a dozen of us—and I was included in that number—that suffered any deduction from our salary on account of it, and my recollection is that nobody suffered after the first month and that they overlooked the certificate.

The resolution remained in force until October 15,[2] when Mr. Underwood offered the following resolution:

Resolved, That House resolution 601 directing the Sergeant at Arms to enforce section 40 of the Revised Statutes of the United States is hereby repealed.

During debate on the resolution, Mr. Charles R. Crisp, of Georgia, asked if the passage of the pending resolution could be interpreted as providing for the reimbursement of those Members whose salaries had been docked under the provisions of the original resolution.

Mr. Underwood replied in the negative.

The resolution was then agreed to, yeas 81, nays 8.

199. Application for leave of absence is properly presented by filing with the clerk the printed form to be secured at the desk rather than by oral request from the floor.—On December 17, 1931,[3] following a number of requests for leave of absence by Members asking recognition from the floor, the Speaker [4] suggested:

The Chair would like to make this suggestion to gentlemen who in the future desire to provide leaves of absence for their colleagues. There is provided at the Sergeant at Arms desk, on the Speaker's right, blanks for just such purposes. The Chair would suggest that Members avail themselves of that means of securing leaves of absence. These blanks, when filled out and given to the Clerk, will be laid before the House prior to adjournment for the approval of the House. The Chair thinks that by this means much of the time of the House will be saved.

200. It is not in order to request leave of absence for colleagues from the floor.

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[1] First session Seventy-second Congress, Record, p. 14051.

[2] Journal, p. 989; Record, p. 16676.

[3] First session Seventy-second Congress, Record, p. 721.

[4] John N. Garner, of Texas, Speaker.

The rules do not provide for announcement of how colleagues would vote if present, and such procedure is by unanimous consent only.

Members are not permitted to obstruct the well of the House during roll call.

On February 1, 1929,[1] Mr. Bertrand H. Snell, of New York, rising to a parliamentary inquiry said:

I would like to propose a parliamentary inquiry to the Speaker. There has been a growing custom lately that during a roll call Members go into the well of the House and create such confusion that it is very difficult for the clerks to hear and impossible for Members in the Hall to hear their names when called. Furthermore, there is no provision in the rules that provides for a Member to explain his vote or how a colleague would vote if present. I think the Speaker should call attention to these infractions of the rules.

The Speaker[2] replied:

I am glad that the gentleman from New York has asked this question. The Chair has had in mind making a statement touching the matters he mentions. In the first place, the Chair thinks that gentlemen should not ask leave of absence for their colleagues on the floor of the House. It simply consumes time. They should be in writing and blanks are provided for that purpose. Hereafter the Chair will refuse to recognize gentlemen who ask for leave of absence for their colleagues from the floor.

As to the second question asked by the gentleman from New York, whether the announcement by Members that their colleagues if present would vote so-and-so, is contrary to the rules of the House. The Chair has no knowledge of any rule that gives Members that privilege. Of course, a Member might obtain unanimous consent to make such a statement, and the Chair hereafter will ask if there is objection to making the statement.

With regard to Members standing in the well of the House during an important roll call, Chair thinks that the rule prohibiting it ought to be strictly enforced, and will enforce it from now on.

201. The compensation of Speaker and Members.

The statutes[3] fix the compensation of the Speaker at $15,000[4] per annum, and the compensation of Members, Delegates from Territories, and Resident Commissioners from Porto Rico and the Philippine Islands, at $10,000 per annum each.

202. The provision of the act of July 16, 1914, relating to payment of salary of Members of Congress for period elapsing between election and death of predecessor, is permanent law.

Since 1914 Members elected to fill vacancies occasioned by death of predecessor are paid salary from date of election only.

A certificate issued by the Speaker of the House of Representatives within the meaning of sections 47 and 48 of the Revised Statutes and as such is conclusive upon the accounting officers of the Treasury.

At a special election held June 5, 1919, Mr. James O'Connor was elected a Representative from the first congressional district of the State of Louisiana to fill a vacancy occurring by the death, on April 28, 1919, of Albert Estopinal.

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[1] Second session Seventieth Congress, Record p. 2624.

[2] Nicholas Longworth, of Ohio, Speaker.

[3] Revised Statutes, sections 35, 37; U.S. Code, title 2, sec. 31; title 3, sec. 45; title 48, sections 893, 1093. 43 Stat. L., p. 1301.

[4] Speaker raised from $12,000 and Members from $7,500 by legislative appropriation act of 1925. (43 Stat. L.)

Following the practice of the Sergeant at Arms since 1914, Mr. O'Connor was paid salary from the date of his election only. A claim for salary for the period elapsing between his election and the death of his predecessor being submitted to the Auditor for the State and Other Departments, the claim was disallowed because of the provisions of the act of July 16, 1914,[1] as follows:

The salaries of Representatives in Congress, Delegates from Territories, and Resident Commissioners, elected for unexpired terms, shall commence on the date of their election and not before.

On appeal to the Comptroller of the Treasury, the comptroller, on July 17, 1919, disclaimed jurisdiction under the following statute:[2]

SEC. 47. The salary and accounts for traveling expenses in going to and returning from Congress of Senators shall be certified by the President of the Senate, and those of Representatives and Delegates by the Speaker of the House of Representatives.

SEC. 48. The certificate given pursuant to the preceding section shall be conclusive upon all the departments and officers of the Government.

Thereupon the question was submitted in the form of a personal letter to the Speaker,[3] who responded:

JULY 28, 1919.

Yours received. I am of the opinion that the act of July 16, 1914, to which you refer, is permanent law. I was on the Committee on Appropriations at the time, and my recollection is that we thought the then-existing practice of giving to an incoming Member salary from the date of the death of his predecessor was unreasonable and that he had no claim for payment for any period before his election, and it was to accomplish that that the legislation was passed. Believing that to be the law, of course I can not encourage you for any remedy.

Thanking you for the courteous manner in which you preferred your request, I am,

Yours respectfully,

F. H. GILLETT.

This letter is construed in the opinion[4] issued by the Comptroller of the Treasury[5] under date of August 25, 1919:

The action by the Speaker of the House of Representatives, as expressed in his letter of July 28, 1919, to Mr. O'Connor is a "certificate" within the meaning of sections 47 and 48 of the Revised Statutes and, as such, is conclusive upon the accounting officers of the Treasury, and the appeal is therefore dismissed for want of jurisdiction to determine the case upon its merits.

203. Payment of salaries of Members at any other rate than that fixed by law is not authorized.

A Member may remit back to the United States any portion of his salary, and amounts so remitted are covered into the general funds of the Treasury and are not subject to recovery.

Only one check monthly may be issued to Members in payment of salary, such check to correspond with the legal rate of pay due for the current month.

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[1] 2 U.S.C. 37.

[2] 2 U.S.C. 48.

[3] Frederick H. Gillett, of Massachusetts, Speaker.

[4] Decisions of the Comptroller of the Treasury, Appeal No. 29861.

[5] Comptroller Walter W. Warwick.

On March 19, 1925,[1] in response to a request from the Sergeant at Arms of the House, the Comptroller General of the United States[2] rendered the following decision:

Public No. 624 fixes the legal rate of pay for Members of the House of Representatives, and payment at any other rate would be an improper payment. You are advised therefore that acceptance of salary certificates calling for an amount less than at the rate provided by law is not, authorized.

You may only make payment of salary at the rate fixed by law. A declining to receive payment of salary at the rate fixed by law or the difference in amount between the old and the new rate of salary does not necessarily affect the right thereto, nor as a general rule preclude the individual or his legal representatives from subsequently making a claim as for unpaid salary. The accounts of the Government are entitled to be kept and payments made so that the transactions will appear therefrom as closed, and if one does not for personal reasons wish to retain the whole amount which the law provides he shall be paid, he is free to remit back to the United States such amount as he does not wish to retain with a statement of his reasons therefor. The transaction will then appear as an acquittance to the United States of any future claims for salary and the remittance back made by the individual is in the status substantially of a gift to the United States which may properly go into the general funds of the Treasury without being subject, to future claim for unpaid salary, as would be possible should any other rule be followed.

As a general rule, several checks should not be issued to pay a single obligation of the Government and there appearing no interest of the United States to require payment by more than one check, you are advised that one check only should be issued therefor.

204. It is the custom to grant to the widow or other dependent of deceased Member one year's salary.

The payment of a year's salary to widows of deceased Members is a, gratuity, and in event of the death of the beneficiary prior to payment there is no authority to make payment to any one else.

In conformity with long-established custom under which a year's salary is. granted to the widow or heirs of a deceased Member, the act of March 28, 1918,[3] appropriated as follows:

To pay the widow of Ebenezer J. Hill, late a Representative from the State of Connecticut, $7,500.

Mrs. Hill died May 23, 1918, without having received payment of the amount appropriated, and Clara M. Hill, administratrix of her estate, applied for payment.

On September 26, 1918, in response to a request from the Clerk of the House, the Comptroller[4] of the Treasury decided:[5]

An appropriation of this character is a gratuity. Prior to making the appropriation there existed no legal right in anyone to the amount provided, and the making the appropriation gave no legal right to anyone beyond the one named in the appropriation. The fact that the widow incurred indebtedness or otherwise obligated herself because of the appropriation furnishes no legal reason for paying the amount to one not named or comprehended in the appropriation. It, is not a relief measure but a gift, and the one named by Congress to receive the gift being unable to receive it because of death, the gift can not be paid to a representative of the one named without, the specific authority of Congress.

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[1] MSS. Vol. XLIII, p. 891.

[2] Comptroller General, J. R. McCarl.

[3] Stat. L., p. 497.

[4] Comptroller Walter W. Warwick.

[5] 25 Comptroller's Decisions, p. 251.

205. Subsistence expenses of members of committees on official missions are not reimbursed at commuted rates or on per diem allowances but on vouchers for actual expenses.

On April 21, 1931,[1] the Comptroller General of the United States[2] handed down the following decision:

Members of congressional committees engaged in the examination of estimates in the field are not civilian officers or employees of the departments or establishments within the purview of the subsistence act of 1926, nor are their traveling expenses payable from appropriations for "traveling expenses", but under the specific provisions for "examination of estimates for appropriations in the field." They may not be reimbursed for their subsistence expenses at a commuted rate nor granted a per diem in lieu of subsistence, but are limited to actual expenses.

206. Old and new systems of providing clerks for Members.

Clerk hire is paid from date of filing of credentials and not from date of election.

Clerks designated by Member are placed upon the roll of employees of the House, and are subject to removal by the Member, with or without cause.

Allowance for clerk hire was first authorized in the joint resolution approved March 3, 1893,[4] not to exceed $100 for any month during a session to Members who were not chairman of committees entitled to a clerk. By the act of July 7, 1898,[5] the allowance was extended to all members throughout the year except to chairmen of committees during a session.

Under the provisions of the legislative appropriation act of 1907,[6] each Member and Delegate received $1,500 annually for the hire of clerks necessarily employed by him in the discharge of official duties.

On November 8, 1911,[7] in response to an inquiry from the Clerk of the House, the Comptroller of the Treasury[8] held that Members elect should be paid this allowance from and including the date on which their credentials were filed and not from date of election.

The amount provided for clerk hire was increased in 1917[3] to $2,000, in 1919[4] to $3,200, and in 1924[9] to $4,000, with the provision that no person receive a salary therefrom in excess of $3,300; in 1929,[10] to $5,000, no person to receive in excess of $3,900 per annum. The Joint Resolution of January 25,1923,[11] provides that the amount shall—

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[1] Comptroller's Decisions, A–36217.
[2] Comptroller J. R. McCarl.
[3] 39 Stat. L., p. 1076.
[4] 40 Stat. L., p. 1219.
[5] 30 Stat. L., p. 687.
[6] 34 Stat. L., p. 942.
[7] 18 Comptroller's Decisions, p. 337.
[8] Comptroller Walter W. Warwick.
[9] 2 U.S.C. 74.
[10] 46 Stat. L., p. 38.
[11] 2 U.S.C. 92.

be paid by the Clerk of the House of Representatives to one or two persons to be designated by each Member, Delegate, and Resident Commissioner, the names of such persons to be placed upon the roll of employees of the House of Representatives, together with the amount to be paid each, and Representatives, Delegates, and Resident Commissioners elect to Congress shall likewise be entitled to make such designations.

And further provides—

That such persons shall be subject to removal at any time by such Member, Delegate, or Resident Commissioner with or without cause.

207. The act [1] of June 20, 1929, provides:

The clerk hire for each member, Delegate, and Resident Commissioner shall be at the rate of $5,000 per annum and shall be paid in accordance with the act of January 25, 1923:[2] *Provided,* That no person shall receive a salary from such clerk hire at a rate in excess of $3,900 per annum.

Under this statute the allowance of clerk hire is increased from $4,000 to $5,000, and the maximum amount payable to any one person is increased from $3,300 to $3,900.

No Member may appoint more than two persons to receive compensation from the allowance and appointments are not retroactive to a date prior to a current month.

The allowance is paid in monthly installments and is not cumulative. Any portion of a monthly allowance not absorbed reverts to the Treasury.

208. Death or resignation of a Member terminates the employment of clerks designated by him.

On July 29, 1919, in response [3] to a request of the Clerk of the House, the Comptroller of the Treasury [4] rendered a decision in the claim of S. L. Irby, designated as clerk to Mr. J. Willard Ragsdale, of South Carolina. Mr. Ragsdale died July 23, 1919, and the question arose as to whether the employment of the clerk was automatically terminated by the death of the Member or whether the clerk served until the appointment of a clerk by Mr. Ragsdale's successor.

The comptroller decided:

In view of the facts that the clerks are personal appointees, that they are subject to removal in the discretion of the appointing authority, and especially that they are necessarily employed by a Member, Delegate, or Resident Commissioner in the discharge of his official and representative duties, as set forth in the act of March 1, 1919, I am of the opinion that the death or resignation of a Member, Delegate, or Resident Commissioner terminates the employment of the clerk appointed by him under the authority of the acts quoted.

209. On March 6, 1920,[5] in response to a request of the financial clerk of the Senate, the Comptroller of the Treasury [2] rendered a decision on the status of persons designated by Mr. John H. Bankhead, of Alabama, and acting as personal clerks and as clerks to committees of which he was chairman at the time of his death.

The comptroller held:

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[1] 46 Stat. L., p. 32.

[2] U. S. Code, title 2, sec. 92.

[3] 26 Comptroller's Decisions, p. 726.

[4] Comptroller Walter W. Warwick.

[5] 26 Comptroller's Decisions, p. 86.

At the time of his death Senator Bankhead was chairman of the Committee on Expenditures in the Interior Department, which committee is not one specifically provided with clerkships. If the clerks who served under him and under his committee were appointed by or for him as his individual clerks you are not authorized to continue them on the pay roll for any period subsequent to his death.

210. The statute providing for clerks for Members does not require the designation of two clerks, but merely limits the number to not more than two.

Payment of clerk hire from lump sum appropriations to persons carried on the rolls in another capacity is additional compensation and prohibited by law.

The statute prohibiting payment of two or more salaries exceeding $2,000 per annum in the aggregate applies to clerks to members.

One person may be designated as clerk to two Members if the aggregate compensation is within the limitation prescribed by law.

On July 18, 1919,[1] the Clerk of the House submitted to the Comptroller of the Treasury the following inquiries:

First. Is the Clerk of the House authorized to pay compensation at the rate of $3,200 per annum to one clerk regularly designated and placed on the rolls as clerk to a Member of the House?

Second. May a person be carried on the rolls in the dual capacity of clerk to a Member at $300 per annum and at the same time as janitor to the Committee on Public Lands, and, if so, may the additional compensation authorized by section 7 of the act of March 1, 1919, be paid in each instance?

Third. May a Member of the House designate a person to be a clerk under the provisions of Joint Resolution No. 104 at compensation of or exceeding $2,000 per annum if such person be on the roll of employees of the House as a committee clerk or in another capacity?

Fourth. Is the additional compensation authorized by the act of March 1, 1919, payable to a Member's clerk at any rate of basic compensation below $2,500?

Fifth. May one person be designated as clerk to two Members, provided the aggregate compensation of the two employments, including the so-called bonus, does not exceed $2,000 per annum?

The comptroller[2] replied:

You are advised that if a Member shall elect to designate only one person as his clerk at a salary not exceeding $3,200 per annum and the name of such person shall be regularly placed upon the roll of employees of the House at such rate of compensation, you would be authorized to pay said person at the rate of compensation so fixed.

As to the second point; the salary or compensation of the position of janitor to the Committee on Public Lands is fixed by law.[3] Therefore, the payment from the lump sum appropriation for clerk hire of additional compensation to the person holding such position is prohibited by the provisions of section 1765, Revised Statutes.

The so-called bonus at the rate of $240 per annum is to be paid to each civilian employed (with certain exceptions). In no circumstances can one person receive more than $240 a year, or at that rate. The bonus does not apply to offices or positions but to a person—a civil employee of the Government. He can not draw more than one bonus.

The third question is answered in the negative as in direct contravention of the provisions of section 6 of the act of May 10, 1916.[4] See also answer to your second question.

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[1] 26 Comptroller's Decisions p. 51.

[2] Comptroller Walter W. Warwick.

[3] 10 Stat., L., 1218.

[4] U. S. Code, title 5, sections 58, 59.

In answer to your fourth question you are advised that the additional compensation authorized by Section 7 of the act of March 1, 1919,[1] is payable to the clerks in question subject, of course, to all of the limitations and restrictions in said section relative to rates of compensation, the 60 per centum limitation, payments from lump-sum appropriations, requirement of duty with respect to time, certificate as to ability and qualifications, etc.

Your fifth and last question is answered in the affirmative.

211. Compensation of clerks may be paid on the third of each month.

On February 21, 1921[2] the Comptroller of the Treasury[3] decided that the month for dividing the annual compensation of clerks to Members into monthly installments may begin on the 4th of each month, and payment may be made on the 3d of the month, which would be coincident with the payment of Members.

212. A Member unseating another is not entitled to clerk hire prior to taking of oath and designation of clerks.

On February 25, 1921,[4] the House decided the Pennsylvania election case of John R. Farr *v.* Patrick McLane against the sitting member and seated the contestant. Thereupon, Mr. Farr designated clerks, and the question arose as to whether such clerks were entitled to compensation from the beginning of the Sixty-sixth Congress.

The Clerk of the House addressed to the Comptroller of the Treasury an inquiry as to whether Mr. Farr was entitled to clerk-hire allowance—

as a Member-elect from and including March 4, 1919, to June 30, 1919 "and" to clerk-hir6 allowance from July 1, 1919, to and including February 24, 1921, he having unseated another who drew clerk-hire allowance from March 4, 1919, to June 30, 1919, and designated persons to receive such allowance from July 1, 1919, to February 25, 1921.

On March 2, 1921,[5] in response to this inquiry, the comptroller[3] decided:

The appropriations for the fiscal years 1920 and 1921[6] do not provide for the payment to the Member for clerk hire as in the appropriation for the fiscal year 1919,[7] and I understand also that during the period covered by the second question, July 1, 1919, to February 24, 1921, Mr. Farr did not and could not comply with the requirements of the joint resolution of July 11, 1919,[8] by designating persons to be paid clerk hire and having them placed upon the roll of employees of the House of Representatives with the amount to be paid to each. In addition there is the express direction in the proviso to the appropriation for the fiscal year 1920,[9] that no part of the clerk hire "shall be paid to any Member, Delegate or Resident Commissioner."

Although there is some difference in the language of the last two appropriations from that for the fiscal year 1919, the clear intent of all three appropriations is to pay for clerk hire "necessarily employed" and that there shall be a showing of such employment. This negatives whatever authority there may be in the appropriations for the fiscal year 1919 to pay the Member the clerk hire; and as to the last two appropriations, there being no provision for payment to

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[1] 40 Stat., L., 1267.

[2] 27 Comptroller's Decisions P. 743.

[3] Comptroller Walter W. Warwick.

[4] Third Session Sixty-sixth Congress, Journal p. 253; Record, p. 3910.

[5] 27 Comptroller's Decisions P. 766.

[6] 41 Stat., 637.

[7] 40 Stat., 764.

[8] 41 Stat., 162.

[9] 40 Stat., 1219.

the Member, the requirements to designate the persons to receive payment precludes payment to anyone else.

The two questions are answered negatively.

213. The disposition of stationery allowance to Members through the stationery room.

Purchase through the stationery room of articles other than stationery and necessary office, supplies is restricted by law.

Since 1893 a sum has been regularly appropriated allowing each Member $125 for stationary for each regular and special session of Congress. This allowance is placed to the credit of Members in the stationery room at the beginning of each session and may be disposed of in two ways: A Member may either draw the entire allowance of $125 in cash when the session of Congress for which the allowance is made convenes, or may leave it to his credit and charge against it for stationery and office supplies, as needed, until exhausted.

A Member drawing the allowance in cash thereby withdraws his official credit account from the stationery room and thereafter purchases are on a cash basis, chargeable to him personally. When the allowance is permitted to remain to the Member's credit and exhausted through the purchase of supplies charged against it, additional stationery or supplies are likewise charged to his personal account.

For the convenience of Members, purchases from the stationery room made after official accounts have been closed, are charged to their personal accounts and statements rendered to them monthly.

Purchases through the stationery room of articles other than stationery and office supplies necessary to the conduct of public business is restricted by the Act of February 20, 1923,[1] as follows:

> No part of the funds herein appropriated shall be used for the purpose of purchasing by or through the stationery rooms articles other than stationery and office supplies essential to and necessary for the conduct of public business.

214. Statutes authorize the sale of stationery for official use and the binding of official documents for Members by the Public Printer at cost.— The sale of stationery by the Public Printer at cost is authorized by the act of June 5, 1920,[2] which provides:

> Paper, envelopes, and blank books required by the stationery rooms of the Senate and House of Representatives for sale to Senators and Members for official use may be purchased from the Public Printer at actual cost thereof and payment therefor shall be made before delivery.

Orders for such supplies are placed through the House stationery rooms and payment is required before delivery.

The following resolution adopted by the Joint Committee on Printing August 14, 1913, restricts the requisitioning of embossing:

> *Resolved,* That the Public Printer be requested to discontinue the embossing of letterheads, note heads, and envelopes for Congress, its officials, committees, and Members: Provided, That such embossing may be done if the cost thereof, in excess of the amount that printing the same would cost the Government, is charged to the person so ordering.

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[1] 42 Stat. L., p. 1280; U. S. Code, title 2, secs. 110–112.

[2] U.S. Code, sec. 110, p. 9.

Authorization for binding of official documents by the Public Printer at cost is provided by law [1] as follows:

That the Public Printer be authorized to bind at the Government Printing Office any books, maps, charts, or documents published by authority of Congress, upon application of any Member of the Senate or House of Representatives, upon payment of the actual cost of such binding.

215. Boxes are provided for the mailing of frankable matter.

On May 9, 1911,[2] Mr. John C. Floyd, of Arkansas, from the Committee on Accounts, submitted a report [3] from which the following is an excerpt:

The duty of distributing packing boxes for frankable matter remains that of the Clerk, and it will not impose a heavy duty on the force at his command to discharge it in such manner as the Clerk may direct. Heretofore these boxes have been distributed from the Clerk's document room. For the information of new Members we will state that an annual appropriation of $3,000 is made as a part of the House contingent fund for packing boxes, intended for the shipment of bulky frankable matter. This custom has obtained for any years, the item dating back to 1857, when "boxes for books" were provided for; in 1862 the term "packing boxes" was first and has since been employed. These boxes are secured by contract pursuant to the act of March 3, 1901 (Supp. R. S., vol. 2, p. 1530), and paid for out of the contingent fund upon vouchers approved by the Committee on Accounts. Each Member is entitled to 3 boxes—1 large pine, 1 large redwood, and 1 small pine. The latter is generally used for sending out bedding plants from the Botanic Garden to any given address, the box being labeled here and sent to the garden with a Member's frank. The large boxes are convenient for mailing documents and files of official correspondence to Member's homes at the end of a session.

With the increase in the membership of the House in 1913, this appropriation was increased to $4,500 and has remained unchanged in subsequent appropriation bills, except in that of 1920, when it was stricken out on a point of order. In 1921, although included in the bill, the appropriation was not expended as the rapid rise in prices following the wax rendered it inadequate. The following year it was found sufficient to provide each Member with one box, and since, that time the quota has been limited to one substantial box for each Member.

216. Discussion of various services of the House, including the House restaurant, House barber shops, and stationery and mileage allowances to Members.

On April 6; 1922,[4] in a debate proceeding under unanimous consent, Mr. Frank W. Mondell, of Wyoming, discussing various services of the House, said:

Mr. Speaker, in view of what has been said about the restaurant, the barber shop, and the stationery room, I think it is proper that there would be a brief statement made with regard to those institutions at this time. For many years, certainly far beyond my 25 years of service, certain colored men have been employed in the House who in addition to their other duties, for which they were paid a small salary, serve the Members and the employees of the House as barbers. I have never been shaved or had a hair cut in the House for which I have paid less than I would pay at any commercial shop anywhere. The necessity for the maintenance of barber shops in the House is apparent to anyone who knows anything about the business of the House. Members and employees can not always find the.time to go down town. It is necessary to have a barber shop. The barbers in the House are paid a small sum for work which they actually perform.

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[1] U. S. Code, sec. 161, p. 1425.

[2] First session Sixty-first Congress, Record, p. 1153.

[3] House Report No. 25.

[4] Second session Sixty-second Congress. Record, p. 5120.

In addition to that they serve the Members and employees, and they are paid for that service by the Members or the employees whom they serve.

We have had for many years a session allowance of $125 each for stationery. We procure that stationery through the stationery room. There lies on my desk to-day a statement from the stationery room to the effect that my stationery account is exhausted. That is not an uncommon experience; it is, I think, the usual experience of Members who endeavor to serve their constituents by answering promptly and fully their correspondence.

We do furnish a room for a restaurant in this building. That is absolutely essential for the conduct of the business of the House and for the accommodation of those who have business with the House and its committees or of the visiting public. All are treated alike and all pay the same price. Quite recently an arrangement has been made under which under certain condition it is possible that there will be something of a charge on the contingent fund for the maintenance of the restaurant, but that is doubtful. We pay at the restaurant for what we obtain there, and pay, I think, a very good price.

The mileage allowance is granted once a session of Congress. For one, I desire to offer testimony to the effect that during my service here, while I never have traveled except as it was necessary to travel between Washington and my home, the mileage allowance made to me, though it is a considerable sum, has not fully paid the bill.

During the course of the debate Mr. Finis J. Garrett, of Tennessee, asked:

I would like to ask the gentleman from Wyoming if he knows how long it has been the law that a Member of Congress shall receive 20 cents a mile each way over the shortest traveled route between his home and Washington?

Mr. William H. Stafford, of Wisconsin, replied that the rate was established in 1866, and Mr. Thomas U. Sisson, of Mississippi, added:

One of the first controversies that came up on the floor of the House after the Government was organized was the equalization of compensation of Members of Congress. In order that their compensation might be equalized the fathers of this Republic and the First Congress—or I think the second-provided that mileage should be paid from the home of the Member to the city of Washington and return, so that every Member of Congress might receive exactly the compensation for services rendered here.

Continuing the discussion, Mr. James R. Mann, of Illinois, said:

Each Member of the House is entitled to a credit In the stationery account of $125 for each session of Congress. The average cost to the average Member of the House for his stationery supplies amounts to a great deal more than $125 for each session of Congress. That allowance was made years ago, before a Member of Congress even had a secretary, much less two. It is credit in the stationery room. The Member of Congress can withdraw the entire $125 in cash if he chooses to do so. That is what I have usually done since I have been a Member of the House. Then he pays for his stationery or other supplies of that character as he gets them in cash out of his own pocket. Having the right to withdraw the $125 in cash, he may obtain from the stationery room any kind of supplies which they will purchase for him, and it is then charged up to his $125, but when he does that he pays the other bills for his stationery out of pocket.

217. Conditions under which the franking privilege is exercised by the Member.

There is no provision of law under which the frank may be used for return reply.

Limit of weight of matter mailed under frank is specified by law.

The franking privilege does not extend to air mail, or with certain exceptions to foreign mails unless forwarded by Department of State.

The franking privilege extends to telegraph service relating to official business.

Ex-Members of Congress are entitled to the franking privilege until the first day of December following expiration of their term of office.

The law [1] extends to Members of Congress the privilege of mailing free under their frank the Congressional Record and extracts therefrom, public documents printed by order of Congress, and correspondence upon "official or departmental business."

Communications which a Member of Congress desires to send to his constituents containing a recital of facts relating exclusively to his public record in Congress or requesting their views on questions pertaining to legislative matters, but embodying no comment of a personal nature or solicitation of personal favor, are regarded as upon official business and, therefore, frankable. The test of frankability of mail is whether its contents relate solely to official or departmental business. Letters and other matter mailed under the congressional frank should be wholly official and not directly or suggestively personal.

There is no provision of law under which a person receiving a request from a Member of Congress for information, official or otherwise, may send such information in the mails free of postage in an envelope bearing the frank of such Member of Congress furnished by the Member.[2]

The weight for official correspondence mailed under the frank of a Member of Congress is limited to 4 ounces. The limit of weight of matter on official or departmental business except "for books and documents published or circulated by order of Congress," is not exceeding 4 pounds for each package.[3]

Public documents are mailable regardless of their weight, and, therefore, a packing box containing public documents only, is mailable under frank without, regard to its weight. If a box weighs more than 4 pounds and contains any matter in addition to public documents, it is not frankable. A package containing stationery and correspondence constituting the official files of a Member of Congress addressed to himself, to be mailable under frank, must not exceed 4 pounds in weight. Correspondence sent by a Member of Congress upon official business to other than a Government official can not be mailed under frank if it exceeds 4 ounces in weight.

Official mail in franked envelopes is not entitled to be dispatched by air mail unless the regular postage for air mail is prepaid thereon.

Ex-members of Congress are entitled to the franking privilege until the first day of December following the expiration of their respective terms of office. The Congressional Record or parts thereof may not, however, be carried in the mails free of postage under the frank of an ex-Member of Congress.[4]

The franking privilege extends to the Territories and insular possessions of the United States and, by special conventions, to Canada, Mexico, Cuba, and Panama, but to no other foreign country.

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[1] U.S. Code, title 39, see. 235; 20 Stat. L. p. 10.

[2] Sections 608 and 610, Postal Laws and Regulations, 1932.

[3] U.S. Code, title 39, sec. 327; section 577 Postal Laws and Regulations, 1932.

[4] 18 Stat. L., p. 343; 28 Stat. L., p. 622. U.S. Code, title 39, sec. 325, title 39, sec. 326.

However, official mail addressed under the frank of a Member to accredited representatives of the United States in foreign countries and forwarded in care of the Department of State wi1l be carried free in diplomatic pouches.

Telegrams relating to official or departmental business are frankable when endorsed by the Member as "official business" or "Government business." Such messages are subject to review by the Committee on Accounts, and when found to relate to other than official business are charged to the personal account of the Member. The payment of telegraph tolls on a frank of a Member began in 1906 with the discontinuance of franks issued gratuitously to Members by telegraph companies. Such payment is without specific statutory authorization except as a necessary expense of the House and is provided through allocation from the fund for miscellaneous items appropriated in the legislative bill.

218. The weight of official correspondence and public documents mailable under the frank is specified by law.—On June 6, 1929.[1] Mr. Ross A. Collins, of Mississippi, under leave to extend his remarks in the Record, inserted the following:

POST OFFICE DEPARTMENT,
THIRD ASSISTANT POSTMASTER GENERAL,
Washington, July 23, 1928.

Mr. WILLIAM TYLER PAGE,

Clerk, House of Representatives, Washington, D.C.,

MY DEAR MR. PAGE: In reply to your letter of the 18th instant, in regard to the franking privilege of Members of Congress, I have to say that section 85 of the act of January 12, 1895 (28 Stat. 622), embodied in sections 479 and 481, Postal Laws and Regulations, provides as follows with regard to the franking by Members of Congress of public documents and mail upon official or departmental business:

"The Vice President, Senators, Representatives, and Delegates in Congress, the Secretary of the Senate, and Clerk of the House of Representatives may send and receive through the mall all public documents printed by order of Congress; and the name of the Vice President, Senator, Representative, Delegate, Secretary of the Senate, and Clerk of the House shall be written thereon, and the proper designation of the office he holds; and the provisions of this section shall apply to each of the persons named therein until the last day of December following the expiration of their respective terms of office. (Sec. 479, Postal Laws and Regulations.)

"The Vice President, Members and Members elect of, and Delegates and Delegates elect to Congress shall have the privilege of sending free through the mails, and under their frank, any mail matter to any Government official or to any person, correspondence, not exceeding 1 ounce in weight upon official or departmental business. (The limit of weight for official correspondence under this paragraph was increased to 4 ounces by the act of April 28, 1904, 33 Stat. 441, sec. 481, Postal Laws and Regulations.)"

Except as indicated in the preceding paragraph, the limit of weight of public documents and matter on official or departmental business mailed under the frank of a Member of Congress is governed by the law embodied in section 450, Postal Laws and Regulations, which, in so far as it is applicable to matter mailed under the frank of a Member of Congress, provides that the limit of weight of mail matter "is hereby declared to be not exceeding 4 pounds for each package thereof * * * except for books and documents published or circulated by order of Congress."

It will be seen from the foregoing that the 4-pound weight limit does not apply to public documents. However, in order that a package may be exempt from this restriction as to weight and be mailable under frank, it must contain public documents only. If a package or box weighs

[1] First session Seventy-first Congress, Record, p. 2435.

more than 4 pounds and contains any matter in addition to public documents, it is not frankable. A package containing stationery and correspondence constituting the official files of a Member of Congress addressed to himself, to be mailable under frank, must not exceed 4 pounds in weight. Correspondence sent by a Member of Congress upon official business to other than a Government official can not be mailed under frank if it exceeds 4 ounces in weight.

If matter which is not frankable should be inclosed in a package or box with public documents, the whole would be thereby rendered unfrankable.

The foregoing is the law which governs the mailing of all public documents and official matter by Members of Congress, and is applicable regardless of whether the matter is deposited for at Washington, D. C., or at any other post office.

Sincerely yours,

R. S. REGAR.
Third Assistant Postmaster General.

219. There is no provision of law under which the frank may be used for return reply.—On July 21, 1930, in reply to an inquiry from the Clerk [1] of the House, submitted at the instance of Mr. Conrad G. Selvig, of Minnesota, the Third Assistant Postmaster General [2] rendered the following opinion:

Is is improper under the law to furnish envelopes bearing frank for the use of individuals in reply to letters, and individuals receiving such envelopes can not lawfully use them to mail matter free of postage under the frank of a Member of Congress. * * * Furthermore, there is no provision of law under which a person receiving a request from a Member of Congress for information, official or otherwise, may send such information in the mail free of postage in an envelope bearing the frank of such Member of Congress.

220. The Committee on Accounts reserves the right to limit the franking privilege on telegrams and declines to authorize the franking of cablegrams.—On March 9, 1933, the Committee on Accounts issued the following bulletin:

The Committee on Accounts desires to bring to the attention of Members of the House, with a view to their cooperation, the practice of using telegrams and cablegrams, payment for which is made out of the contingent fund of the House with the sanction of the Committee on Accounts.

This practice, and it is only a practice, is neither specifically authorized by law nor prohibited.

The Postmaster General pursuant to law, has established Government rates, and Members of Congress are accorded the privilege, somewhat analagous to the franking privilege on letter correspondence, of sending telegrams on official business. Each member is provided with an identification card furnished by the telegraph companies through the Committee on Accounts, to which committee the companies submit monthly bills, accompanied by the telegrams. These telegrams are carefully checked, and for telegrams on other than official business refunds are made by the senders and the amounts covered back into the contingent fund. The franking privilege of a Member will be revoked if he fails to make such refund by the sixth day of the month following the receipt of the notice.

(1) "Book," block, or identic telegrams to a list of newspaper addresses, telegrams in the nature of news, congratulations, condolence, or of a political or personal nature are not official, and will be charged back to the Members. No telegram shall be held to be official giving the result of legislation in committee or on the floor, or in answer to propaganda desiring to know the views of Members. Telegrams notifying candidates for office of their appointment are not official. No telephone call carrying any toll will be considered as official.

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[1] William Tyler Page, of Maryland, Clerk.

[2] Third Assistant Postmaster General Robert S. Regar.

(2) The Committee on Accounts has no authority to O. K. cablegrams. Such communications may be sent through the medium of the State Department.

221. Opinion of the Attorney General on the law authorizing the franking of public documents.

While speeches or reports printed in the Congressional Record are frankable, the addition of price lists, indices, or any other matter, written, printed, or stamped, destroys the privilege.

The statute authorizing the addressing of franked matter "on behalf of" a Member does not authorize the extension of such privilege to purchasers of frankable documents.

On March 9, 1914,[1] in response to a request of the Third Assistant Postmaster General, the following opinion was transmitted:

POST OFFICE DEPARTMENT,
OFFICE OF THE ASSISTANT ATTORNEY GENERAL,
Washington, March 9, 1914.

THIRD ASSISTANT,

Division of Classification:

I have considered your letter of March 4, 1914, submitting pamphlet of a speech of Representative George J. Kindel, delivered in the House of Representatives on January 16, 1914, on the back of which is an imprint reading as follows:

"Every citizen will profit by studying the tables contained in Kindel's speech on express and parcel-post rates. Copies of speech in franked envelopes delivered to your address at the rate of 1 copy free; 10 copies, 10 cents; 100 copies, $1; 1,000 copies, $10; 10,000 copies, $100. Address George J. Kindel, M. C., Washington, D. C."

This imprint is not a part of the Congressional Record.

You ask to be advised whether the imprint is, under the law, a permissible addition to copies of the Congressional Record, or parts thereof, mailed under frank in parcels not exceeding 4 ounces in weight.

The law authorizing the franking of the Congressional Record and parts thereof by Members of Congress in section 5 of the Postal Servi6e appropriation act of March 3, 1875 (18 Stat. L., 343), which is as follows:

"That from and after the passage of this act the Congressional Record, or any part thereof, or speeches or reports therein contained, shall, under the frank of a Member of Congress, or Delegate, to be written by himself, be carried in the mail free of postage, under such regulations as the Postmaster General shall prescribe."

On December 19, 1913, I advised you that, under the provisions of this act, the addition of an index, which did not appear in the Congressional Record, made to a pamphlet containing speeches delivered in the Senate, rendered the matter unmailable under the frank of a Senator. This opinion was in accord with a former opinion of this office of November 3, 1905 (4 Ops. A. A. G. P. O. D., p. 1), in which a similar ruling was made.

The addition of the imprint on the back of the pamphlet submitted by you in this case appears to me to be a more flagrant violation of the letter and the spirit of the act than the added index in the case cited, in view of the fact that the index related to the subject matter of the speeches included in the pamphlet, while the matter contained in the stamp is advertising and relates solely to the sale and distribution of the pamphlet in this case. You are therefore advised that the addition of the imprint renders the pamphlet of Mr. Kindel's speech unmailable under the act above quoted.

The following appears in the imprint on the speech above referred to: "Copies of speech in franked envelopes delivered to your address at the rate of 1 copy free; 10 copies, 10 cents; 100 copies, $1," etc. Apparently, Mr. Kindel proposes not only to frank this unfrankable matter in

[1] Second session Sixty-third Congress. Record, p. 5544.

bulk, in direct violation of law, but to sell to the purchaser the right to use the frank in the distribution of the matter by the purchaser himself.

The act of January 12, 1895 (ch. 23, Sec. 85, 28 Stat. L., 601, 622), confers authority for franking public documents printed by order of Congress. This office has decided that two conditions are necessary to authorize the franking of matter mentioned therein:

1. That the matter shall be sent or received by one of the designated parties; and
2. That the matter transmitted shall be a public document printed by order of Congress.

The opinion continues:

"This statute does not give the right to Congressmen to extend to others the privilege of sending public documents printed by order of Congress through the mails, but simply gives the right to Congressmen themselves to send such documents. This of course, does not mean that the actual mailing of the documents shall be made by the Congressman, but simply that the mailing shall be in truth the sending by the Congressman of such matter." (4 Ops. A. A. G. P. O. D., p. 4.)

Section 494 of the Postal Laws and Regulations, authorizing the sending of franked matter in bulk to an addressee, who may address and mail it, was adopted under authority of the act in question. This section authorizes the placing of addresses on such franked matter by the addressee only, "on behalf of "the Congressman whose frank is used, and cannot be extended so as to legalize such a transaction as the one in question, where the privilege itself is being made the subject of sale, and the proceeds of which flow to the Congressman whose frank is thus being used. Aside from the fact that none of the pamphlets are subject to frank, in view of the addition of this imprint, as explained in the first part of this opinion, even if they were originally frankable, their distribution by purchaser under the frank would be illegal.

You are further advised that the advertising features of the imprint render the pamphlet unmailable as official correspondence under section 492 of the Postal Laws and Regulations.

The pamphlet is returned to you herewith.

W.H. LAMAR,
Assistant Attorney General.

222. Subject matter eligible to the franking privilege. Application of the law governing the franking privilege.

On September 6, 1916,[1] Mr. Charles Curtis, of Kansas, caused to be read, in the Senate, a circular letter mailed by Mr. Henry F. Ashurst, of Arizona, under his frank. The letter, which was addressed to Mr. Ashurst's constituents, discussed his record in the Senate, outlined his position on certain public questions, enumerated bills which he had supported, named the Senate committees on which he was serving, and gave his vote on various measures considered in the Senate. Mr. Curtis stated that he considered the letter a violation of the franking privilege. Thereupon, Mr. Ashurst submitted the following opinion on the propriety of transmitting the letter under frank:

POST OFFICE DEPARTMENT,
THIRD ASSISTANT POSTMASTER GENERAL,
DIVISION OF CLASSIFICATION,
Washington, July 6, 1916.

HON. HENRY F. ASHURST,
United States Senate, Washington, D.C.

MY DEAR SENATOR: Referring to your call to-day, submitting a draft of a circular letter, a copy of which is inclosed, which it is your desire to send to your constituents and inquiring whether

[1] First session Sixty-fourth Congress, Record, p. 13918.

it is frankable, I have to say that a careful examination of the circular shows that it is upon official business, and therefore frankable under the law.

Yours very truly,

A. M. DOCKERY,
Third Assistant Postmaster General.

223. The franking privilege is authorized by statute, and denial or curtailment of the privilege to any particular Member may not be made by simple resolution.

On November 11, 1919,[1] Mr. Thomas L. Blanton, of Texas, proposed to offer, as privileged, a resolution prohibiting the mailing under frank of a certain speech appearing in the Congressional Record of the previous day.

Mr. Joseph Walsh, of Massachusetts, made the point of order that the franking privilege was authorized by law and could not be limited by simple resolution.

The Speaker[2] sustained the point of order.

224. There is no statutory provision for the mailing of matter under the frank of a deceased Member.

On January 13, 1930, in response to a formal inquiry from the Clerk[3] of the House, the Third Assistant Postmaster General[4] submitted the following decision:

In reply to your letter of the 10th instant, I have to invite your attention to the inclosed abstract from the laws governing the franking privilege and to inform you that there is no provision of law under which matter can continue to be mailed free of postage under the frank of a deceased Member of Congress.

225. Opinion of the Attorney General as to construction of the statute forbidding Members being interested in contracts.

Definition of the terms "agreements" or "contracts" within the meaning of the statute prohibiting Members from entering into certain contracts.

On March 12, 1908,[5] the Secretary of the Interior addressed to the Attorney General a request for an official opinion upon the following question:

Are agreements for the purchase of lands, for water rentals, for conveyance of water rights and similar instruments, contractual in form, relating to the adjustment of vested water rights, executed in behalf of the United States by some officer of the Reclamation Service for purposes within the purview of the reclamation act[6] "agreements" or "contracts" within the meaning of Revised Statutes, sections 3739–3742, requiring the insertion of the stipulation in section 3741."

The opinion of the Attorney General[7] submitted March 20, after quoting the material sections of the statutes referred to, says:

The language of section 3739 is not that which it would seem natural to use in framing a statute intended to forbid all contracts by Members of or Delegates to Congress, made with or on behalf of the United States, except those specially excepted. Language similar to that in the

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[1] First session Sixty-sixth Congress, Record, p. 8308.

[2] Frederick H. Gillett, of Massachusetts, Speaker.

[3] William Tyler Page, of Maryland, Clerk.

[4] F. A. Tilton, Third Assistant Postmaster General.

[5] Opinions of Attorneys General, p. 537.

[6] U. S. Code, title 39, sections 411 et seq.

[7] Attorney General Charles J. Bonaparte.

beginning of section 3742, would seem more appropriate for such purpose. And for this reason, and because of the language used in other portions, this section might be thought to only forbid that any Member of or Delegate to Congress should be interested in or in part the beneficiary of any contract made by another person with or on behalf of the United States. But the same reason and policy which would dictate this would, equally at least, forbid that such Member or Delegate should be the sole party in interest in such contract.

Besides this, the language, when carefully considered, makes it clear that the sections were intended to prevent any such Member or Delegate from being in any way a party to such contracts. Thus-section 3739 provides that no such Member or Delegate shall "undertake, execute, hold, or enjoy, in whole or in part, any contract or agreement made or entered into on behalf of the United States by any officers or persons authorized to make contracts on behalf of the United States."

This plainly forbids any such Member or Delegate to make or be a party to such contract, either by himself or with others. And while section 3741, in saying that in any such contract with the United States there "shall be inserted an express condition that no Member of (or Delegate to) Congress shall be admitted to any share or part of such contract or agreement, or to any benefit to arise therefrom," would seem to indicate something different from a contract made directly with such Member or Delegate, yet I do not think this can overcome the plain meaning of the other portions of the sections and especially of section 3742, which provides that—

"Every officer who, on behalf of the United States, directly or indirectly, makes or enters into any contract, bargain, or agreement in writing or otherwise, other than as are hereinbefore excepted, with any Member of [or Delegate to] Congress, shall be deemed guilty of a misdemeanor, and shall be fined three thousand dollars."

This plainly includes every such contract not thus excepted, and, as we can not suppose that it was intended to impose this penalty for an act which the other sections permitted, it must be taken that their prohibition is as broad as is that of this section.

The papers to which you refer and samples of which are transmitted with your note are certainly "contracts" or "agreements" as those words are used in the sections referred to, and as they are executory and continuous in their nature, and for an indefinite future performance, they are not within the exception of section 3740, but are within the prohibition of these sections.

This construction makes these provisions forbid that any Member of, or Delegate to, Congress shall be a party to, or interested in any contract with, or on behalf of, the United States, which is in its nature executory and continuous as to future performance, and perhaps this is just what was intended by these sections.

With the policy or expediency of forbidding a Member of Congress to be a party to, or interested in a contract which Congress alone can authorize, or how far such prohibition should, or should not, extend we have no concern. This is for Congress alone.

From the nature of the contract transmitted with your note it is manifest that in case a person with whom it is desired to make such contract is a Member of, or Delegate to, Congress, it would interfere with the carrying out of what is contemplated by the reclamation act referred to, if he could not enter into such contract, when willing to do so; and that it would be to the advantage of the Government to be permitted to make such Member the same kind of contract that it makes with any other person in aid of such reclamation project. And it may well be thought as it is urged here, that Congress did not intend that these sections should operate to prohibit such contracts as these, and that, had the attention of Congress been called to this, it would have modified these sections as to their application to the reclamation act.

But in dealing with a statute fairly plain in its meaning, such considerations have no place; and in such cases the legislative intent, even if it were susceptible of legal ascertainment, cuts little figure except as it is expressed in legislative enactments, and when so expressed the legal meaning of what is said must be taken to express the legislative intent, wherever that interest is material.

And it is familiar law that even in a clear casus omissus a matter omitted by inadvertence or by being overlooked or unforeseen, cannot be supplied by construction.

After careful examination of the whole subject, I am of the opinion that the contracts to which you refer are within the prohibition of sections 3739, 3740, 3741, and 3742, Revised Statutes, and your question is answered in the affirmative.

226. A Member may resign his seat by a letter transmitted to the House alone.

Instance wherein a Member tendered his resignation to take effect at a future date.

While not required, it is customary for a Member to notify the House of his resignation.

When received, a resignation is laid before the House by the Speaker and no action by the House is required.

On January 5, 1921,[1] the Speaker[2] laid before the House the following communication:

1089 COMMONWEALTH AVENUE,
Boston, Mass., January 3, 1921.

Hon. FREDERICK H. GILLBERT,
Speaker of the House of Representatives,
Washington, D.C.

Sir: I hereby tender my resignation as the Representative in the Sixty-sixth Congress from the ninth congressional district of Massachusetts, such resignation to take effect on the 5th day of January, 1921.

Respectfully, yours,

ALVAN T. FULLER.

In response to a parliamentary inquiry by Mr. Joseph Walsh, of Massachusetts, as to whether any action should be taken by the House in acceptance of the resignation, the Speaker said:

The Chair finds the precedents are to the effect that when a person resigns he generally resigns to the governor of his State and notifies the Speaker, although there are precedents where a person has resigned directly to the Speaker; and in that case, at least in one instance, the House has adopted a resolution ordering the Speaker to direct the Clerk to notify the governor of the State. The Chair does not think it necessary that that be done. The Chair presumes the governor of the State will also be notified by the gentleman himself.

In answer to a further parlimentary inquiry by Mr. Martin B. Madden, of Illinois, as to whether a Member was required to notify the House of his resignation the Speaker replied that while it was not necessary it was customary.

227. Instance wherein a Member tendered his resignation to take effect at a future date.

A Member having resigned during vacation, transmitted to the Clerk a letter of notification which was laid before the House when Congress reconvened.

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[1] Third session Sixty-sixth Congress, Record, p. 1017.

[2] Frederick H. Gillett, of Massachusetts, Speaker.

On December 1, 1924,[1] the first day of the session, the Speaker laid before the House the following communication, which was read and laid on the table:

AUGUST 28, 1924.

THE CLERK, HOUSE OF REPRESENTATIVES,

Washington, D.C.

DEAR SIR: Quite a long time ago I forwarded a formal resignation of my seat in Congress to Gov. R. A. Nestos, Bismarck, N. Dak., to take effect on September 2, 1924.

Yours, respectfully,

GEORGE M. YOUNG.

228. A Member who has tendered his resignation to take effect at a future date is entitled to exercise all rights of membership prior to that time.—On May 13, 1929,[2] the Speaker laid before the House the following communication:

WASHINGTON, D. C., *May 10, 1929.*

HON. NICHOLAS LONGWORTH,

Speaker of the House of Representatives, Washington, D. C.

MY DEAR MR. SPEAKER: I beg leave to inform you that I have this day transmitted to the Governor of the State of Minnesota my resignation as a Representative in the Congress of the United States from the fifth district of Minnesota, to be effective at the close of business June 30, this year.

Respectfully yours,

WALTER H. NEWTON.

Subsequently, on June 13[3] Mr. Newton answered to his name on a yea-and-nay vote on the passage of the bill (H. R. 1) to establish a Federal Farm Board to promote the effective marketing of agricultural commodities in interstate and foreign commerce,. and to place agriculture on a basis of economic equality with the other industries.

The roll call having been completed, Mr. John N. Garner, of Texas, submitted a parliamentary inquiry as to Mr. Newton's vote.

The Speaker[4] replied:

His resignation does not take effect until June 30.

229. An exceptional instance wherein a Member having notified the House by letter of his resignation to take effect at a future date was permitted to withdraw the communication.

A request for unanimous consent that the Journal show proceedings which did not take place was denied by the House.

The Record failing to include communications read from the desk and objection being made on that account, the Speaker directed that they be printed in the Record of the following day.

On February 3, 1927,[5] Mr. Finis J. Gaxrett, of Tennessee, submitted as a parliamentary inquiry:

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[1] Second session Sixty-eighth Congress, Record, p. 6.

[2] First session Seventy-first Congress, Record, p. 1195.

[3] Record, p. 2789.

[4] Nicholas Longworth, of Ohio, Speaker.

[5] Second session Sixty-ninth Congress, Record, p. 2908.

Mr. Speaker, I desire to make an inquiry concerning the Record. Yesterday there was read to the House from the Clerk's desk a letter from the gentleman from New York, Mr. Mills, advising, as I recollect, that there was being transmitted therewith a copy of a letter which he had addressed to the Governor of the State of New York, being his resignation as a Member of the House. That proceeding does not appear in the Record. I presume the Chair has some knowledge of the reasons why it did not appear?

The Speaker [1] explained:

The Chair will be glad to relate the circumstances. The Chair laid before the House just before adjournment a letter from the gentleman from New York inclosing a copy of a letter which he had just addressed to the Governor of New York announcing his resignation as a Member of this House. Subsequently, just after adjournment, a gentleman came to the office of the Speaker with the statement that the gentleman from New York had decided to withhold his resignation for some time and had telegraphed, as the Chair understood, to the Governor of New York, stating that he did not desire to present his resignation at this time, and requested the Chair to withhold his original letter from the Record. In view of the fact that the gentleman from New York intends to withhold his resignation as a Member of this House and has not been sworn in as Undersecretary of the Treasury, his letter being simply a statement of the fact that he was about to transmit a letter of resignation on which the House was not compelled to take any action whatever, the Chair assumed that there would be no objection to leaving out of the Record the fact that his letter had been sent. Of course, if any gentleman should make any objection to that course or should request that the letter be printed in the Record, under all the circumstances the Chair would be glad to have that done.

The letter from the gentleman from New York simply notifies the Speaker of the House that his resignation was in course of transmission. It had not been accepted. Of course, the ordinary procedure, as the Chair recollects, is, when a Member resigns, to tender his resignation to the governor of the State, and when the resignation is accepted, he notifies the House to that effect. Then the House is officially notified of the resignation. In this particular case the House was not notified because the resignation was not accepted.

Mr. John N. Garner, of Texas, protested:

Mr. Speaker, in the interest of the integrity not only of the Record but of the Journal of the House of Representatives, I think that letter and the letter to the Governor of New York ought to appear in the Record. If no withdrawal of the resignation had occurred upon the part of the gentleman from New York, that letter would have been sufficient for the Clerk, in the organization of the House, to have known that Mr. Mills was no longer a Member of the House of Representatives.

I am sure there is no objection to Mr. Mills continuing as a Member of the House of Representatives. I really wish he could continue as a Member. I think he more ideally represents and has a better knowledge of a class of people in this country that are potential politically than any other man who has been here during my time. I think this instance here illustrates it very conclusively. We have the gentleman from New York appointed as Underseeretary of the Treasury. We have his name sent to the Senate in the morning and confirmed in the afternoon. We find on the same afternoon—and his purpose was to take the oath to-day, I might say—that he visits the White House, that the President and he have an interview, and that he wires the Governor of New York withdrawing his resignation as a Member of Congress for the time being. I do not know at the present moment for how long.

I think in the interest of the integrity of the Record, as well as of the Journal, this matter should appear in the Record and the Journal.

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[1] Nicholas Longworth, of Ohio, Speaker.

Mr. Carl R. Chindblom, of Illinois, submitted a request for unanimous consent that:

both the Journal and the Record may show that on yesterday the gentleman from New York informed the Speaker that he had withdrawn his resignation, which he had intended to submit to the governor of his State, and that he requested that his communication to the House be withdrawn from the House.

Mr. Garrett objected.

Mr. Speaker, I would venture to suggest that it does not seem to me it is proper to have that request granted, for this reason, that it was not something which occurred in the House. The letter from Mr. Mills was, of course, read from the desk. Privately, Mr. Mills advised the Speaker that he had withdrawn his resignation.

Now the query is: Can you have your Journal show what occurred outside of the House at a private conference with the Speaker?

Ought the House to grant unanimous consent to show an act which did not take place in the House? Certainly I am not trying to embarrass anybody about this matter, but I do question whether the Journal of any legislative body on earth ought to show or ever has been made to show something that occurred outside of that body.

Mr. Garner then requested that the communication appear in the Record and the Speaker, by unanimous consent, directed:

The Chair will, then, direct that the letters be inserted in the Record.

The letters referred to follow:

FEBRUARY 2, 1927.

Hon. NICHOLAS LONGWORTH,

House of Representatives, Washington, D. C.

MY DEAR MR. SPEAKER: I inclose herewith a copy of a letter to the Governor of the State of New York, tendering my resignation as a Representative in Congress from the seventeenth New York district.

Very sincerely yours,

OGDEN L. MILLS.

FEBRUARY 2, 1927.

Hon. ALFRED E. SMITH

Executive Chamber, Albany, N. Y.

MY DEAR SIR: I hereby tender my resignation as Representative in Congress from the seventeenth district of New York, to take effect at noon on Thursday, February 2, 1927.

I shall very much appreciate it if you will do me the courtesy of sending your acceptance by wire, addressed to me collect, House of Representatives, Washington, D. C.

Very truly yours,

OGDEN L. MILLS.

230. The Speaker having been elected Vice President and a Member of the succeeding Congress at the same election, transmitted to the governor of his State his resignation as a Member elect.—On January 1, 1933, John N. Garner, of Texas, who had been elected Vice President and a Member of the Seventy-third Congress in the general election of November 8, 1932, transmitted to the governor of his State the following communication:

Hon. ROSS STERLING,
Governor of Texas.

SIR: I hereby tender to YOU my resignation as a Member elect to the National House of Representatives for the Seventy-third Congress, the term of which commences on March 4, 1933.

My election as Vice President of the United States makes it impossible for me to qualify as a Member of the Seventy-third Congress.

I submit my resignation at this time so you may take such action as you deem proper to select my successor that he may qualify by March 4 next.

Respectfully,

JOHN N. GARNER.

231. Form of resignation of a resident commissioner and notification of the appointment of his successor.—On April 4, 1932,[1] the Speaker laid before the House the following communication:

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D. C., April 4, 1932.

Hon. JOHN N. GARNER,
Speaker of the House of Representatives,
Washington, D. C.

SIR: I beg leave to inform you that I have this day transmitted to the Governor of Porto Rico my resignation as Resident Commissioner from Porto Rico, to take effect April 11, 1932.

Respectfully yours,

FELIX CORDOVA DAVILA.

On April 28,[2] the following was received from the Clerk and laid before the House:

HOUSE OF REPRESENTATIVES,
CLERK'S OFFICE,
Washington, D. C., April 28, 1932.

Hon. JOHN N. GARNER,
House of Representatives, Washington, D. C.

DEAR SIR: I beg to inform you that the certificate of appointment of Hon. José L. Pesquera as Resident Commissioner from Porto Rico to fill the vacancy caused by the resignation of Hon. Felix Cordova Davila, in due form of law, has been filed in this office.

Yours very truly,

SOUTH TRIMBLE,
Clerk of the House of Representatives.

Thereupon, Mr. Pesquera, appeared and took the oath of office.

No action was taken by the House with reference to either announcement.

232. The executive of a State sometimes informs the House that he has received the resignation of a Member.

On June 30, 1921,[3] the Speaker laid before the House a communication from the Governor of Iowa, informing the House that Hon. James W. Good, Member of Congress from the fifth district of Iowa, had tendered his resignation, effective June 15.

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[1] First session Seventy-second Congress, Record, p. 7419.

[2] Record, p. 9142.

[3] First session Sixty-seventh Congress, Record, p. 3253.

233. A discussion of the unwritten rule of seniority of service.—On May 11, 1928,[1] Mr. Guy U. Hardy, of Colorado, in the course of remarks inserted in the Record said:

Seniority is a powerful influence in the United States Congress. The unwritten law of seniority of service is rarely set aside.

The preferred office rooms in the House Office Building are assigned the Member of longest service. A Member's rank in committee is according to seniority and his place at committee table is in order of length of service. The chairman of the committee, while selected by the committee on committees, is almost always the oldest member of his party on the committee.

Conferees who meet with the conferees of the Senate to iron out differences on bills where the two Houses have not agreed are usually the oldest members on the committee which has that particular bill in charge.

The committee on committees is made up for the most part of the Members who have served longest from their respective States. As a rule, Members have to serve some years before they are put on the Appropriations or Ways and Means Committees. The Rules Committee is made up of older Members—no majority member having served for less than 10 years. And the same may be said of the steering committee, there is no one on that committee who has served less than 10 years.

Fifty-seven Members in all out of the total membership of 435 have served 16 years or more. The Speaker, both party leaders, and 15 chairmanships are held in this group. Those who have served five terms—10 years or more—number only 182. All the key positions, nearly all the chairmanships, almost every Member who is ever a conferee, a large majority of the Ways and Means and Appropriation Committees, all the Rules Committee, all the steering committee, most all of the committee on committees, and minority ranking Members (future possible chairmen) on practically all committees are included in this group.

234. The title "Father of the House" as applied to the member of longest continuous service.—On March 4, 1933, Mr. Gilbert N. Haugen, of Iowa, retired from the House, having served without interruption from March 4, 1899, a term of 34 years, the longest continuous service in the history of the House.

On March 23, 1932,[2] Mr. Bertrand H. Snell, of New York, the minority leader, rising in his place, said:

Mr. Speaker, I desire to call the attention of the House and of the country to the fact that we have with us a man who, to-day, completes 33 years and 20 days of continuous service in the House of Representatives.

This is the longest period of continuous service that any person has ever been privileged to serve in this House. I refer to that grandest old Roman of them all, Gilbert N. Haugen, of Iowa. [Applause, the Members rising.]

Mr. Speaker, may I add that during all these years Mr. Haugen has always stood foursquare to every political wind that has blown. He has not only rendered able, honest, and efficient service to his district, but he has rendered patriotic service to his Government. I know I speak the voice of both his Republican and Democratic colleagues when I extend to him our heartiest congratulations on his long and useful service. I want the people of his district and the State of Iowa to know that he has the affection and respect of all his colleagues here in the House, and we hope his life may be spared for another 33 years and that he may be with us and continue his efficient and useful service here.

The Members of the House again rose and stood in applause.

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[1] First session Seventieth Congress, Record, p. 8440.

[2] First session Seventy-second Congress, Record, p. 6730.

235. At the close of the Sixty-seventh Congress, Mr. Joseph G. Cannon, of Illinois, retired from the House, after a service extending from March 4, 1873, to March 4, 1923, with the exception of the Fifty-second and Sixty-third Congresses, a total of 46 years, the longest service in the history of either House. He presided as Speaker in the Fifty-eighth, Fifty-ninth, Sixtieth, and Sixty-first Congresses.

On December 29, 1920,[1] under a special order in honor of the occasion, Mr. William A. Rodenberg, of Illinois, said:

Mr. Speaker, this day marks an important event in the political history of our country. Until yesterday the record for length of service in the Congress of the United States was held by the late Justin Smith Morrill, of Vermont, whose combined service in the House and Senate covered a period of 43 years 9 months and 25 days. To-day that remarkable record of congressional service is surpassed by one day by our distinguished and beloved colleague, the Hon. Joseph Gurney Cannon, of Illinois. An event of such great national interest calls for more than passing mention. Twice during his long service he went down in defeat, but they were only temporary defeats, and he was on each occasion returned by his constituency at the following election. The two occasions to which I refer were the elections for the Fifty-second and the Sixty-third Congresses.

These interruptions operated against his being known as "Father of the House" when on some four or five occasions other Members who had seen but a fraction of his service attained the title. This has caused the historian to say:

"Very early in its history the House adopted the English custom of designating for this duty (i. e., administering the oath to the Speaker elect) the Member of longest continuous service, known as "Father of the House." For four Congresses John Quincy Adams bore this title. Lewis Williams, of North Carolina, held it for six terms, and William D. Kelley, of Pennsylvania, sustained it with great credit for 16 years out of a service of 15 terms. Speakers Randall and Crisp interrupted the custom by designating William S. Holman, of Indiana, to officiate. Holman had served as many terms as the then "Father," but not consecutively."[2]

But, irrespective of the temporary interruptions in his long and distinguished career, the event we commemorate today securely establishes Joseph G. Cannon in the place of "Father of a the American Congresses."

In the course of the proceedings, Mr. Champ Clark, of Missouri, who was in charge of time, in yielding to Mr. Isaac R. Sherwood, the date of whose birth was August 13, 1835, said:

Mr. Speaker, I yield 10 minutes to the oldest man that ever served in the House of Representatives, General Sherwood, of Ohio.

Mr. Sherwood said in part:

Mr. Speaker, it is true that I am the oldest man who ever served in this historic Chamber, but I have always been told that there is no virtue in being old. If there were, I would be the most virtuous here.

Uncle Joe Cannon has honored this Chamber with the longest service of any man who ever served in any parliamentary body in the world.

In conclusion Mr. Sherwood said:

After the 4th of March next I shall bid farewell to Congress, and Uncle Joe will then be the oldest Member of Congress and the oldest member of any parliamentary body in the world, and I wish him a parting God bless with all my heart.

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[1] Third session Sixty-sixth Congress, Record, p. 794.

[2] Alexander's History and Procedure of the House of Representatives, p. 35.

Chapter CLXXV.[1]

PUNISHMENT AND EXPULSION OF MEMBERS.

236. For abuse of the leave to print, the House censured a Member after a motion to expel him had failed.

In the absence of a Member against whom resolutions of expulsion were offered, consideration of the resolutions was postponed with notice that the Sergeant-at-Arms would be asked to deliver to the Member or his secretary a copy of the resolution with notice of its pending consideration.

A proposition to censure is not germane to a proposition to expel. (Contra 5923.)

The question on agreeing to resolutions of expulsion having been decided adversely, the Speaker recognized a Member of the opposition to offer resolutions of censure.

Form of censure administered by the Speaker to a Member by order of the House.

A Member having been subjected to censure, the Speaker, after deliberation, laid before the House a letter of explanation and apology from the Member.

A Member against whom a resolution of censure was pending was asked by the Speaker if he desired to be heard.

The Speaker having censured a Member by order of the House, the censure appears in full in the Journal.

Resolutions providing for the expulsion of a Member were presented as privileged.

On October 24, 1921[2] the House agreed, yeas 314, nays 1, to a motion by Mr. Frank W. Mondell, of Wyoming, to expunge from the Record an extension of remarks inserted on the previous legislative day by Mr. Thomas L. Blanton of Texas.

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[1] Supplementary to Chapter XLII.

[2] First session Sixty-seventh Congress, Record, p. 6687; Journal, p. 498.

Subsequently,[1] Mr. Mondell, as a question of privilege, submitted the following:

Whereas Thomas L. Blanton, Representative from the seventeenth district of the State of Texas, did on October 4, 1921, ask unanimous consent to extend his remarks in the Congressional Record "upon the improvements in the Government Printing Office," which consent was granted by the House; and

Whereas under such permission the said Thomas L. Blanton did insert and cause to be printed in the Congressional Record for Saturday, October 22, 1921, grossly indecent and obscene language, unworthy of a Member of the House of Representatives, contrary to the rules of the House, derogatory to its dignity, and in violation of its confidence: Therefore be it

Resolved, That the said Thomas L. Blanton, by his conduct as aforesaid, has forfeited all right to sit as a Representative in the Sixty-seventh Congress, and is hereby expelled and declared to be no longer a Member of this House.

Mr. Finis J. Garrett, of Tennessee, called attention to the fact that Mr. Blanton was absent and asked that the resolution be withdrawn.

Mr. Mondell said:

I will not withdraw the resolution, but I shall not press it for consideration at this time. While our rules do not require it, in order that there may be no question as to the service of notice on the gentleman from Texas of the resolution which I have just presented, I shall ask the Sergeant-at-Arms to deliver him, or his secretary in his absence, a copy of the resolution at the earliest possible moment, and notice that it will be taken up Thursday.

On October 27,[2] Mr. Mondell called up the resolution. At the conclusion of Mr. Mondell's remarks, the Speaker said:

The Chair will recognize the gentleman from Texas, Mr. Blanton, if he desires to be heard.

Thereupon Mr. Blanton addressed the House in his own behalf.

In the course of debate, Mr. Garrett proposed to offer the following substitute for the pending resolution:

Whereas Thomas L. Blanton, a Representative in Congress from the State of Texas, did on the 4th day of October, 1921, ask unanimous consent to extend his remarks in the Congressional Record "upon the improvements in the Government Printing Office," which consent was granted by the House; and

Whereas under the permission thus obtained the said Thomas L. Blanton did insert and cause to be printed in the Congressional Record for Saturday, October 22, 1921, a certain letter or communication purporting to have been written by one Millard French to George H. Carter, Public Printer, which said communication contained language that was so indecent, obscene, vulgar, and vile as to render it unmailable had it been contained in any other than an official publication; and

Whereas the said Thomas L. Blanton by taking the responsibility of inserting such matter in the Congressional Record has offered an indignity to the House of which he is a member and to the people represented by the membership of the Congress whose official organ the publication is, for which he deserves the severe rebuke and censure of the House: Therefore be it

Resolved, That the said Thomas L. Blanton be, and he is hereby, voted the censure of this body, and the Speaker of the House is hereby directed to summon him to the bar of the House and deliver to him its reprimand and censure.

Mr. Mondell made the point of order that the substitute proposed was not germane to the original proposition.

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[1] Record, p. 6755; Journal, p. 501.

[2] Record, p. 6880; Journal, p. 508.

The Speaker [1] said: [2]

The Chair has given considerable attention to this point of order. It seems to the Chair very clear. It does not seem that a motion of censure, if this were a new question, would be germane to a motion to expel. The two are very different intrinsically. Then, the motion to expel requires a two-thirds majority; a motion to censure requires simply a majority. Suppose the amendment was adopted and the motion to expel was amended by a motion to censure; would that still be a motion to expel amended and require a two-thirds vote for its adoption or would it be a motion to censure? But probably that is not final, because it might be interpreted as a substitute. The decision which the gentleman from Massachusetts, Mr. Luce, cited from section 5923 of Hinds' precedents appears to be strictly on the point, but the Chair examined it in the Record, and he finds in the decision of the Chair that this point was not at all alluded to. It went over for two days, and when the decision was made this point of order was not even referred to. And the Chair does not think, consequently, that that is a precedent. There is a precedent, although the Chair does not think this either is final, in which Speaker Henderson said in the Roberts case:

"Does anyone contend that changing a resolution from a condition where a mere majority can carry it through to a resolution which will require a two-thirds vote to carry it through—that such an amendment is germane to the original proposition?

"The Chair does not entertain a single doubt but that this is not germane to the original resolution."

Of course, that case was different from this, and therefore the Chair does not think it is a direct precedent. But it seems to the Chair that in the nature of things, and looking at it as a new question, a motion to censure is not germane to a case to expel. And the Chair is confirmed by the conditions that exist on this resolution. Both motions are privileged, and therefore if the motion to expel should not prevail the motion to censure would still be in order, and therefore the remedy would still exist. And as to the objections made by the gentleman from Texas, Mr. Black, that this motion is necessary in order that the House may express itself, it must be remembered that men who are opposed to doing anything might well vote, and often do vote, for a milder amendment, and if they carry that then vote against the whole proposition. So it would not follow on this amendment that a man who voted for the amendment would necessarily, if that amendment carried, vote for the resolution as amended. So the vote on the amendment would not really produce the result which the gentleman from Texas, Mr. Black, referred to, of allowing the House to express its judgment. The Chair thinks that, inasmuch as both motions are privileged, the House will have the right to express itself if two-thirds do not vote for a motion to expel. The Chair sustains the point of order.

The vote recurring on the original resolution, there appeared yeas 204, nays 113; and so, two-thirds not concurring, the resolution was not agreed to.

Thereupon, the Speaker recognized Mr. Garrett, who submitted as a question of privilege the resolution previously offered as a substitute.

The vote being taken, the resolution was agreed to, yeas 293, nays 0.

Thereupon, by direction of the Speaker, the Sergeant at Arms appeared at the bar with Mr. Blanton, when the Speaker said:

Mr. Blanton, by a unanimous vote of the House—yeas, 293; nays, none—I have been directed to censure you because, when you had been allowed by the courtesy of the House to print a speech which you did not deliver, you inserted in it foul and obscene matter, which you knew you could not have spoken on this floor; and that disgusting matter, which could not have been circulated through the mail in any other publication without violating the law, was transmitted as part of the proceedings of this House to thousands of homes and libraries throughout the country, to be read by men and women, and, worst of all, by children, whose prurient curiosity it would excite

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[2] Frederick H. Gillett, of Massachusetts, Speaker.

[3] Expressly overruling decision at section 5923 of this work.

and corrupt. In accordance with the instructions of the House and as its representative, I pronounce upon you its censure.

This censure by the Speaker appears in full in the Journal.

On the following days [1] the Speaker pro tempore [2] laid before the House a communication with the following explanation:

The Chair is in receipt of a communication addressed to the Speaker of the House and which the writer of the communication has requested should be laid before the House to-day. The Chair after conference with the majority leader, the gentleman from Wyoming, Mr. Mondell, and the minority leader, the gentleman from Tennessee, Mr. Garrett, feels that the request of the writer of the communication is entitled to be recognized, and therefore directs the Clerk to read the letter.

The Clerk read as follows:

OCTOBER 28, 1921.

Hon. FREDERICK H. GILLETT,

Speaker House of Representatives.

MY DEAR MR. SPEAKER: I am involved in no issue now before the House, hence what I now say is not a sacrifice of any principle.

When I expressed a wish of being able to place before the country the record expunged, I was misunderstood by my colleagues, who believed that I would circulate the objectionable language. My intention was not to do this, but to circulate the expunged record with all the objectionable words and abbreviations contained in the employee's affidavit eliminated, and circulated only to show to the country the honest bona fide purpose of my remarks.

I realize that the judgment of no human is infallible. I bow to the collective judgment of my colleagues, against none of whom I harbor malice, and offer this my apology to the House for what my colleagues in their decision determined was an error.

Very sincerely,

THOMAS L. BLANTON.

237. The Speaker may not pronounce censure except by order of the House. On June 8, 1933,[3] Mr. Thomas L. Blanton, of Texas, rising to a question of personal privilege, called attention to an article in the current issue of a newspaper in which it was charged that on the preceding day he had been censured by the Speaker.

The Speaker said: [4]

The Chair will state to the gentleman from Texas that the Speaker has no authority whatever to censure any Member of Congress unless ordered to do so by the House itself.

The Speaker did not violate the rules. Neither did the House censure the gentleman from Texas, because the House permitted the gentleman's remarks to remain in the Record.

238. A Member convicted in the courts resigned after the House had ordered an inquiry.

A Member convicted by the courts refrained from participation in the proceedings of the House pending action on his appeal.

It is the custom of the House to defer final action against Members under criminal charges pending disposition in the court of last resort.

The House will not expel a Member for reprehensible action prior to his election, even when convicted for an offense.

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[1] Record, p. 6968.

[2] Joseph Walsh, of Massachusetts, Speaker pro tempore.

[3] First session Seventy-third Congress, Record, p. 5335.

[4] Henry T. Rainey, of Illinois, Speaker.

A committee announced as a fundamental principle that the House could not permit in its membership a person serving a sentence for crime.

A Member whose qualifications; were being investigated by a special committee having resigned, the committee was discharged.

On December 9, 1925,[1] Mr. Theodore E. Burton, of Ohio, offered the following resolution:

Resolved, That the credentials presented to the House of Representatives by John W. Langley, Representative elect from the tenth district of the State of Kentucky, be referred to a select committee of five members, to be appointed by the Speaker, to inquire into the election returns and qualifications of mid Representative elect. Said committee shall report to the House the result of its inquiries, together with such recommendations as it may deem advisable.

In debating the resolution, Mr. Burton explained:

The facts may be briefly stated. A committee was appointed in the first session of the last Congress to investigate certain charges against Members. It appeared that during their investigations an indictment had been found against Mr. Langley in the District of Columbia, and, further, that an indictment had also been found against him in the United States Court for the Eastern District of the State of Kentucky. Mr. Langley was convicted before that district court early in May of last year and sentenced to a term of two years. The committee reported that as the courts had taken jurisdiction and proceedings were to be instituted before an appellate court it seemed the proper and best thing to suspend further proceedings in the House. An appeal or writ of error was taken to the appellate court, the Circuit Court of Appeals for the Sixth Circuit, which very recently affirmed the conviction in the district court. In the meantime Mr. Langley was elected a Member of this Congress. A motion for a rehearing was made very recently. That has been heard and the motion denied, though execution of the sentence has been suspended. But there is now a further opportunity which the attorneys for the defendant intend to utilize, and that is to apply for a writ of certiorari to the Supreme Court of the United States. The time for that is comparatively brief. It must be within 90 days after the decision of the circuit court.

The resolution was agreed to, and the Speaker immediately appointed the committee, which reported on December 22, 1925.[2]

The report briefly summarizes the history of the case:

While a Member of the Sixty-eighth Congress, on May 13, 1924, Mr. Langley was convicted of conspiracy in the United States District Court for the Eastern District of Kentucky under section 37 of the Penal Code, and was sentenced to serve a term of two years in the Atlanta Penitentiary. From this conviction a writ of error was taken to the Circuit Court of Appeals for the Ninth Circuit. That court, on November 13, 1925, affirmed the conviction in the district court. A motion for rehearing was filed and decided against the accused on December 4 last. On December 8 a stay of execution of the sentence was ordered by the circuit court, to continue until five days after the first motionday in the United States Supreme Court for the year 1926—January 4—with the further provision that if prior to that date a petition for certiorari should be presented in that court the execution of the sentence should be deferred until a decision should be rendered upon the petition.

At the November election for 1924, Mr. Langley was reelected as a Representative from the tenth Kentucky district.

The committee unanimously agree that under the long-established custom of the House the circumstances do not warrant expulsion and the report states:

Without an expression of the individual opinions of the members of the committee, it must be said that with practical uniformity the precedents in such cases are to the effect that the House will

[1] First session Sixty-ninth Congress, Record, p. 567.

[2] House Report No. 30.

not expel a Member for reprehensible action prior to his election as a Member, not even for conviction for an offense. On May 23, 1884, Speaker Carlisle decided that the House had no right to punish a Member for any offense alleged to have been committed previous to the time when he was elected a Member, and added, "That has been so frequently decided in the House that it is no longer a matter of dispute."

The committee, however, are just as strongly of the opinion that the circumstances require action on the part of the House at the appropriate time and agree that:

A more serious question arises, however, in the ease of Mr. Langley, in that the House could not permit in its membership a person serving a sentence for crime.

Such action, according to the report, is delayed only because of the further custom of the House to defer final disposition of such cases until passed upon by the court of last resort:

It is, however, again in accordance with precedent that final action shall not be taken until a criminal charge has been disposed of in the court of last resort.

The committee are informed that a petition for certiorari on behalf of Mr. Langley has already been filed in the Supreme Court, seeking a reversal of the conviction. There is every prospect of an early disposition of this petition, and the committee recommend that no action be taken at present. It is well known that Mr. Langley is not participating in the proceedings of the House, and it is understood that his resignation will be immediately presented in case of the refusal of the petition for certiorari.

And the committee reserve the right to submit a further report if occasion requires:

The committee do not ask at this time to be discharged from the duties imposed upon them. If there should be unusual delay in action on the petition for certiorari, or other circumstances arise which would seem to require action, the committee desire leave to make a further report to the House.

However, on January 11, 1926,[1] Mr. Langley addressed to the Speaker the following resignation:

HOUSE OF REPRESENTATIVES, *Washington, D. C.*

THE SPEAKER OF THE HOUSE OF REPRESENTATIVES.

MY DEAR MR. SPEAKER: I hereby tender my resignation as a Representative elect to the Sixty-ninth Congress from the tenth Kentucky district, to take effect immediately. I would appear on the floor and do this myself but for the state of my health and other conditions. I am taking this action for two reasons:

First. The action of the Supreme Court in denying my application for a writ of certiorari.

Second. I do not wish to cause my colleagues in the House any embarrassment. Most of them have been my associates and warm, personal friends, having served with many of them for nearly 20 years, and I am glad to believe that, notwithstanding the unfortunate circumstances which have recently surrounded me, they will have faith in the reiteration which I now make of my absolute innocence of the charges upon which my prosecution has been based, and that the day will yet come when my complete vindication will follow.

Very respectfully.

JOHN W. LANGLEY.

A copy of the resignation was transmitted by the Speaker to the Governor of the State of Kentucky, and on motion of Mr. Burton, by unanimous consent, the committee was discharged.

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[1] First session Sixty-ninth Congress, Record, p. 1861.

239. A proposition for the censure of a Senator was entertained as priviledged.

A Senator who had employed an official of a manufacturing association as a clerk in the formulation of a tariff bill was censured by the Senate.

The introduction in official capacity to confidential committee conferences of a representative of business organizations interested in legislation under consideration was declared by resolution to be contrary to senatorial ethics.

A Senator against whom a resolution of censure was pending addressed the Senate without permission being asked or given.

On September 30, 1929,[1] in the Senate, a subcommittee of the Committee on the Judiciary, instructed by resolution,[2] "to inquire into the activities of lobbying associations and lobbyists," reported:

Your committee, having had under consideration the matter of the association of one Charles L. Eyanson, assistant to the president of the Manufacturers Association of Connecticut (Inc.), with Hon. Hiram Bingham, a Senator from that State, during the consideration by the Finance Committee of the Senate and the majority members thereof of the pending tariff bill and having completed that phase of its work, beg leave to report as follows:

The Manufacturers Association of Connecticut (Inc.) is an organization in the nature of a trade association, the purpose of which is to promote the general interests of its members in their business, manufacturing establishments of the State of Connecticut, including the New York, New Haven & Hartford Railroad Co. Its business at Hartford, Conn., is under the immediate supervision and direction of the said Charles L. Eyanson under the president thereof, E. Kent Hubbard. Eyanson is paid a salary of $10,000 per annum, by the association. He came to Washington while the tariff bill referred to was under consideration by the Committee on Ways and Means of the House of Representatives in the early part of the present year, and aided members of the association in preparing arguments and data for submission by them to the committee referred to.

Eyanson came to Washington to take position, in effect, as a clerk in the office of Senator Bingham, in which he had a desk where he received callers who came to consult with him or Senator Bingham or both. He assembled material for the use of Senator Bingham in connection with the hearings before the Senate Committee on Finance and attended the hearings, occupying a seat from which he could communicate at any time with Senator Bingham and aided him with suggestions while the hearings were in progress. After the hearings were completed the majority members went into secret session for the purpose of considering the bill. At that time, at the direction of Senator Bingham, Eyanson was sworn in as clerk of the Committee on Territories and Insular Possessions, of which Senator Bingham was then and is now the chairman, displacing one Henry M. Barry, who was told by Senator Bingham that his salary would nevertheless continue. This course was purused, the committee was told by Senator Bingham, that Eyanson might be "subject to the discipline of the Senate," the significance of the phrase being left unexplained.

After Eyanson had thus been introduced into the secret meetings of the majority members and had sat with them for some two or three days, Senator Smoot, chairman of the committee, inquired of Senator Bingham whether, Eyanson, was an officer or employee of the Manufacturers Association of Connecticut, and being advised that he was, Senator Bingham was told by Senator Smoot that objection had been made to Eyanson's presence in the committee and intimated it would be better if he did not longer attend. Senator Bingham then inquired as to the attitude of other members of the committee and from the view thus elicited reached the conclusion that

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[1] First session Seventy-first Congress, Senate Report No. 43.

[2] Senate Resolution 20.

Eyanson ought not longer to attend the meetings and he did not. Eyanson drew his salary as clerk of the Committee on Territories and Insular Possessions. At the end of his first months service as such he turned the amount so received over in cash to Senator Bingham. The remainder of his salary while he continued on the rolls he drew and turned over to Mr. Barry, the whole amounting to $357.50.

After the departure of Eyanson from Washington on the completion of his work here with Senator Bingham, the latter transmitted to him a check for $1,000, which has never been cashed, the recipient having determined tentatively on its receipt to return it personally rather than by letter to Senator Bingham, but now remains undecided as to what disposition he should make of the check.

On November 4, 1929,[1] Mr. George W. Norris, of Nebraska, referred to this report and offered the following resolution:

Resolved, That the action of the Senator from Connecticut, Mr. Bingham, in placing Mr. Charles L. Eyanson upon the official rolls of the Senate at the time and in the manner set forth in the report of the subcommittee of the Committee on the Judiciary is contrary to good morals and senatorial ethics and tends to bring the Senate into dishonor and disrepute, and such conduct is hereby condemned.

A request that consideration of the resolution be delayed having been submitted by Mr. Simeon D. Fess, of Ohio, the President pro tempore[2] said:

The Chair is of the opinion that the resolution is privileged.

Request then being preferred by Mr. Fess that consideration of the resolution be postponed until the following day, the President pro tempore continued.

Although privileged, with the assent of the mover of the resolution, it will go over one day.

On November 4,[3] during consideration of the resolution in the Senate, Mr. Bingham participated in the debate and thus analyzed the issues raised by the pending resolution:

The resolution asks for the condemnation of my having placed Mr. Eyanson, secretary to the president of the Connecticut Manufacturers' Association, on the Senate rolls on three grounds: First, that it is contrary to good morals; second, that is contrary to senatorial ethics; and third, that it tends to damage the honor and reputation of the Senate.

In the first place, it is claimed that the employment of Mr. Eyanson was contrary to good morals. It is difficult, Mr. President, to know exactly what is meant by this expression "contrary to good morals"; but if it means anything at all it must mean that there was something in this employment which was immoral in the sense of being dishonorable or corrupt. To this charge, Mr. President, I plead not guilty. There was nothing in his employment which was dishonorable or corrupt. Not one dollar of the public money was wasted. Not a single taxpayer's dollar was employed for any sinister purpose. I did not profit to the extent of one dollar by any part of this transaction. There was nothing contrary to good morals.

Now, let us take the second point: It is claimed that his being placed on the rolls of the Senate was contrary to senatorial ethics. It is fair to assume, Mr. President, that the expression "senatorial ethics" relates to what is considered by senatorial practice to be right or wrong. Again, Mr. President, I plead not guilty.

Everyone in the Senate knows that to each Senator there are assigned four clerkships. It may not be generally known to the public, but it is known to every Senator that the Senator himself is considered the sole judge as to the nature of the employment to which these clerks

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[1] Record, p. 5131.

[2] George H. Moses, of New Hampshire, President pro tempore.

[3] Record p. 5063.

should be put and the character of the persons appointed to those positions. There is no restriction on who should be appointed or how he or the shall be employed. That is the custom of the Senate. That is the nature of senatorial ethics so far as these positions are concerned.

So far as I have been able to learn, according to senatorial ethics, no official of the Government, no official of the Senate, no committee of the Senate has ever held that a Senator was answerable as to whom he appointed or as to how the clerk was used. In view of this fact, Mr. President, I do not see how my placing of Mr. Eyanson on the rolls as one of my four clerks can possibly be held to be contrary to senatorial ethics.

The third charge, Mr. President, is that my action tends to bring the Senate into dishonor and disrepute. In order for this action to bring the Senate into dishonor and disrepute it must have had some sinister motive and must have been directed against the interest of the people of the United States.

Mr. President, I do not believe that those who have done me the honor of listening to or of reading my previous statements will accuse me of having had dishonorable or unpatriotic motives. My sole desire was to secure the beat possible information on a difficult and intricate subject, particularly as it related to the people who elected me to the United States Senate.

My sole object, my sole purpose in placing Mr. Eyanson on the official rolls of the Senate was so that I might be the better prepared to present the case of my constituents in Connecticut, both employers and employees, both producers and consumers; that I might be the better prepared to meet in committee and on the floor of the Senate the arguments of those who are opposed to a high protective tariff.

Mr. President, this was my motive. This was my sole object. In carrying it out not a dollar of the public funds was misused. Nothing dishonorable or disreputable was attempted. Nothing was done contrary to good morals or to senatorial ethics.

Mr. Norris replied:

This is not a question of the vindication of the Senator from Connecticut or of his condemnation. It is a question of the honor of this body. No one has disputed the evidence; no one has contradicted the facts which were brought out.

After extended debate an amendment disavowing any imputation of corrupt motives was incorporated and the resolution was agreed to, yeas 54, nays 22, in the following form:

Resolved, That the action of the Senator from Connecticut, Mr. Bingham, in placing Mr. Charles L. Eyanson upon the official rolls of the Senate and his use by Senator Bingham at the time and in the manner set forth in the report of the subcommittee of the Committee on the Judiciary (Rept. No. 43, 71st Cong., 1st sess.), while not the result of corrupt motives on the part of the Senator from Connecticut, is contrary to good morals and senatorial ethics and tends to bring the Senate into dishonor and disrepute, and such conduct is hereby condemned.

Chapter CLXXVI.[1]

DELEGATES.

240. A Delegate may make a point of order but may not vote.

A Delegate may make any motion which a Member may make, except the motion to reconsider.

Dicta by a Chairman expressing the opinion that former decisions denying Delegates the right to object to consideration were out of harmony with general decisions defining the rights of Delegates.

The rights and prerogatives of a Delegate in parliamentary matters are not limited to legislation affecting his own territory.

A provision limiting executive discretion is construed as legislation.

Requirement that the Secretary of the Interior should provide for Eskimo support and education "through the Bureau of Indian Affairs" was held to interfere with executive authority and to constitute legislation.

On December 11, 1930,[2] during the consideration of the Interior Department appropriation bill, in the Committee of the Whole House on the state of the Union the Clerk read, in part, as follows:

Natives in Alaska: To enable the Secretary of the Interior, in his discretion and under his direction through the Bureau of Indian Affairs, to provide for support and education of the Eskimos, Aleuts, Indians, and other natives of Alaska, including necessary traveling expenses of pupils to and from industrial boarding schools in Alaska.

Mr. Dan A. Sutherland, of Alaska, Delegate from the Territory of Alaska, asked to be recognized and said:

Mr. Chairman, I desire to raise a point of order on this paragraph, but I will first ask the Chair, if permissible, to rule on my right to raise such a point of order by reason of my status as a Delegate in the Congress. The floor privileges of a Delegate seem to be governed largely by precedent, and in this case I would ask for a ruling. I have endeavored to get Members to challenge my right, but none seems disposed to do so.

The Chairman[3] ruled:

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[1] Supplementary to Chapter XLIII.

[2] Third session Seventy-first Congress, Record, p. 607.

[3] Carl R. Chindblom, of Illinois, Chairman.

The Delegate from Alaska rises for the purpose of making a point of order to a portion of the paragraph just read and directs to the Chair an inquiry as to his right to make a point of order and requests the occupant of the Chair to rule upon that issue.

The Chair has previously been advised of the purpose of the Delegate from Alaska and appreciates very much his procedure and conduct in the matter.

There has so far been no direct ruling upon this exact question, but the present occupant of the Chair has studied the law and the precedents quite thoroughly and is quite willing to answer the inquiry of the Delegate from Alaska. There are at the present time only two Territories, the Territory of Alaska and the Territory of Hawaii. There are two separate organic laws for the establishment of these Territories, and in some respects they are different.

In the ease of the Territory of Alaska the Code of Laws, on page 1569, contains a provision paragraph 131, that—

"The people of the Territory of Alaska shall be represented by a Delegate in the House of Representatives of the United States chosen by the people thereof"—

And so on; but nowhere has the present occupant of the Chair found anything in this organic act defining the powers and privileges of the Delegate after he has become a Delegate and has presented himself in the House of Representatives.

In the case of the Territory of Hawaii however, there is an express provision, to be found on page 1607 of the Code of Laws, and reading as follows:

"Every such Delegate shall have a seat in the House of Representatives with the right of debate, but not of voting."

The Chair, however, has found an ancient statute which apparently has never been repealed and which is quoted in many of the decisions of Chairmen of the Committee of the Whole, as well as by Speakers, which statute, the Chair will say, does not seem to be incorporated as yet in the code or any of the supplements to the code, but which may be found in the Revised Statutes of the United States, second edition, 1878, section 1862, reading as follows:

"Every Territory shall have the right to send a Delegate to the House of Representatives of the United States to serve during each Congress who shall be elected by the voters in the Territories qualified to elect members of the legislative assembly thereof. The person having the greatest number of votes shall be declared by the Governor duly elected and a certificate shall be given accordingly. Every such Delegate shall have a seat in the House of Representatives, with the right of debating but not of voting."

It will be noticed that this language was followed in the organic act for the election of a Delegate from the Territory of Hawaii. This act was passed and became effective on the 3d of March, 1817. The Chair believes it applicable to the Delegate from the Territory of Alaska.

In the House Manual, on page 316, will be found a rule of the House, Rule XII, section 1, to the effect that the House shall elect from among the Delegates one additional member on each of certain committees, and that these Delegates shall possess in their respective committees, the same powers and privileges as in the House, and may make any motion except to reconsider.

In the precedents cited in the manual, on page 316 of the current edition, 1929, will be found references to some of the decisions; and the Chair shall read a portion of the text in the manual:

"The law provides that on the floor of the House a Delegate may debate and he may in debate call a member to order (citing the precedent). He may make any motion which a member may make except the motion to reconsider. A Delegate has even moved an impeachment. He may be appointed a teller, but the law forbids him to vote, and he may not object to the consideration of a bill."

Upon the general principles that the prohibition of one particular right permits other rights and the inclusion of one matter excludes all others, it seems to the Chair that there is no good reason for holding that the Delegate may not make a point of order, when as a matter of fact he may participate in all other parliamentary procedure; and certainly, if the Delegate is here for the purpose of promoting the interests of his constituents either by securing legislation or preventing legislation from being passed, it seems to the present occupant of the chair that he should have the right to insist that the House follow its own rules. That is what is meant by the inter-

position of a point of order. The point of order is interposed to call attention to a rule of the House that is being violated by the House itself, at least, whenever the rule involved relates to the passage of legislation.

The Chair, therefore, with all deference, is of the opinion that the Delegate from Alaska is entitled to raise the point of order.

The Chair would like to add that on page 862 in Hinds' Precedents, section 1291, it will be found that a Delegate was permitted to make a motion to suspend the rules and he was permitted to move to discharge a standing committee from further consideration of a bill. He was permitted to make that motion, and when the motion was put he moved the previous question. A point of order was made against the right of the Delegate to move the previous question, and that specific point of order was overruled and the Delegate was permitted to move the previous question.

If a Delegate can move to suspend the rules and pass legislation, notwithstanding the rules of the House, and if he can move the previous question so as to put an end to debate and to the offering of amendments, it seems to the Chair there can be no reason for denying him the right to make a point of order which compels the House to follow its own rules.

Mr. William B. Bankhead, of Alabama, interposed to inquire if the Chairman was to be understood as holding that a Delegate was restricted in his parliamentary rights to matters pertaining to his own Territory.

The Chairman replied:

No; not at all. There has been a specific holding that he may not move to reconsider a vote and that seems logical inasmuch as he can not vote, and therefore should not be permitted to make a motion to reconsider a vote. Aside from that there is only this one precedent to which the Chair has called attention, which would militate against the position of the present occupant of the chair, and that decision the Chair believes to be out of line with the general trend of opinion as to the rights of a Delegate from a Territory.

The Chair thinks that the Delegate is here for all purposes of legislation, and the Chair did not intend to limit him as to his rights as to the particular Territory he represents. The truth is, he comes as a Delegate to represent his Territory, but in order to discharge his full duties to his constituency, it seems to the Chair that he must have these complete privileges.

As to the right of a Delegate to object to the consideration of a bill the Chairman continued:

The Chair will state with reference to the last precedent, which is found in volume 2 of Hinds' Precedents, sections 1923 and 1924, the present occupant of the chair is inclined to think that that decision is out of line with the other decisions with reference to the rights and privileges of Delegates.

The Chair is speaking now of the right to object to the consideration of a bill. That is the only precedent which would militate against the right of a Delegate to raise a point of order, so far as the present occupant of the chair has been able to find; but the present occupant of the chair believes that that decision is out of line with all the other decisions relative to the powers and privileges of Delegates.

This particular question as to the right of a Delegate to object to the consideration of a bill is quoted in Hinds' Precedents, second volume, page 863, paragraph 1293. A bill was pending before the House on June 6, 1866, making appropriations to negotiate certain treaties with certain Indian tribes.

Here the Chairman quoted from the section referred to and resumed:

It seems to the present occupant of the chair that the conclusion of the argument does not follow from the premise. It will be found in numerous cases that the right of a Delegate not only to represent his views upon pending legislation but to participate in parliamentary proce-

dure as well has been recognized, and it seems to the present occupant of the chair that if a Delegate representing a Territory is to have a seat in the House for the purpose of representing his constituency, for the purpose of assisting in the passing of legislation which may be beneficial to his constituency, except by voting, and, of course, conversely to assist in preventing the passage of legislation which he may deem harmful to his constituency, then the right to debate and have a seat on the floor of the House should also include the right for him to take part in the parliamentary procedure except only the single right to vote.

In response to an inquiry by Mr. Bankhead, the Chairman added:

In the particular case to which the Chair has referred the objection was not made on a Consent Calendar day. There was no Consent Calendar at that time. The objection was to the consideration of a bill upon the ground that it should be considered in the Committee of the Whole House on the state of the Union, and not in the House. So, therefore, it was in fact a point of order.

Thereupon, Mr. Sutherland made the point of order that the language "through the Bureau of Indian Affairs" in the pending amendment proposed a restriction on the executive discretion of the Secretary of the Interior and was therefore a proposal to incorporate legislation in a general appropriation bill.

The Chairman sustained the point of order and said:

The Chair is required to rule only upon the words "through the Bureau of Indian Affairs." The present occupant of the chair does not mean to say his judgment would be foreclosed by the concession of the point of order if he did not agree with the concession. As it happens, the Chair does agree with the concession that these lines are subject to a point of order, and with reference to the words "through the Bureau of Indian Affairs," it seems to the Chair that they do infringe upon the present wide authority of the Secretary of the Interior, who may use any agency under his control under the existing law, and it might be held to be a pro tanto repeal of the law of 1927, to which the chairman of the committee called attention, inasmuch as this would be a later enactment than the general law of 1927.

For these reasons the Chair feels constrained to sustain the point of order as to the words "through the Bureau of Indian Affairs."

The Chair sustains the point of order.

241. Instance wherein a Delegate was recognized to object to the consideration of a measure.[1]

Under the circumstances, as the action of the Delegate was not contested at the time, it is questionable whether this instance is of any great binding value and should not be regarded as a passing incident in the stress and confusion attending the call, of the Consent Calendar.

It might well be argued that such objection is equivalent to a vote against the measure. True, the right to object is in exercise of a parliamentary privilege under the rules in harmony with the decision of the Chairman as to raising a point of order, but would a Delegate, following the logic of that decision, ordinarily have the right to object to the many requests for unanimous consent coming up in the House and, if so, would it not be tantamount to voting?

On December 11, 1930,[2] the right of a Delegate to object to the consideration of a measure was debated in the Committee of the Whole and, while the question was not directly presented, the Chairman[3] expressed the opinion that the former practice in that respect was inconsistent with the general rights accorded Delegates and should be revised.

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[1] See section 1293 of Hinds' Precedents.

[2] Third session Seventy-first Congress, Record, p. 603.

[3] Carl R. Chindblom, of Illinois, Chairman.

On the following Monday,[1] during the call of the Consent Calendar, the bill (S. 4142) to fix the salary of the Governor of the Territory of Alaska was reached.

Mr. Dan A. Sutherland, of Alaska, rose in his place and objected to the consideration of the measure.

The Speaker pro tempore[2] recognized him for that purpose and, the objection being entered, the bill was stricken from the Consent Calendar.

242. Delegates are elected as additional members of certain committees, where they possess the same powers and privileges and may make any motion except to reconsider.

Form and history of section 1 of Rule XII.

Rule XII, section 1, provides:

> The House shall elect from among the Delegates one additional member on each of the following committees, viz: Coinage, Weights, and Measures; Agriculture; Military Affairs; the Post Office and Post Roads; Public Lands; Indian Affairs; and Mines and Mining; and two on Territories; and they shall possess in their respective committees the same powers and privileges as in the House, and may make any motion except to reconsider.

This rule originally provided for the appointment of Delegates to these committees by the Speaker, but with the amendment of the rules in the revision of 1911,[3] providing for the election of all committees by the House, the rule was amended to conform to that requirement.

The abolition of the Committee on Private Land Claims in the same revision required the elimination of that committee from those named in the rule. Otherwise the rule retains the form adopted in 1892.

243. Discussion of status of a Delegate as a member of a standing committee.

Determination by a committee that a Delegate as a member of the committee has the right to debate but not to vote.

On January 18, 1932,[4] Mr. Edgar Howard, of Nebraska, from the Committee on Indian Affairs, included under leave to extend his remarks in the Record the following:

> Hon. EDGAR HOWARD,
> *Chairman Indian Affairs Committee of the*
>
> *House of Representatives:*
>
> At the meeting of this committee on January 5, 1932, the chairman propounded the following question and asked the subcommittee on rules to examine and report upon the same, to wit:
>
> "Whether or not a Delegate from a Territory of the United States, regularly assigned to the Committee on Indian Affairs of the House, should be accorded a vote in the committee?"
>
> Upon this question your subcommittee on rules makes the following report—
>
> "The Constitution of the United States, Article I, section 2, provides that:
>
> "The House of Representatives shall be composed of Members chosen every second year by the people of the several States," and in the same section that "no person shall be a Representative who shall not have attained the age of 25 years and been seven year a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen."

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[1] Record, p. 747.

[2] Bertrand H. Snell, of New York, Speaker pro tempore.

[3] First session Sixty-second Congress, Record, p. 80; Journal. p. 40.

[4] First session Seventy-second Congress, Record, p. 2163.

Nowhere in the Constitution is mentioned an office such as "Delegate to Congress."

From the foregoing provisions it is plain that only Representatives elected from a State can be Members of the House of Representatives.

The Constitution, Article IV, section 3, provides that: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States."

By reason of the exclusive sovereignty which the Government of the United States exercises over all territory owned by the United States not within the boundaries of a State, and the power given by the above section of the Constitution, Congress has organized Territorial governments in such Territories and has in each instance authorized the inhabitants under certain conditions to elect a Delegate to Congress.

The first Territorial government was authorized by the Continental Congress on July 13, 1787, by "An ordinance for the Government of the United States northwest of the River Ohio" which authorized the inhabitants of that Territory under conditions prescribed to elect a Delegate to Congress who should have the "right of debating but not of voting."

On March 3, 1817, Congress passed "An act further to regulate the Territories of the United States and their Delegates to Congress."

This act is general in its nature and applies to all Territories. It provides that "every such Delegate shall have a seat in the House of Representatives with the right of debating but not of voting."

From the foregoing it is apparent that a Delegate to Congress from a Territory is not a Member of the House of Representatives. Nowhere in the Constitution nor in the statutes can the intention be found to clothe the Delegate with legislative power.

Rule X of the Rules of the House of Representatives of the Seventy-first Congress (which rule has not been changed in the Seventy-second Congress) reads:

"There shall be elected by the House, at the commencement of each Congress, the following standing committees" (naming them in order).

Rule XII, paragraph 1, reads:

"The House shall elect from among the Delegates one additional member on each of the following committees, viz: Coinage, Weights, and Measures; Agriculture; Military Affairs; and Mines and Mining; and two on Territories; and they shall possess in their respective committees the same powers and privileges as in the House, and may make any motion except to reconsider."

Manifestly, the House could not elect to one of its standing committees a person not a Member of the House. The designation "additional member" applied to a Delegate clearly indicates the character of the assignment. Expressly the Delegate shall exercise in the committee to which he becomes an additional member the same powers and privileges as in the House, to wit, the "right of debating, but not the right of voting."

244. The privileges of the floor with the right to debate were extended to Resident Commissioners in the Sixtieth Congress. On February 4, 1908,[1] Mr. Dalzell, of Pennsylvania, submitted a report from the Committee on Rules recommending the adoption of the following:

"Resolved, That the privileges of the floor, with the right of debate, be extended to the two Resident Commissioners appointed by the Philippine assembly in accordance with the provisions of the act approved July 1, 1902."

Mr. James R. Mann, of Illinois, a member of the commission in control of the House Office Building, called attention to a regulation providing that allotment of offices in the House Office Building was contingent on the right to a seat on the floor, and inquired if under the pending resolution Resident Commissioners would be entitled to seats on the floor, Mr. Dalzell replied to the effect that the right to the privileges of the floor with right to debate necessarily implied a right to a seat on the floor.

The resolution was unanimously agreed to.

[1] First session Sixtieth Congress, Record, p. 1540.

245. By order of the House the Resident Commissioners of the Philippine Islands were granted the right of debate, and assigned to offices in the House Office Building.

On January 7, 1910,[1] Mr. John Dalzell, of Pennsylvania, presented by unanimous consent the following:

Ordered, That the privileges of the floor, with the right of debate, be extended to Benito Legards and Manuel L. Quezon, Resident Commissioners appointed by the Philippine legislature in accordance with the provisions of the act approved July 1, 1902.

Mr. James R. Mann, of Illinois, offered the following amendment:

Amend by adding:

"And ordered further, That the said Resident Commissioners be entitled to have offices in the House Office Building."

The amendment was agreed to and the order as amended was passed.

246. By general acquiescence the Resident Commissioners of the Philippine Islands have been permitted the privilege of debating.

On April 14, 1911,[2] Mr. Finis J. Garrett, of Tennessee, submitted by unanimous consent the following resolution which was agreed to by the House.

Resolved, That the right of debate be extended to the two Resident Commissioners from the Philippine Islands.

While the right extended by the resolution has not since been renewed or incorporated in the rules of the House, the commissioners have been recognized for debate in each succeeding Congress without objection.

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[1] Second session Sixty-first Congress, Record, p. 406; Journal, p. 131

[2] First session Sixty-second Congress, Record, p. 253; Journal, p. 106.

Chapter CLXXVII. [1]

THE SPEAKER.

1. **Statement of motion by the Chair governs its interpretation. Section 247.**
2. **Duties as presiding officer. Section 248.**
3. **Questions not for his decision. Sections 249–257.**
4. **Required to preserve order. Sections 258–260.**
5. **Control of corridors, etc. Sections 261, 262.**

247. The motion as stated by the Chair in putting the question and not as stated by the Member in offering the motion, is the proposition voted upon.

On May 26, 1917,[2] while the bill (H. R. 4188) for the distribution of agricultural products was under consideration in the Committee of the Whole House on the state of the Union, Mr. Horace M. Towner, of Iowa, asked unanimous consent that the portion of the bill then under consideration—

be considered under the rule governing appropriation bills, and that the amendments be offered at the end of the paragraph.

The Chairman put the question as follows:

The gentleman from Iowa asks unanimous consent that this particular section shall be considered by paragraphs.

The question is on the motion of the gentleman from Iowa. Is there objection?

There was no objection.

On May 28,[3] when the bill was again under consideration, Mr. Sidney Anderson, of Minnesota, made a point of order against an amendment to strike out certain language offered by Mr. James F. Byrnes, of South Carolina, and said:

My contention is that section 9 of this bill relates solely to appropriations; that legislative provisions are not in order as amendment to it; that they should be considered, and, under unanimous-consent agreement of Saturday, must be considered, in the light of a general appropriation bill. I call the attention of the Chair to the unanimous-consent agreement which was entered into on Saturday.

The Chair did not put the question in exactly the form submitted by the gentleman from Iowa. But if the request made by the gentleman from Iowa was the request upon which the committee acted on Saturday, the committee is now considering the appropriation sections of the bill under the rules governing appropriations, and it would not be in order as to any section to

[1] Supplementary to Chapter XLIV.

[2] First session Sixty-fifth Congress, Record, p. 2947.

[3] Record, p. 2992.

offer an amendment changing existing law, or to amend the section so that as amended it would change existing law. Now, under existing law the increasing of food production and eliminating waste by educational and demonstrational methods are obviously in order. But if the language "and promoting conservation of food by educational and demonstrational methods" is eliminated, that will leave simply the language "for increasing food production and eliminating waste."

Now, that language obviously contemplates and authorizes the doing of things which are not authorized by law. The gentleman from South Carolina, [Mr. Byrnes] himself contends that if that language remains in the bill it will authorize the addition of a paragraph which makes new law, and if it does it is new law standing alone. My contention is that the amendment of the gentleman from South Carolina is not in order because in effect it changes an appropriating section in such a way as to make it new law.

The Chairman [1] held:

The gentleman from Iowa, Mr. Towner, asked unanimous consent that this portion of the bill, referring to these paragraphs, which contain certain appropriations, be considered under the rules governing appropriation bills, and that amendments be offered at the end of the paragraph. But it seems that the proposition stated to the committee by the Chair was—

"The gentleman from Iowa asks unanimous consent that this particular section shall be considered by paragraphs"—

And that was agreed to. Now, of course the Chair takes it that the question is not as to what a Member may ask by way of unanimous consent, but it is the proposition which was actually submitted to the committee, and to which the committee agreed and that in this case was that this particular portion of the bill, which is not an appropriation bill, be considered by paragraphs instead of by sections, as it would otherwise be considered.

The Chair holds strictly to the proposition submitted by the Chair at the time it was submitted, and would have to hold that the only request submitted to the committee was to consider this particular section by paragraphs and not under the rules governing appropriation bills.

248. When precedents conflict, the Chair is constrained to give greatest weight to the latest decisions.

On July 20, 1909,[2] during consideration of the urgent deficiency bill in the Committee of the Whole, Mr. Marlin E. Olmsted, of Pennsylvania, offered an amendment providing for the payment of an extra month's salary to employees of the House and Senate.

In reply to a point of order interposed of Mr. Robert B. Macon, of Arkansas, against the amendment, Mr. Olmsted cited decisions in the Forty-eighth, Fifty-fourth, and Fifty-fifth Congresses in support of this contention that the amendment was in order.

The Chairman [3] said:

There is no question about the decisions having been rendered that were cited by the distinguished gentleman from Pennsylvania, and the last instance cited by him was in the Fifty-fifth Congress, where a decision of the Chair sustaining the point of order was overruled by the committee. But the Chair is, of course, bound by the last precedent upon the question. In the Fifty-sixth Congress, on May 14, 1900, an amendment providing an extra month's pay for employees was ruled out of order on the general deficiency bill by Mr. Chairman Hopkins, and on appeal the decision was sustained—ayes 58, noes 24.

There is no question in the mind of the Chair that the proposed appropriation is wholly without warrant of law. The Chair is, therefore, compelled to sustain the point of order.

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[1] Courtney W. Hamlin, of Missouri, Chairman.

[2] First session Sixty-first Congress, Record, p. 4572.

[3] Irving P. Wanger, of Pennsylvania, Chairman.

249. It is not the duty of the Chair to decide hypothetical points of order or to anticipate questions which may be suggested in advance of their regular order.

On May 26, 1917,[1] during consideration of the bill (H. R. 4188) for the distribution of agricultural products, in the Committee of the Whole House on the state of the Union, Mr. James F. Byrnes, of South Carolina, offered an amendment authorizing the sale of nitrate of soda to farmers by the Government. The amendment was ruled out of order as not germane to the section to which offered. Thereupon [2] Mr. Byrnes offered an amendment striking out that section of the bill, and said:

If my motion to strike out should prevail it is my purpose to follow it with a motion to insert in lieu of the language stricken out the amendment heretofore offered by me authorizing the Secretary of Agriculture to furnish nitrate of soda at cost.

I have no desire to consume the time of the Committee of the Whole, nor have I any desire to attack this particular section of this bill. If I can not accomplish the object I have in mind, I do not desire to discuss this specific motion to strike out. Therefore I propound this parliamentary inquiry: Assuming that my motion to strike out shall prevail, and that I follow it with the motion I have indicated to insert in lieu thereof the language of the amendment with which, the Chair is already familiar, I desire to ask whether or not the Chair will now rule on the question as to whether that would be in order? If the Chair rules that it is not in order, then the time of the House will be saved.

The Chairman [3] held:

The Chair certainly would not anticipate a matter that is not before the committee.

The Chair can not anticipate, even though he may have intimations as to what may follow, and he will not anticipate his ruling on a proposition until it is submitted in a regular, orderly way to the committee.

250. It is not the duty of the Chair to construe the Constitution as affecting proposed legislation.

On May 21, 1919,[4] during consideration by the House of a joint resolution submitting for ratification an amendment to the Constitution providing for woman suffrage, Mr. Edward W. Saunders, of Virginia, offered an amendment authorizing ratification by popular vote in three-fourths of the several States, as provided by the joint resolution.

Mr. Thomas L. Blanton, of Texas, made the point of order that the method of ratification proposed by the amendment was in violation of the Constitution.

The Speaker pro tempore [5] said:

The Chair does not pass upon the constitutionality of an amendment, and therefore overrules the point of order.

251. On November 27, 1922,[6] the bill (H. R. 12817) to amend the merchant marine act of 1920 was under consideration in Committee of the Whole House on

[1] First session Sixty-fifth Congress, Record, p. 2958.

[2] Record, p. 2994.

[3] Courtney W. Hamlin, of Missouri, Chairman.

[4] First session, Sixty-sixth Congress, Record, p. 87.

[5] Simeon D. Fess, of Ohio, Speaker pro tempore.

[6] Third session Sixty-seventh Congress, Record, p. 323.

the State of the Union, when Mr. John C. Box, of Texas, offered an amendment requiring certain treaties to conform to the immigration laws of the United States.

Mr. Carl R. Chindblom, of Illinois, raised the point of order that Congress could not by legislation establish the terms of treaties to be negotiated by the Executive department of the Government.

The Chairman [1] said:

The gentleman raises a constitutional question. It is not within the province of the Chair to determine that. The Chair overrules the point of order.

252. It is not within the province of the Chair to decide whether proposed legislation conflicts with treaty obligations.

On May 28, 1924,[2] during consideration in the Committee of the Whole House on the state of the Union of the bill (H. R. 8687) to authorize alterations to certain naval vessels, Mr. Fred A. Britten, of Illinois, offered an amendment to increase the elevation and range of turret guns on certain vessels, when Mr. Thomas L. Blanton, of Texas, made the point of order that such alterations would be in violation of treaty obligations heretofore entered into with foreign countries.

The Chairman [3] said:

The question whether it is in violation of a law or of a treaty is not for the Chair but for the committee to decide. The point of order is overruled.

253. It is for the House and not the Speaker to decide whether or not an office is incompatible with membership in the House.

It is not the duty of the Speaker to decide a hypothetical question.

On January 15, 1909,[4] following the reading and approval of the Journal, Mr. John W. Gaines, of Tennessee, propounded as a parliamentary inquiry:

Mr. Speaker, a parliamentary inquiry. I notice that on the roll call on yesterday, that Mr. George L. Lilley, of the State of Connecticut—was called as a Member of this House; I want to ask the Speaker if he is any longer a Member of this House, having been sworn in as, and being now, governor of the State of Connecticut?

The Speaker [5] said:

From the headlines of the newspapers the Chair has noticed some question as to whether Mr. Lilley is governor of the State of Connecticut, but the Chair has no official information in the premises.

Of course, if the House has official information that Representative Lilley is in the enjoyment of the office, namely, governor of the State of Connecticut, that would be a matter for the House to decide whether or no that is an office incompatible with the position of Representative in the House, and the Chair does not care to give any opinion in the premises upon a hypothetical case.

254. The effect or purport of a proposition is not a question to be passed on by the Chair.

A point of order as to the competency or meaning of an amendment does not constitute a parliamentary question.

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[1] John Q. Tilson, of Connecticut, Chairman.

[2] First session Sixty-eighth Congress, Record, p. 9766.

[3] William J. Graham, of Illinois, Chairman.

[4] Second session Sixtieth Congress, Record, p. 951.

[5] Joseph G. Cannon, of Illinois, Speaker.

On March 15, 1918,[1] during consideration of the legislative, executive and judicial appropriation bill, in the Committee of the Whole House on the state of the Union, Mr. Joseph W. Byrns, of Tennessee, made the point of order that an amendment to the bill proposed by Mr. Meyer London, of New York, was without sense.

The Chairman[2] declined to entertain the point of order for the reason that it did not present a parliamentary question.

255. The question as to whether a proposed amendment embodies a proposition already voted on is one to be passed upon by the House and not by the Speaker.

A change in the wording of the text of a proposition is sufficient to prevent the Chair from ruling it out of order as one already disposed of.

On March 21, 1908,[3] during the consideration of the fortifications appropriation bill in the Committee of the Whole House on the state of the Union, Mr. Walter I. Smith, of Iowa, offered an amendment providing that material purchased under the provisions of the act should be of American manufacture.

Mr. Swagar Sherley, of Kentucky, raised the point of order that the amendment comprised subject matter upon which the committee had already expressed its views.

The Chairman[4] said:

It is not for the Chair to enter into the question of the consistency of an amendment or the intent of an amendment. On its face it is a different amendment from the original proposition, as the gentleman will appreciate.

It is a substantial change of words, and it is not for the Chair to say what the effect of it is.

The Chair would like to offer further proof by reading from Jefferson's Manual:

"If an Amendment be proposed inconsistent with one already agreed to, it is a fit ground for its rejection by the House, but not within the competence of the Speaker to suppress as if it were against order. For were he permitted to draw questions of consistence within the vortex of order, he might usurp a negative on important modifications and suppress instead of subserving the legislative will."

The Chair therefore overrules the point of order.

256. It is not within the province of the Chair to decide whether an amendment is inconsistent with previous action of the committee.

On August 3, 1921,[5] the bill (S. 674), for the distribution of captured war trophies, was under consideration in the Committee of the Whole House on the state of the Union, when Mr. Julius Kahn, of California, proposed an amendment authorizing an appropriation for the purpose of carrying out the provisions of the act.

Mr. Finis J. Garrett, of Tennessee, made a point of order against the amendment on the ground that a similar provision had been previously rejected by the committee.

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[1] Second session Sixty-fifth Congress, Record, p. 3562.

[2] Edward W. Saunders, of Virginia, Chairman.

[3] First session Sixtieth Congress, Record, p. 3734.

[4] Adin B. Capron, of Rhode Island, Chairman.

[5] First session Sixty-seventh Congress, Record, p. 4020.

The Chairman [1] said:

Jefferson's Manual contains the following paragraph:

"SEC. 459. If an amendment be proposed inconsistent with one already agreed to, it is fit ground for its rejection by the House, but not within the competence of the Speaker to suppress it as if it were against order. For were he permitted to draw questions of consistence within the vortex of order, he might usurp a negative on important modifications, and suppress, instead of subserving, the legislative will."

The Chair thinks in accordance with the precedent there laid down and the principle established it is not within the jurisdiction of the Chair to declare this amendment subject to a point of order upon the ground that it is inconsistent with the previous action of the committee, and therefore the Chair overrules the point of order.

257. A question as to the inconsistency of a proposed amendment with action previously taken by the committee, is a proposition to be passed upon by the committee and not by the Chair.

On April 6, 1909,[2] while the tariff bill was under consideration in the Committee of the Whole House on the state of the Union, the committee rejected a motion by Mr. James A. Tawney, of Minnesota, to strike out paragraphs 196 and 197 of the bill.

Thereupon Mr. Tawney offered the following amendment:

Transfer all of the items in paragraphs 196 and 197, proposed to be stricken out by my amendment originally offered to paragraphs 196 and 197, and transfer all of said items to paragraph 708 of the free list.

Mr. Joseph H. Gaines, of West Virginia, raised the question of order that the amendment was inconsistent with the action already just taken by the committee.

The Chairman [3] said:

The Chair does not desire to hear argument; it is not for the Chair to determine the consistency or inconsistency of the amendment. The committee must determine for itself whether or not it will be consistent. This is not the same identical amendment that was voted upon, and is an amendment to a different part of the bill—an entirely different paragraph—and it appears to be germane. The point of order is overruled.

258. Extreme disorder arising on the floor, the Speaker directed the Sergeant-at-Arms to enforce order with the mace.

On March 4, 1911,[4] the House was considering the conference report on the general deficiency appropriation bill.

In the midst of much disorder, the Speaker put the question on agreeing to the conference report, and directed the Clerk to call the roll.

Extreme disorder continued after the roll call began, many Members standing and addressing the chair.

The Speaker [5] said:

The Sergeant-at-Arms will take the mace and see that gentlemen are seated. The Clerk will call the roll.

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[1] Joseph Walsh, of Massachusetts, Chairman.

[2] First session Sixty-first Congress, Record, p. 1139.

[3] Marlin E. Olmsted, of Pennsylvania, Chairman.

[4] Third session Sixty-first Congress, Record, p. 4331.

[5] Joseph G. Cannon, of Illinois, Speaker.

The Sergeant-at-Arms, bearing the mace, appeared at the head of the center aisle.

Members resumed their seats, and the Clerk proceeded with the calling of the roll.

259. A point of order being raised against an interruption from the galleries, the Speaker admonished the galleries.

On December 20, 1923,[1] Mr. Bill G. Lowrey, of Mississippi, while addressing the House by unanimous consent said:

Congress has appropriated for the care and compensation of World War veterans $2,250,000,000—$102 for every family in the country.

A voice from the gallery asked, "Who got the money?"

In response to a point of order against the interruption made by Mr. Thomas L. Blanton, of Texas, the Speaker[2] said:

The gentleman from Texas makes the point of order that an occupant of the gallery in addressing any remarks to Members on the floor is out of order. The Chair, of course, admonishes the people in the gallery that they are here by the courtesy of the House and that it is quite beyond their province to interrupt the proceedings of the House.

260. A spectator in the Senate gallery having addressed remarks to the floor, the Vice President directed the Doorkeeper to remove him.—On June 1, 1920,[3] the Senate was considering the concurrent resolution (S. Con. Res. 27) respectfully declining to grant to the Executive the power to accept a mandate over Armenia, as requested in the message of the President dated May 24, 1920. Mr. Frank B. Brandegee, of Connecticut, was addressing the Senate when the following occurred:

Mr. Brandegee. The House of Commons in Britain has resounded with the eloquent periods of British statesmen, before and since the time of Gladstone, denouncing the atrocities of the Turks and of the Turkish rule everywhere, and it has called upon the powers to take measures to suppress the bloody government of the Sultan. [Voices in the galleries pleading for the cause of Ireland.]

The Vice President[4] said:

The Sergeant at Arms will see that those persons are removed from the galleries.

Mr. Brandegee continued:

As much as we sympathize with the Armenians, Congress is a responsible body in the authorization and direction of the governmental policies of this country. [Other voices in the galleries pleading for the cause of Ireland.]

The Vice President directed:

The doorkeepers will remove from the galleries the persons violating the rule of the Senate.

261. The Speaker has general control of the Hall and corridors in the House wing of the Capitol.

The Speaker has the disposal of the unappropriated rooms in that part of the Capitol assigned to the use of the House.

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[1] First session Sixty-eighth Congress, Record, p. 472.

[2] Frederick H. Gillett, of Massachusetts, Speaker.

[3] Second session Sixty-sixth Congress, Record, p. 8057.

[4] Thomas R. Marshall, Indian , Vice President.

The rule relating to the control by the Speaker of the Hall and its surroundings, and the disposal of unappropriated rooms under the jurisdiction of the House, is section 3 of Rule I:

He shall have general control, except as provided by rule or law, of the Hall of the House, and of the corridors and passages and the disposal of the unappropriated rooms in that part of the Capitol assigned to the use of the House, until further order.

This rule was amended in the revision of 1911,[1] giving the Speaker, in addition to the general control previously exercised under the rule, the disposal of the unappropriated rooms in that part of the Capitol assigned to the use of the House.

With this exception, the rule retains the form it has borne since 1885.

262. Instance wherein the Speaker directed the removal of a placard posted in the lobby of the House.—On June 4, 1930, while the tariff bill was under daily consideration, the Speaker[2] directed the removal from the Lobby of the House of an anonymous placard reading as follows:

1. The plain purpose of the gentleman's agreement was that the House and not its conferees should determine the duties on lumber.

2. The mandate of the House by overwhelming majorities was that all lumber be placed on the free list.

3. The House conferees, in violation of the gentleman's agreement and in disregard of the positive mandate of the House, voted lumber used by the farmers on the dutiable list and poles and ties used by the public utilities on the free list.

4. The conferees are the servants of the House, not its masters. Will the Members by their votes condone the violation of the gentleman's agreement and the disregard of the positive mandate of the House on the part of its conferees?

On the following day[3] Mr. Albert Johnson, of Washington, rising to a parliamentary inquiry, asked:

I would like to inquire if the rules of the House forbid the placing of propaganda in the Speaker's lobby when no debate on the subject of the propaganda is on at the time that the propaganda is put there? And further, is it proper to put printed matter in large placarded letters in the lobby criticizing this body?

The Speaker replied:

The Chair will simply state that he ordered the Doorkeeper to remove the document yesterday.

As soon as it was called to the attention of the Chair it was ordered removed, under the authority which the Chair possesses under rule 1, clause 3, which provides as follows:

"He [the Speaker] shall have general control, except as provided by rule or law, of the Hall of the House, and of the corridors and passages and the disposal of the unappropriated rooms in that part of the Capitol assigned to the use of the House until further order."

Mr. Charles R. Crisp, of Georgia, inquired:

Mr. Speaker, I have no criticism of the Speaker having the placards removed if the Speaker saw fit, but I rise to this parliamentary inquiry: Does the Speaker hold that when a Member of the House places a statement in the lobby of the House for the benefit of his colleagues that that Member is a lobbyist or is guilty of lobbying?

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[1] First session Sixty-second Congress, Record, p. 80; Journal, p. 40.

[2] Nicholas Longworth. of Ohio, Speaker.

[3] Second session, Seventy-first Congress, Record, p. 10122.

I happened to be passing by and saw an honored Member of this House putting up the notices in the lobby, and I just wanted to know whether the Speaker was agreeing with the statement of the gentleman from Washington that the Member of the House was lobbying by placing that in the lobby?

The Speaker explained:

No. That is not the point at all. The point is that in the opinion of the Chair it imputed dishonorable motives to the conferees on the part of the House.

The Chair thinks that anything which gives information is proper, but anything which imputes dishonorable motives to Members of the House, either conferees or others, is not proper.

The Chair has no knowledge of who did it or how it was done.

The Chair thinks he could have them all removed if he saw fit, but he certainly would not cause to be removed any placards which were intended to give information and not impute any dishonorable motives to a Member.

Chapter CLXXVIII.[1]

THE SPEAKER PRO TEMPORE.

263. A Speaker pro tempore is appointed by the Speaker or elected by the House.

Form and history of Rule 1, Section 7.

The rule relating to the Speaker's appointment of a Speaker pro tempore is section 7 of Rule I:

> He shall have the right to name any Member to perform the duties of the Chair, but such substitution shall not extend beyond three legislative days: *Provided, however,* That in case of his illness, he may make such appointment for a period not exceeding ten days, with the approval of the House at the time the same is made; and in his absence and omission to make such appointment, the House shall proceed to elect a Speaker pro tempore to act during his absence.

Formerly the rule provided that the substitution of a Speaker pro tempore by appointment should not extend beyond an adjournment.

On December 9, 1920,[2] the House agreed to an amendment proposed by Mr. Philip P. Campbell, of Kansas, providing that such substitution should not extend beyond three legislative days.

This was the first change in the rule since the general revision of 1880.

264. Instance wherein one not a member of the majority party was called to preside in the Committee of the Whole.

On June 21, 1918,[3] Mr. Meyer London, of New York, who was not a member of the majority party, presided temporarily in the Committee of the Whole during the consideration of the bill (H. R. 12402), to exclude and expel anarchists from the United States.

265. Recently it has been the general, though not the universal practice, to designate as Speaker pro tempore during eulogies on a deceased Member, the dean of the State delegation regardless of party affiliation.

[1] Supplemental to Chapter XLV.

[2] Third session Sixty-sixth Congress, Record, p. 145.

[3] Second session Sixty-fifth Congress, Record, p. 8108.

On February 14, 1919,[1] pending a motion to resolve into the Committee of the Whole for the consideration of business in order on that day, the Speaker[2] announced:

On next Sunday there will be held memorial exercises for gentlemen from Wisconsin, Virginia, Maryland, and Pennsylvania, The Chair usually appoints the senior Member of a delegation to preside. In this case the Chair will appoint Mr. Butler, of Pennsylvania, to preside, and request him that when Wisconsin is reached that Mr. Cooper of Wisconsin shall be called to preside, when Virginia is reached that Mr. Flood shall be called, and when Maryland is reached Mr. Linthicum.

Mr. Butler and Mr. Cooper were members of the minority while Mr. Flood and Mr. Linthicum were members of the majority part in the House.

266. The Speaker, about to be absent, asked the approval of the House of his designation of a Speaker pro tempore.

The House having approved the designation of a Speaker pro tempore, the Speaker directed the Clerk to notify the President and the Senate.

A Speaker pro tempore whose designation was approved by the House was not sworn.

On November 22, 1921,[3] at the opening of the day's session, the Speaker[4] said:

The Chair designates the gentleman from Massachusetts, Mr. Walsh, to act as Speaker tomorrow, Wednesday, November 23, 1921, and the next two succeeding days, if there should be any in this session, and asks that the designation be approved by the House. Is there objection? [After a pause.] The Chair hears none, and the Clerk will notify the President and the Senate.

Notice of the appointment of a Speaker pro tempore was sent to the President and the Senate, but the Speaker pro tempore was not sworn.

267. The House having agreed to an order for formal sessions on two days only of each week over an extended period, authorized the Speaker to appoint Speakers pro tempore at will during that time.

On June 19, 1929,[5] the House, having agreed to an order to meet on Mondays and Thursdays only of each week until October 14, 1929, unless sooner convened by the Speaker, supplemented that order by passing the following resolution:

Resolved, That the Speaker may at any tune during the months of September and October designate any Member to perform the duties of the Chair, notwithstanding the provisions of clause 7 of Rule I.

268. Form of resolution naming a Speaker pro tempore.

On March 8, 1922,[6] the Speaker[4] announced an intended absence of a week and suggested the election of a Speaker pro tempore.

In accordance with the Speaker's suggestion, Mr. Frank W. Mondell, of Wyoming, offered the following resolution:

Resolved, That the Hon. Joseph Walsh, of Massachusetts, be elected Speaker pro tempore to discharge the duties of the Chair during the absence of the Speaker, not to exceed 10 days.

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[1] Third session Sixty-fifth Congress, Record, p. 3351.

[2] Champ Clark, of Missouri, Speaker.

[3] First session Sixty-seventh Congress, Journal, p. 563, Record, p. 8124.

[4] Frederick H. Gillett, of Massachusetts, Speaker.

[5] First session Seventy-first Congress, Record, p. 3229.

[6] Second session Sixty-seventh Congress, Journal, p. 197; Record, p. 3571.

The resolution was agreed to and the Speaker directed the Clerk to notify the President and the Senate.

Mr. Walsh assumed the duties of Speaker pro tempore on March 9,[1] without being sworn.

269. Form of Speaker's designation of a Speaker pro tempore.

On June 10, 1922[2] following the reading and approval of the Journal, the Speaker[3] announced:

> The Chair expects to be absent on Monday and Tuesday of next week, and designates the gentleman from Massachusetts, Mr. Walsh, to act as Speaker pro tempore in his absence.

270. A Member of the minority party is sometimes designated as Speaker pro tempore on formal occasions.

On March 4,[4] 1913, Mr. Speaker Clark called to the chair ex-Speaker Joseph G. Cannon,[5] who presided during the consideration of the usual resolution extending to the Speaker the thanks of the House.

On March 4, 1915,[6] at the suggestion of Mr. James R. Mann, of Illinois, Mr. Speaker Clark designated as Speaker pro tempore Mr. Victor Murdock, of Kansas, who presided during the consideration of a similar resolution.

On March 4, 1921,[7] Mr. Henry T. Rainey, of Illinois, was called to the chair, by Mr. Speaker Gillett, on a similar occasion.

271. On May 27, 1922,[8] the Speaker designated Mr. Andrew J. Montague, of Virginia, a member of the minority, but not the senior member of his delegation in service, as Speaker pro tempore on the following day during eulogies on the late Henry D. Flood, of Virginia.

On January 19, 1919,[9] Mr. Joseph G. Cannon, of Illinois, a member of the minority, oldest in point of service in the House but not of longest continuous service, presided as Speaker pro tempore during eulogies on the late John H. Sterling, of Illinois.

In some instances where not convenient to appoint the dean of the delegation, on account of illness, absence from the city or other cause, the next ranking member of the delegation has been appointed.

272. In the absence of the Speaker the Clerk calls the House to order. Form of Speaker's designation of a Speaker pro tempore.

Form of resolution approving designation of Speaker pro tempore and authorizing him to sign enrolled bills and appoint committees.

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[1] Journal, p. 200; Record, p. 3622.

[2] Second session Sixty-seventh Congress, Journal, p. 421; Record, p. 8542.

[3] Frederick H. Gillett, of Massachusetts, Speaker.

[4] Third session Sixth-second Congress, Record, p. 4853.

[5] Ex-Speaker Cannon presided, March 4, 1913, and March 4, 1919, on similar occasions.

[6] Third session Sixty-third Congress, Record, p. 5520.

[7] Third session Sixty-sixth Congress, Record, p. 4545.

[8] First session Sixty-seventh Congress, Journal, p. 388; Record, p. 7803.

[9] Third session Sixty-fifth Congress, Journal, p. 96; Record, p. 1710.

On July 29, 1916,[1] the House was called to order by the Clerk who read the following communication:

THE SPEAKER'S ROOMS,
HOUSE OF REPRESENTATIVES,
Washington, D. C., July 26, 1916.

Hon. SOUTH TRIMBLE,
Clerk of the House:

I hereby designate Hon. Charles M. Stedman, a Representative from North Carolina, to preside in the House on Saturday, July 29.

CHAMP CLARK.

Thereupon, Mr. Claude Kitchin, of North Carolina, offered the following resolution which was agreed to:

Resolved, That the designation and appointment by the Speaker of Hon. Charles M. Stedman, a Representative from the State of North Carolina, as Speaker pro tempore for this day during the temporary absence of the Speaker, be, and the same is hereby, approved, and the said Charles M. Stedman is hereby empowered to sign as Speaker pro tempore during this day enrolled bills and joint resolutions and appoint conferees.

Resolved, That a copy of these resolutions be sent to the Senate as notice of the action of the House.

Resolved, that a copy of these resolutions be sent to the President as notice of the action of the House.

273. On July 1, 1912,[2] the Clerk called the House to order and read a communication from Mr. Speaker Clark, designating Mr. Joshua W. Alexander, of Missouri, as Speaker pro tempore, and Mr. Alexander assumed the duties of the chair.

Later in the day the signature of the Speaker was required to certain enrolled bills and the House agreed to the following:

Resolved, That Hon. Joshua W. Alexander, a Representative from the State of Missouri, be, and hereby is, elected Speaker pro tempore during the temporary absence of the Speaker.

Resolved, That the Clerk of the House be directed to notify the Senate that the House has elected Hon. Joshua W. Alexander, a Representative from the State of Missouri, as Speaker pro tempore during the temporary absence of the Speaker.

Resolved, That the Clerk be instructed to inform the President of the election of Hon. Joshua W. Alexander, a Representative from the State of Missouri, as Speaker pro tempore of the House of Representatives during the temporary absence of the Speaker.

274. A Speaker pro tempore elected by the House is sworn as a prerequisite to signing enrolled bills.

On October 31, 1918,[3] at the close of the day's session, the Speaker[4] expressed a desire to absent himself for a longer period than that permitted under the rules and suggested the election of a Speaker pro tempore.

Thereupon, Mr. Claude Kitchin, of North Carolina, moved the election of Mr. Finis J. Garrett, of Tennessee, as Speaker pro tempore "until the 12th of November, or until the Speaker returns if he should sooner return, with the power to sign bills and resolutions."

The motion was agreed to, and on the following day[5] Mr. Garrett called the House to order as Speaker pro tempore and proceeded with the duties of the office,

[1] First session Sixty-fourth Congress, Journal, p. 904; Record, p. 11807.

[2] Second session Sixty-second Congress, Journal, p. 832; Record, p. 8543.

[3] Second session Sixty-fifth Congress, Record, p. 11523.

[4] Champ Clark, of Missouri, Speaker.

[5] Journal, p. 606; Record, p. 11527.

when Mr. Asbury F. Lever raised the question of order that the Speaker pro tempore should be sworn.

The Speaker pro tempore said:

The Chair has examined the precedents very hastily. It seems that Speakers pro tempore designated or elected have not been sworn in as Speakers pro tempore during the time that they were merely presiding. The question of the signing of bills or resolutions by a Speaker pro tempore without his being sworn does not seem to have been definitely decided, although there is much in the books about it. If the present Speaker pro tempore is called upon to sign any written resolution or bill, it is his opinion that he should be sworn.

The oath of office was then administered by Mr. Joseph W. Byrns, of Tennessee, and a resolution was passed directing the Clerk to inform the President and the Senate.

275. A Speaker pro tempore sometimes designates another Speaker pro tempore.

For an absence extending over a number of days it was considered expedient to elect a Speaker pro tempore.

The President and the Senate were informed of the election of a Speaker pro tempore.

On June 11, 1932,[1] the House was called to order by the Clerk[2] who read a communication from the Speaker,[3] designating Mr. Henry T. Rainey, of Illinois, as Speaker pro tempore.

On June 13,[4] the House was again called to order by the Clerk, when Mr. Charles R. Crisp, of Georgia, being recognized, suggested that in view of the continued illness of the Speaker and the character of business coming before the House, he deemed it wise to offer the following resolution:

Resolved, That Eon. Henry T. Rainey, a Representative from the State of Illinois, be, and he is hereby, elected Speaker pro tempore during the absence of the Speaker.

Resolved, That the President and the Senate be notified by the Clerk of the election of Hon. Henry T. Rainey as Speaker pro tempore during the absence of the Speaker.

The resolution was agreed to and Mr. Crisp administered the oath to Mr. Rainey who assumed the chair as Speaker pro tempore.

On June 20,[5] the Clerk called the House to order and read the following:

THE SPEAKER'S ROOM,
HOUSE OF REPRESENTATIVES OF THE UNITED STATES,
Washington, D. C., June to, 1932.

I hereby designate Hon. William B. Bankhead to act as Speaker pro tempore to-day.

HENRY T. RAINEY,
Speaker pro tempore.

276. A Member called to the Chair during the day's sitting does not sign enrolled bills or appoint committees.

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[1] First session Seventy-second Congress, Record, p. 12692.

[2] South Trimble, of Kentucky, Clerk.

[3] John N. Garner, of Texas, Speaker.

[4] Record, p. 12843.

[5] Record, p. 13502.

On February 10, 1919,[1] while Mr. Edward W. Saunders, of Virginia, was presiding as Speaker pro tempore (by designation merely), the House took from the Speaker's table the post-office appropriation bill; disagreed to all Senate amendments and agreed to the conference asked by the Senate.

The Speaker pro tempore proceeded to announce the conferees, when Mr. James R. Mann, of Illinois, said:

Mr. Speaker, in order not to create a precedent, I think the present occupant of the chair ought to ask that by unanimous consent he may name the conferees. I do not think a Member temporarily occupying the chair as Speaker pro tempore is authorized under the rules to name the conferees without the consent of the House.

Thereupon the Speaker pro tempore submitted the question to the House, and unanimous consent having been obtained, announced the names of the managers on the part of the House.

277. A Speaker about to be absent obtained the approval of the House of his designation of a Speaker pro tempore.

The House having approved the designation of a Speaker pro tempore the President and the Senate were informed.

A Speaker pro tempore whose designation had received the approval of the House signed enrolled bills.

On July 1, 1921,[2] following the reading and approval of the Journal, the Speaker[3] said:

The Chair is not going to be present to-morrow and part of this afternoon, and as there might be some bills which would need the signature of the Speaker, the Chair designates Mr. Towner, of Iowa, to act as Speaker, and asks the approval of the House of that designation, which meets the requirements of the law as to signing bills. Is there objection?

There was no objection, and the President and Senate were notified of the designation of Mr. Towner as Speaker pro tempore with the approval of the House.

278. The House approved the designation of a Speaker pro tempore as a prerequisite to his signing enrolled bills.

Form of resolution approving designation of Speaker pro tempore.

On May 22, 1922,[4] Mr. Frank W. Mondell, of Wyoming, presented, as privileged, the following resolution:

Resovled, That the designation of Hon. Joseph Walsh, a Representative from the State of Massachusetts, as Speaker pro tempore be approved by the House, and that the President of the United States and the Senate be notified thereof.

In explaining the purpose of the resolution, Mr. Mondell said:

Mr. Speaker, the adoption of this resolution is necessary in order to authorize the Speaker pro tempore to sign the Ball Rent Act or any other measure that may be presented to him. The bill goes immediately to the Senate. Our expectation is that the Senate will take it up at once and agree to the House amendments. The bill ought to be back to the House inside of 30 minutes at the latest. While we are waiting for the action of the Senate, the committee will call up another bill and have it under consideration.

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[1] Third session Sixty-fifth Congress, Journal, p. 179; Record, p. 3103.

[2] First session Sixty-seventh Congress, Journal, p. 332; Record, p. 3301.

[3] Frederick H. Gillett, of Massachusetts, Speaker.

[4] Second session Sixty-seventh Congress, Journal, p. 374; Record, p. 7427; Record, p. 7432.

The resolution was agreed to, and on the same day the Speaker pro tempore announced his signature to enrolled bill (S. 2919), extending the provisions of the District of Columbia rents act.

279. On July 11, 1921,[1] following the passage of a joint resolution making available appropriations for the fiscal year, Mr. Patrick H. Kelley, of Michigan, offered the following:

Resolved, That the designation by the Speaker of Hon. Joseph Walsh, a Representative from the State of Massachusetts, as Speaker pro tempore be approved by the House and the Clerk notify the Senate and President thereof.

Mr. Kelley said:

Mr. Speaker, the necessity for this is a desire to get the bill signed, so that it will become a law to-day. This is pay day in nearly all the navy yards and stations of the Government.

The resolution was agreed to, and the Speaker pro tempore affixed his signature to several bills reported from the Committee on Enrolled Bills.

280. Instance wherein the House authorized the Speaker to designate a Speaker pro tempore for a term extending beyond the time provided by the rules.

The House having approved the Speaker's designation of a Speaker pro tempore, the oath was administered and the Clerk was directed to notify the President and the Senate.

On March 8, 1920,[2] in compliance with a request from the Speaker,[3] the House agreed to the following:

The Speaker may at any time during the present month name a Member to perform the duties of the Chair for a period not exceeding 10 legislative days, who shall have authority to sign bills and appoint select and conference committees, and which designation is hereby approved by the House.

Under the authority granted the Speaker announced[4] the designation of Mr. Joseph Walsh, of Massachusetts, as Speaker pro tempore, and on the following day[5] Mr. James R. Mann, of Illinois, offered as privileged the following:

Resolved, That the Clerk notify the Senate and the President of the United States that the Speaker has designated Hon. Joseph Walsh, a Representative from the State of Massachusetts, as Speaker pro tempore for a period not exceeding 10 legislative days, and that the said designation is approved by the House.

The resolution was agreed to, and the oath of office as Speaker pro tempore was administered to Mr. Walsh by Mr. Joseph G. Cannon, of Illinois.

281. In the absence of the Vice President during the election of a President pro tempore of the Senate, a President pro tempore was designated to preside.

The election of an officer of the Senate is privileged and unless otherwise ordered by the Senate, balloting continues until a majority is obtained.

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[1] First session Sixty-seventh Congress, Journal, p. 351; Record, p. 3570.

[2] Second session Sixty-sixth Congress, Record, p. 4022.

[3] Frederick H. Gillett, of Massachusetts, Speaker.

[4] Record, p. 4130; Journal, p. 249.

[5] Record, p. 4179; Journal, p. 251.

On May 11, 1911,[1] when the Senate proceeded to the election of a President pro tempore of the Senate, Mr. Henry Cabot Lodge, of Massachusetts, who had been previously called to the chair by the Vice President, said:

The Chair thinks it only proper to say that by an inadvertence which seems almost incredible he did not remember the second clause of Rule I of the Senate, and in pursuing the course that has been pursued here he has followed the proceeding which has always taken place in such a case since he has been in the Senate. The Vice President would leave the chair, calling a Senator to it, and in his absence, as the Constitution requires, the Senate would proceed to the election of a President pro tempore.

Under the second clause of Rule I of the Senate the present occupant of the chair has no right to occupy the chair. It must be occupied by the Secretary of the Senate, or in his absence by the Chief Clerk, unless the Senate chooses to suspend the rule, which, of course, it can do by unanimous consent.

Thereupon, on motion of Mr. Joseph W. Bailey, of Texas, by unanimous consent, the rule was suspended and Mr. Lodge continued to occupy the chair until the election of a President pro tempore.

Upon the announcement that no one had received a majority of the votes cast on the first ballot and that there was no choice, Mr. Shelby M. Cullom, of Illinois, moved to proceed to another ballot.

The President pro tempore held that under the Constitution, when the Senate entered upon the election of an officer, it proceeded to ballot until one was elected, unless it was otherwise ordered.

282. The election of an officer of the Senate may be by ballot, by roll call, or by resolution.

The instance wherein the Senate elected a number of Presidents pro tempore to serve seriatim for stated terms.

On December 16, 1912,[2] the term for which the President pro tempore, Mr. Augustus O. Bacon, of Georgia, had been elected, having expired, Mr. Henry Cabot Lodge, of Massachusetts, pursuant to the order of the Senate made May 15, 1911, called the Senate to order.

The Senate thereupon proceeded to the consideration of the following order providing for the election of Presidents pro tempore of the Senate:

Ordered, That Jacob H. Gallinger, a Senator from the State of New Hampshire, be, and he hereby is, elected President of the Senate pro tempore, to hold and exercise the office from and including December 16, 1912, to and including January 4, 1913; that Augustus O. Bacon, a Senator from the State of Georgia, be, and he hereby is, elected President of the Senate pro tempore, to hold and exercise the office from and including January 5, 1913, to and including January 18, 1913; that Jacob H. Gallinger be, and he hereby is, elected President of the Senate pro tempore, to hold and exercise the office from and including January 19, 1913, to and including February 1, 1913; that Augustus O. Bacon be, and he hereby is, elected President of the Senate pro tempore, to hold and exercise the office from and including February 2, 1913, to and including February 15, 1913; and that Jacob H. Gallinger be, and he hereby is, elected President of the Senate pro tempore to hold and exercise the office from and including February 16, 1913, to and including March 3, 1913.

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[1] First session Sixty-second Congress, Record, pp. 1173, 1204; Senate Journal, p. 60.

[2] Third session Sixty-second Congress, Record, p. 695; Senate Journal, p. 34.

Mr. Joseph L. Bristow, of Kansas, made the point of order that under the provisions of Jefferson's Manual,[1] a President pro tempore of the Senate should be chosen by ballot.

The Presiding Officer said:

> The first rule of the Senate states that the Senate shall choose its Presiding Officer, which is the language of the Constitution. No method is stated either in the rule or in the Constitution as to the manner in which the Senate shall choose. In the opinion of the Chair the Senate may choose by ballot by calling the roll, or by resolution, and the last course has been followed over and over again. The Secretary will read the resolution offered by the Senator from Utah.

The question being put the resolution was agreed to, yeas 51, nays 18, and Mr. Gallinger took the chair as President pro tempore.

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[1] Second paragraph of sec. IX of Jefferson's Manual.

Chapter CLXXIX.[1]

SPEAKER'S POWER OF RECOGNITION.

1. **The rule and practice. Sections 283–291.**
2. **No appeal from. Sections 292–294.**
3. **Member once recognized not to be deprived of floor. Section 295.**
4. **Recognition governed by Member's relation to the pending question. Sections 296–306.**
5. **Conditions under which right to prior recognition passes to opponents of a measure. Sections 307–313.**

283. A Member desiring recognition must first rise and address the Speaker.

On December 10, 1913[2] after announcing the business in order for the day, the Speaker[3] said:

The Chair desires to suggest to the House that Members can not sit in their seats and make any motion whatever; they can not sit in their seats and interrupt a Member who has the floor. The Chair understands that these things are done without due consideration and without any desire on the part of a Member to disturb the order of the House, but he does disturb it.

284. Women presiding in the House or in the Committee of the Whole are properly addressed as "Madam Speaker" and "Madam Chairman" respectively.—On March 2, 1932,[4] following, the approval of the Journal, Mr. Claude V. Parsons, of Illinois, rising to correct the Record, said:

Yesterday afternoon the distinguished Congresswoman from Florida occupied the Chair and in addressing the Chair I addressed her as Madam Chairman. I notice in the Record this morning, that it is printed as Mr. Chairman. I wish to inquire which one of the titles is correct.

The Speaker[5] replied:

In the opinion of the present occupant of the Chair, the gentleman from Illinois in addressing the Chair as Madam Chairman used the correct form.

285. The rules require Members to address themselves to "Mr. Speaker only, and it is a breach of parliamentary law for Members to preface remarks by addressing themselves to Gentlemen of the House," "Ladies and gentlemen," etc.

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[1] Supplemental to Chapter XLVI.

[2] Second session Sixty-third Congress, Record, p. 634.

[3] Champ Clark, of Missouri, Speaker.

[4] First session Seventy-second Congress, Record, p. 5117.

[5] John N. Garner, of Texas, Speaker.

On January 12, 1932,[1] Mr. Robert Luce, of Massachusetts, rising to a question of privilege, said:

I find in the Record this morning that a few remarks I made yesterday are printed as follows.

Mr. Speaker, ladies, and gentlemen.

Not since I have been a Member have I thus broken parliamentary law. Of course, I desire not to go on record as supporting a practice which is obnoxious to me.

When I came here 12 years ago, nobody, so far as I can recollect, ever deviated from the parliamentary rule that salutation should be confined to the occupant of the chair, either "Mr. Speaker" or "Mr. Chairman." Within a very few years the practice has grown up of addressing the House en masse by some form of preliminary language. This is contrary to the parliamentary precedent of several hundred years.

I would read to you a statement by Sir Thomas Smith who described the practice of the Parliament of Queen Elizabeth's time. He said:

"Though one do praise the law, the other dissuade it. For every man speaketh as to the Speaker, not as one to another, for that is against the order of the house."

Jefferson's Manual, which is the law of the House when it has no rule to the contrary, says that "when any Member means to speak * * * he is * * * to address himself not to the House, nor to any particular Member, but to the Speaker," and so forth. Notice that he is to address himself not to the House, but to the Speaker of the House.

I called this matter to the attention of Speaker Longworth, and he was even more severe than I would be in criticizing the practice and in expressing the hope that some means might be found to call it to the attention of the House. I hope that I have not unduly taken the time of the House in calling attention to this matter, and ask unanimous consent that the words "ladies and gentlemen" be stricken from the report of my speech.

The Speaker[2] said:

The Chair is in entire sympathy with the remarks made by the gentleman from Massachusetts. It is supposed to be a slight upon the Chair, according to the expressions of former Speakers of the House, when Members address the Chairman of the Committee of the Whole or the Speaker and then address the Members on the floor en masse. The Speaker represents the House of Representatives in its organization, and by addressing the Chair gentlemen address the entire membership of the House.

Is there objection to the request of the gentleman from Massachusetts?

There was no objection.

286. Under the rules Members seeking recognition rise and address themselves to the Speaker from their places in the House and the Speaker declines to recognize Members preferring requests from the well of the House.—On December 9, 1931,[3] a number of Members came down the aisles and stood in the well of the House asking recognition.

Mr. William B. Bankhead, of Alabama, raised a question of order against the recognition of Members from the well of the House and asked that the rule against the practice be enforced.

The Speaker[4] sustained the point of order and said:

May the Chair make a few remarks concerning that? It is the opinion of the Chair that the practice of coming down into the well of the House in order to attract the attention of the Chair is improper. It tends to confusion. It does not give the membership in the rear of the

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[1] First session Seventy-second Congress, Record, p. 1815.

[2] John N. Garner, of Texas, Speaker.

[3] First session, Seventv-second Congress. Record, p. 236.

[4] John N. Garner, of Texas, Speaker.

Hall opportunity to hear the requests. So the Chair thinks he will adopt the practice of not recognizing gentlemen who seek recognition from the well of the House. The Chair thinks this will finally stop the practice.

287. A Member may not by reserving the right to object to a request for unanimous consent secure the floor for debate.

On April 14, 1913,[1] Mr. Frank W. Mondell, of Wyoming, asked unanimous consent to extend his remarks in the Record on the subject of woman suffrage.

Mr. A. W. Lafferty, of Oregon, reserved the right to object and was engaging in debate, when Mr. Martin B. Madden, of Illinois, inquired under what rule a reservation of the right to object entitled Members to the floor.

The Speaker[2] replied that while it was a custom which had prevailed for many years and was the practice when he first entered the House more than eighteen years before, it was not sanctioned by the rules, and was frequently the cause of a waste of time, but that any Member by demanding the regular order might prevent such reservations and preclude debate.

288. On September 5, 1919,[3] twhile the House, proceeding under a special order, was in Committee of the Whole House for the consideration of bills, on the Private Calendar unobjected to, Mr. Thomas L. Blanton of Texas objected to the consideration of a certain bill.

Mr. Charles C. Kearns, of Ohio, inquired of the Chair whether a Member reserving the right to object to the consideration of a bill was entitled to the floor, and if recognized, whether he could be deprived of the floor by a demand for the regular order.

The Chairman, Mr. Nicholas Longworth, of Ohio, replied that until unanimous consent for the consideration of a bill was secured no Member could be recognized, as there was nothing before the House for discussion, and that no Member could occupy the floor in debate under reservation of the right to object to a request for unanimous consent if there was objection or demand for the regular order.

289. The Speaker may inquire for what purpose a Member rises and then deny recognition.

On April 14, 1913,[1] when the immediate business before the House had been concluded, Mr. Richard W. Austin, of Tennessee, rose and addressed the Chair.

The Speaker inquired:

For what purpose does the gentleman from Tennessee rise?

Upon ascertaining that the request was for the purpose of presenting an unprivileged resolution, the Speaker refused recognition.

Mr. James R. Mann, of Illinois, submitted as a parliamentary inquiry, that having recognized Mr. Austin to make the inquiry the Speaker could not then withdraw recognition.

The Speaker[2] said:

The gentleman from Tennessee arose, and the Chair asked him for what purpose he rose.

Then the gentleman sent up the resolution, and the Chair obtained the resolution from the Clerk and read enough of it to determine that it was not a privileged resolution.

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[1] First session Sixty-third Congress, Record, p. 173.

[2] Champ Clark, of Missouri, Speaker.

[3] First session Sixty-sixth Congress, Record, p. 4938.

The Chair does not think that if the gentleman from Illinois would rise, for instance, and the Chair would then ask for what purpose the gentleman rose, that he would thereby recognize the gentleman from Illinois until he found out whether he was entitled to be recognized. At first to-day the Chair did not do that, and several gentlemen obtained in that way recognition for matters which they had no right to bring up; but afterwards the Chair adopted the old procedure of propounding a question that was very unpopular here for awhile, namely, for what purpose the gentleman rose. The Chair think that is the only orderly way to proceed.

290. On July 5, 1918,[1] during the consideration of Senate amendments to the river and harbor appropriation bill, the Speaker recognized Mr. Oscar L. Gray, of Alabama, to offer a motion to recede and concur, but declined to recognize him for debate on the ground that Mr. John H. Small, of North Carolina, the Member in charge of the bill, was entitled to the floor.

In the course of his remarks the Speaker[2] said:

A good many gentlemen have been under the impression that if a man is recognized at all he is recognized for all purposes, which is not true. The late Hon. Augustus P. Gardner always insisted that there were two recognitions, and finally he convinced me of the truth of that; and that is the reason that the Chair asks a gentleman for what purpose he rises. There was a tremendous agitation here once about the Speaker asking that question. When I became Speaker I started in with the intention not to propound that inquiry, and the first thing I knew I was in deep water and in a good deal of trouble. After seeing how it worked out I concluded that Speaker Cannon had been right in demanding "For what purpose does the gentleman rise?" I have carried out that practice ever since.

291. On August 5, 1919,[3] William L. Igoe, of Missouri, rose to a question of personal privilege and in the course of his remarks referred to the fact that on a previous day the Speaker, after recognizing him, had declined to permit him to proceed.

During the colloquy which ensued, Mr. John N. Garner, of Texas, suggested:

Will the gentleman yield for a suggestion which occurs to me, that this colloquy illustrates the advisability of one custom that Mr. Speaker Cannon always insisted upon, for which we criticized him a good deal, but that finally the ex-Speaker, Mr. Clark of Missouri, was compelled to adopt, and that was to ask each Member when he rises, "For what purpose does the gentleman rise?"

The Speaker[4] agreed:

That strikes me as logical, and I think it is probably wise, as the gentleman from Texas, Mr. Garner suggests, to ask for what purpose a gentleman rises, and the Chair does that very often; but when the leader of the minority rises, the Chair generally recognizes him without putting that question, because he knows that the leader of the minority has a sense of responsibility and is familiar with the rules, and the Chair knows that he would not intend to take advantage of his recognition. So the Chair many times recognizes him when he would not recognize other gentlemen without making the inquiry; but I agree that perhaps it is wise that the Chair should always ask that question. Most Members on both sides of the House who wish to make a motion out of the regular order consult the Speaker in advance and then it is arranged whether and when they can be recognized so as least to interfere with the regular business of the House.

292. There is no appeal from a decision by the Speaker on a question of recognition.

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[1] Second session Sixty-fifth Congress, Record, p. 8710.

[2] Champ Clark, of Missouri, Speaker.

[3] First session Sixty-sixth Congress, Record, p. 3663.

[4] Frederick H. Gillett, of Massachusetts, Speaker.

On March 15, 1910,[1] the legislative, executive, and judicial appropriation bill was ordered to be engrossed and read a third time, when Mr. William S. Bennett of New York, Mr. Martin D. Foster of Illinois, and Mr. William A. Cullop of Indiana, arose simultaneously, and demanded recognition to move to recommit the bill. The Speaker, after ascertaining that all were opposed to the bill, recognized Mr. Bennett. Mr. Foster appealed from the decision of the Chair.

The Speaker[2] said:

It is a question of recognition, and the gentleman is quite aware that upon a question of recognition an appeal from the Chair has never, at least for a generation, been entertained.

293. An inquiry to ascertain for what purpose a Member arises does not constitute recognition.

While an appeal or a motion to adjourn is always in order, a Member must first secure recognition in order to present either.

On February 28, 1919,[3] during the consideration of the bill (S. 1419) regulating the construction of dams across navigable waters, Mr. William E. Mason, of Illinois, rose and demanded recognition.

The Speaker pro tempore, Mr. Finis J. Garrett, of Tennessee, inquired for what purpose the Member arose, and, upon ascertaining that the Member desired to move to adjourn, refused recognition.

Mr. Mason asked if a motion to adjourn was in order.

The Speaker pro tempore said:

The motion to adjourn is always in order when a gentleman gets recognition to make it; but the gentleman from Tennessee, Mr. Sims, has the floor and has an hour.

The Chair recognized the gentleman from Tennessee. The gentleman from Illinois rose and addressed the Chair, and the Chair asked him for what purpose he rose. He said, "I rise to make a motion to adjourn." That does not constitute a recognition.

The gentleman from Tennessee has been recognized.

The Chair never recognized the gentleman, and can not recognize him in the time of the gentleman from Tennessee. The gentleman from Tennessee has this hour and the right to parcel it out as he chooses.

Mr. Mason proposed to appeal from the decision of the Chair, and the Speaker pro tempore held that an appeal was not in order, as the Member had not been recognized.

294. While circumscribed by the rules and practices of the House, the exercise of the power of recognition is not subject to a point of order.

On February 15, 1923,[4] during the consideration of the naval omnibus bill in the Committee of the Whole House on the state of the Union, Mr. William J. Fields, of Kentucky, and Mr. Isaac V. McPherson, of New York, rose and simultaneously addressed the chair.

The Chairman recognized Mr. Fields, when Mr. Frederick C. Hicks, New York, made the point of order that Mr. McPherson, being a member of the Committee on Naval Affairs, which had reported the bill, was entitled to recognition in preference to Mr. Fields, who was not a member of that committee.

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[1] Second session Sixty-first Congress, Record, p. 3218.

[2] Joseph G. Cannon, of Illinois, Speaker.

[3] Third session Sixty-fifth Congress, Record, p. 4639.

[4] Fourth session Sixty-seventh Congress, Record, p. 3719.

The Chairman [1] held that recognition is within the discretion of the Chair and is not subject to a point of order.

295. After a Member has proceeded with his remarks it is too late to challenge his right to the floor.

On January 30, 1923,[2] Mr. Philip P. Campbell, of Kansas, from the Committee on Rules, submitted a privileged resolution providing for the consideration of the joint resolution (S. J. Res. 12) to dispose of sugars imported from Argentina.

The previous question having been ordered, debate proceeded for 40 minutes under the rule and Mr. Campbell was recognized and addressed the House in behalf of the resolution.

Mr. Edward W. Pou, of North Carolina, was then recognized under the impression that he was opposed to the resolution. After he had proceeded for some time, in support of the resolution, Mr. Thomas L. Blanton, of Texas, made the point of order that the previous recognition was in favor of the resolution and therefore the opposition was entitled to recognition.

The Speaker [3] said:

The rules provide [4] that one-half of such time shall be given in favor of and one-half in opposition. As the House is aware, it is always the custom in the House to recognize the ranking member of the Committee on Rules in favor and the ranking member of the minority against. When the gentleman from Kansas, Mr. Campbell, had finished and reserved the balance of his time, the Chair recognized the gentleman from North Carolina, Mr. Pou, for 20 minutes.

The Chair assumed that he was against the rule, which was confirmed by his yielding to the gentleman from Texas, Mr. Jones, who opposed the rule. Then the first knowledge the Chair had that the gentleman from North Carolina was in favor of the rule was when he took the floor and occupied time for 10 minutes. The Chair thinks the point of order should be made when recognition is had.

296. The Member in charge of the bill is entitled to prior recognition to offer amendments.

On April 2, 1908,[5] the House was in Committee of the Whole House on the state of the Union for the consideration of the resolution (H. Res. 233) to dispose of a message from the President.

During the consideration of the resolution for amendments, Mr. John Sharp Williams, of Mississippi, and Mr. Sereno E. Payne, of New York, rose at the same time and addressed the chair. The Chairman recognized Mr. Williams. Thereupon Mr. Payne made the point of order that being in charge of the resolution, he was entitled to prior recognition.

Mr. Williams submitted.

Mr. Chairman, I submit it is too late for that now. If the gentleman had been upon his feet at the same time I was offering an amendment and striving himself to offer one undoubtedly he would have been entitled to preference. But he was not upon his feet to offer any amendment, and I leave it to him if his amendment is not an afterthought. It was never his intention at the time that I offered this amendment to offer one.

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[1] John Q. Tilson, of Connecticut, Chairman.

[2] Fourth session Sixty-seventh Congress, Record, p. 2731.

[3] Frederick H. Gillett, of Massachusetts, Speaker.

[4] Section 3 of Rule XXVII.

[5] First Session Sixtieth Congress, Record, p. 4330.

The Chairman [1] said:

The Chair, under the procedure of the House, must recognize the gentleman in charge of the bill if he rises for the purpose of offering an amendment. The Chair can not question his motives. The gentleman from New York, Mr. Payne, has offered an amendment to strike out the last word, and he is entitled to the floor.

297. A Member may not by offering a motion of higher privilege than the pending motion deprive the member of the committee in charge of the bill of the floor.

On February 10, 1910,[2] the House was considering the Senate amendment to the urgent deficiency appropriation bill. Mr. James A. Tawney, of Minnesota, chairman of the Committee on Appropriations, and in charge of the bill, moved that the House further insist on Senate amendments not concurred in and ask for a further conference.

Mr. Augustus P. Gardner, of Massachusetts, made a motion to recede and concur and upon that motion claimed the floor.

The Speaker held that while the motion of the gentleman from Massachusetts was entitled to precedence, the right to prior recognition for debate belonged to the Member in charge of the bill.

298. On June 7, 1910 [3] the House was considering the Senate amendment to the bill (H. R. 17536) to create a commerce court. Mr. James R. Mann, of Illinois, moved that the House disagree to the amendment. Thereupon Mr. Irvine L. Lenroot, of Wisconsin, made a motion to concur with an amendment, and took the floor, claiming the right under clause 6 of Rule XIV, to open and close debate.

The Speaker [4] recognized Mr. Mann, and said:

If the gentleman from Illinois had yielded, under the ordinary practice of the House the gentleman would be entitled to the floor for an hour. But the gentleman from Illinois [Mr. Mann] while he is taken off of the floor temporarily by the offering of a preferential motion, is not deprived of the floor. It has been the uniform and well-understood practice of the House that arises constantly every session.

The practice of the House, so far as the Chair recollects is unbroken.

299. On May 13, 1912,[5] the House was considering the Senate amendments to the joint resolution proposing a constitutional amendment providing for election of Senators by direct vote. A motion to recede and concur in a certain amendment had been made by Mr. William W. Rucker, of Missouri, chairman of the committee in charge of the resolution.

Mr. Charles L. Bartlett, of Georgia, made a motion to recede and concur with an amendment, and upon that motion claimed the right to debate for one hour.

The Speaker [6] held that of the two motions that of Mr. Bartlett was entitled to precedence and would be first voted upon, but that the offering of the preferential motion could not deprive the Member in charge of the floor, and Mr. Rucker was

[1] George P. Lawrence, of Massachusetts, Chairman.

[2] Second session Sixty-first Congress, Record, p. 1703.

[3] Second session Sixty-first Congress, Record, p. 7568.

[4] Joseph G. Cannon, of Illinois, Speaker.

[5] Second session Sixty-second Congress, Journal, p. 1046; Record p. 6346.

[6] Champ Clark, of Missouri, Speaker.

entitled to recognition for one hour during which time which he might move the previous question.

300. The Member in charge of the bill is entitled at all stages to prior recognition for allowable motions intended to expedite the bill.

On May 8, 1912,[1] the House was considering the bill (H. R. 17756) to provide civil government in the Philippine Islands, when Mr. Marlin E. Olmsted, of Pennsylvania, was recognized, and offered an amendment which was agreed to. Thereupon Mr. William A. Jones, the Member in charge of the bill, moved the previous question on the bill and all pending amendments.

Mr. Swagar Sherley, of Kentucky, made the point of order that the Member in charge having yielded the floor was not again entitled to recognition until other Members desiring to be heard had been recognized.

The Speaker[2] held that Mr. Olmsted, though recognized for an hour, surrendered the floor in offering an amendment, and no one having the floor, the Member in charge was entitled to prior recognition at any stage of the bill to move the previous question.

301. On August 3, 1917,[3] Mr. Asbury F. Lever, of South Carolina, called up the conference report on the bill (H. R. 4188), the food-survey bill. At the conclusion of the reading of the report and statement, Mr. Frank D. Scott, of Michigan, proposed to move the previous question.

The Speaker[2] declined to recognize the gentleman from Michigan for that purpose, on the ground that the chairman of the committee, in charge of the bill, was entitled to the floor.

302. The Member on whose motion a subject is brought before the House is first entitled to the recognition.

On January 3, 1917,[4] Mr. William R. Wood, of Indiana, rose to a question of privilege and presented a resolution providing for an investigation of certain charges affecting the dignity of the House.

Mr. Robert L. Henry, of Texas, asked recognition for the purpose of making a motion to refer the resolution, and Mr. James R. Mann, of Illinois, made the point of order that Mr. Wood, as the proponent of the resolution, was entitled to recognition.

The Speaker[2] sustained the point of order and recognized Mr. Wood.

303. On July 5, 1918,[5] while the House was considering the Senate amendments to the river and harbor appropriation bill, Mr. Oscar L. Gray, of Alabama, made a motion that the House recede and concur in the pending amendment.

Mr. John H. Small, of North Carolina, chairman of the committee, and in charge of the bill demanded recognition to offer a motion to further insist.

The Speaker[2] read the decision[6] of Mr. Speaker Carlisle on a similar question, holding that a member may not by offering a preferential motion deprive the mem-

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[1] Second session Sixty-second Congress, Journal, p. 1044; Record, p. 6075.

[2] Champ Clark, of Missouri, Speaker.

[3] First session Sixty-fifth Congress, Record, p. 5770.

[4] Second session Sixty-fourth Congress, Record, p. 897.

[5] Second session Sixty-fifth Congress, Record, p. 8710.

[6] Vol. II, see. 1460 of this work.

ber in charge of the bill of the floor, and in conformity with that decision recognized Mr. Small for one hour.

304. On December 22, 1920,[1] the House was considering the emergency tariff bill in the Committee of the Whole House on the state of the Union.

Mr. Joseph Walsh, of Massachusetts, offered an amendment striking out the pending paragraph, when Mr. Carl Hayden, of Arizona offered an amendment perfecting the paragraph.

A question of precedence being raised, the Chairman[2] held that the perfecting amendment took precedence over the motion to strike out the paragraph and was first voted on, but Mr. Walsh having been first recognized was entitled to the floor in debate.

305. On June 15, 1921,[3] during consideration by the House of the bill (H.R. 6754) to promote the welfare of American seamen in the merchant marine, Mr. Frank D. Scott, of Michigan, offered an amendment and after the expiration of the five minutes allowed for debate under the rule moved the previous question on the amendment.

Mr. Meyer London, of New York, made the point of order that Mr. Scott's time having expired, he was not entitled to recognition for that purpose.

The Speaker pro tempore[4] stated that the gentleman from Michigan, in moving the previous question, was within his rights as the Member in charge of the bill.

306. The members of the committee reporting the bill have precedence in the discussion.—On January 12, 1933,[5] the Committee of the Whole House on the state of the Union was considering the bill (H. R. 13991), the farm relief bill, when Mr. Donald F. Snow, of Maine, a member of the Committee on Agriculture, reporting the bill, and Mr. William J. Granfield, of Massachusetts, who was not a member of the committee, rose simultaneously and asked recognition to offer amendments.

The Chairman[6] recognized Mr. Granfield, whereupon Mr. Bertrand H. Snell, of New York, made the point of order that Mr. Snow as a member of the committee reporting the bill was entitled to precedence.

The Chairman sustained the point of order and said:

> The Chair understands the precedents of the House. The Chair has uniformly given preference to members of the committee on each occasion when he has presided. The Chair agreed to recognize the gentleman from Massachusetts. The gentleman was on his feet and asking for recognition before any member of the committee. However, the Chair will follow the precedents and recognize the gentleman from Maine to offer an amendment which the Clerk will report.

307. The member of the committee reporting a bill is entitled to precedence in recognition for its discussion when it is taken up for consideration in the House.—On February 24, 1933,[7] Mr. Hatton W. Sumners, of Texas,

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[1] Third session Sixty-sixth Congress, Record, p. 661.

[2] Sidney Anderson, of Minnesota, Chairman.

[3] First session Sixty-seventh Congress, Record, p. 2643.

[4] Wm. H. Stafford, of Wisconsin, Speaker pro tempore.

[5] Second session Seventy-second Congress, Record, p. 1679.

[6] Lindsay C. Warren, of North Carolina, Chairman.

[7] Second session Seventy-second Congress, Record, P. 4912.

having been recognized to submit a parliamentary inquiry, asked whether he as chairman of the Committee on the Judiciary reporting a resolution relating to the proposed impeachment of Judge Harold Louderback, but having signed the minority report, or Mr. Tom D. McKeown, of Oklahoma, who had filed the majority report from the committee, was entitled to recognition when the resolution was called up for consideration in the House.

The Speaker [1] held:

The usual custom is that the Member who reports the legislation coming before the House is the one the Chair recognizes, and the Speaker would recognize the gentleman who has been directed by the committee to report the bill.

Thereupon, Mr. McKeown called up the resolution, and the Speaker said:

Under the rules of the House the gentleman from Oklahoma, Mr. McKeown, has one hour in which to discuss this resolution.

308. A motion to direct or control the consideration of the subject before the House being made by the Member in charge and decided adversely, right to recognition passes to the opposition.

On March 15, 1909,[2] at the organization of the House, Mr. John Dalzell, of Pennsylvania, offered resolutions providing for the adoption of rules.

The question being taken, the House disagreed to the resolutions—yeas 189, nays 193.

Thereupon the Speaker recognized Mr. Champ Clark, of Missouri, a member of the opposition, who offered other resolutions providing for the adoption of rules.

Mr. John J. Fitzgerald, of New York, proposed to offer an amendment when Mr. Clark demanded the previous question on the resolutions.

The House refused the previous question, and Mr. Clark, rising to a parliamentary inquiry, asked who was entitled to recognition.

The Speaker [3] said:

The previous question having been refused, the gentleman from New York, Mr. Fitzgerald, who had asked the gentleman to yield to him for an amendment, is entitled to the first recognition.

309. On October 5, 1917,[4] Mr. Finis J. Garrett, of Tennessee, from the Committee on Rules, submitted a resolution to take from the Speaker's table the war-risk insurance bill with Senate amendments, disagree to the amendments and agree to the conference asked by the Senate.

Mr. Garrett demanded the previous question on the resolution, which was refused, yeas 112, nays 144.

Thereupon, on motion of Mr. William C. Adamson, of Georgia, by unanimous consent, all proceedings touching the resolution were vacated.

The Speaker [5] recognized Mr. Frederick H. Gillett, a member of the minority, who moved to concur in amendment No. 100.

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[1] John N. Garner, of Texas, Speaker.

[2] First session Sixty-first Congress, Record, p. 22; Journal, p. 9.

[3] Joseph G. Cannon, of Illinois, Speakers.

[4] First session Sixty-fifth Congress, Journal, p. 428; Record, p. 7851.

[5] Champ Clark, of Missouri, Speaker.

Mr. Sam Rayburn, of Texas, raised a question of order against the recognition of Mr. Gillett, and the Speaker explained that when the vote on ordering the previous question was decided adversely, the right to recognition passed to those opposed to the resolution.

310. On January 13, 1920,[1] Mr. James A. Gallivan, of Massachusetts, moved to discharge the Committee on Military Affairs from the further consideration of a resolution of inquiry, and upon that motion demanded the previous question.

The previous question was refused, yeas 155, nays 174, and Mr. Edward W. Saunders, of Virginia, rising to a parliamentary inquiry, asked if the refusal of the House to sustain the demand for the previous question passed the control of the resolution to the opposition.

The Speaker pro tempore[2] answered in the affirmative, and recognized Mr. Arthur G. Dewalt, of Pennsylvania, the only Member who had spoken in opposition to the resolution.

311. On October 11, 1921,[3] while the bill (H. R. 8520) to regulate certain public service corporations in the District of Columbia, was under consideration in the Committee of the Whole House on the state of the Union, Mr. Thomas L. Blanton, of Texas, moved to strike out the enacting clause.

The question was decided in the affirmative, yeas 58, nays 60, and the Chairman recognized Mr. Blanton.

Mr. Nicholas Longworth, of Ohio, made the point of order that under the accepted procedure of the House it was the duty of the Chair to recognize the Member in charge of the bill and not the gentleman from Texas.

The Chairman[4] held that when a preferential or other decisive motion is agreed to, the Member in charge loses control of the bill and the proponent of the motion is entitled to recognition.

312. A material motion by the Member in charge being rejected through absence of the majority acting under representations of the minority, the minority declined to take advantage of the situation and yielded for a motion to adjourn.

On January 20, 1910,[5] late in the afternoon, Mr. James T. Lloyd, of Missouri, proposed to tender his resignation from a special committee, when Mr. James A. Tawney, of Minnesota, moved to adjourn.

The motion was rejected, and the Speaker[6] recognized Mr. John J. Fitzgerald, of New York, a member of the minority, to move a call of the House.

Whereupon, Mr. Oscar W. Underwood, of Alabama, said:

> Mr. Speaker, I desire to make a statement. We called a Democratic caucus to meet here at this time to pass on matters of interest to the Democratic party. It was supposed we were going into caucus at once, and I know that Republican Members went home in good faith under those

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[1] Sixty-sixth Congress, Record, p. 1504.

[2] John Q. Tilson, of Connecticut, Speaker pro tempore.

[3] First session Sixty-seventh Congress, Record, p. 6244.

[4] Mr. Nicholas J. Sinnott, of Oregon, Chairman.

[5] Second session Sixty-first Congress, Record, p. 857.

[6] Joseph G. Cannon of Illinois, Speaker.

circumstances. I did not know that the gentleman from Missouri, Mr. Lloyd, was going to present his resignation at the desk at that time. I do not think it was known to the membership on this side of the House. When Mr. Lloyd's resignation was sent to the desk I did not at once realize the position we were placed in, when we refused to adjourn by Democratic votes, having the temporary control of the House, due to the absence of Republican Members who did not expect further business to be transacted. I rose to make a parliamentary statement in reference to the question presented by Mr. Lloyd's resignation. I am sure this side of the House did not realize that possibly we were taking advantage of the absence of the majority Members. Now, the intention of the gentleman from Missouri to submit his resignation at that time was not a deliberate move on this side of the House. It came up unexpectedly on our part. It came without my knowledge, and, I think, without the knowledge of most Members on this side of the House. Under those circumstances, I think there is nothing for us to do but to make a motion to adjourn at once.

I yield to the gentleman from New York to make the usual motion to adjourn.

The Speaker accordingly recognized Mr. Payne, who moved to adjourn.

313. While the rejection of a conference report transfers the control of the measure to the opponents, the sustaining of a point of order against a conference report is not adverse action on the part of the House and exerts no effect on the right of recognition.

On January 12, 1917,[1] the Speaker sustained a point of order made by Mr. William S. Bennett, of New York, against a conference report on the immigration bill.

Thereupon Mr. Bennett demanded recognition upon the ground that the sustaining of a point of order against the report was equivalent to the rejection of the report by the House and the right of recognition passed to the opponents of the measure.

The Speaker[2] held that while an adverse vote on a material motion transferred the right of recognition to those in opposition, the approval of a point of order by the Chair gave no indication of the attitude of the House upon the proposition, and therefore could not affect the right of recognition.

The Speaker then recognized Mr. John L. Burnett, of Alabama, the Member in charge, who moved to disagree to the amendments of the Senate and ask for further conference.

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[1] Second session Sixty-fourth Congress, Record, p. 1294.

Chapter CLXXX.[1]

PREROGATIVES OF THE HOUSE AS TO REVENUE LEGISLATION.

314. Instance wherein a Senate amendment affecting the revenue was not objected to until the stage of conference.

A question relating to the invasion of the constitutional prerogatives of the House by a Senate amendment comes too late after the bill has been sent to conference.

On June 4, 1920,[2] during the consideration by the House of the conference report on the bill (H. R. 10378) to provide for the American merchant marine, Mr. Finis J. Garrett, of Tennessee, said:

The Constitution of the United States provides that all bills for raising revenue shall originate in the House of Representatives, but that the Senate may propose or concur with amendments, as in other bills. The bill which this House passed was not a revenue bill in the sense in which the term is used in the Constitution, and it had no reference whatsoever to it. It went to the Senate, and the Senate put upon it an amendment which does have to do with revenue. It originated in the Senate.

Now, unless I am mistaken in my recollection, it has not been many years since the Senate amended some House bill by putting upon it a revenue feature involving the subject of child labor, and that was not upon a revenue bill; and the matter got before the Supreme Court of the United States, and the Supreme Court held that act unconstitutional because it did not originate in the House of Representatives, where the Constitution provides that revenue bills shall originate.

That is worthy of pretty serious attention.

I remember, Mr. Speaker, more than once in my experience here, that the House has by a respectful resolution advised the Senate that it would have to decline to receive or consider any bill which interfered with its constitutional right to originate revenue measures.

The Speaker pro tempore[3] said:

The Chair is of the opinion that it is too late to raise that question now, the bill having gone to conference; that question might have been raised when the bill came over from the Senate with the Senate amendments, but can not be raised upon a conference report, which presents the compromise of managers of the two Houses.

315. A bill raising revenue incidentally was held not to infringe upon the constitutional prerogative of the House to originate revenue legislation.

Discussion of differentiation between bills for the purpose of raising revenue and bills which incidentally raise revenue.

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[1] Supplement to Chapter XLVII.

[2] Second session Sixty-sixth Congress, Record, p. 8575.

[3] Joseph Walsh of Massachusetts, Speaker pro tempore.

On December 18, 1920,[1] Mr. Robert Luce, of Massachusetts, rising to a question of the privilege of the House, presented the following:

Resolved, That the first section of Senate joint resolution 212 in the opinion of this House contravenes the first clause of the seventh section of the first article of the Constitution of the United States and is an infringement of the privileges of this House, and that the said resolution be respectfully returned to the Senate with a message communicating this resolution.

The first section of the joint resolution in question, which was then pending on the Union Calendar, was as follows:

Resolved, etc., That the Secretary of the Treasury and the members of the War Finance Corporation are hereby directed to revive the activities of the War Finance Corporation, and that said corporation be at once rehabilitated with the view of assisting in the financing of the exportation of agricultural and other products, to foreign markets.

Mr. James R. Mann, of Illinois, made the point of order that a question of privilege was not involved, and said:

All laws which incidentally raise revenues are not laws for the purpose of raising revenue. Would the gentleman from Massachusetts contend, for instance, that the Senate could not pass a bill providing for the sale of a former public-building site and that it would not become a law if then passed by the House and signed by the President? The effect of the law would be to raise revenue. That is the only effect it would have. And yet no one has ever contended that the Senate could not originate a bill of that kind, the incidental effect of which is to raise revenue.

The provision of the Constitution the gentleman referred to provides that bills for the purpose of raising of revenue shall originate in the House of Representatives. It does not provide that laws which take the effect and which will have the effect either of raising revenue or producing a deficit shall originate in the House, and no one can tell whether the passage of the original act in this case was to produce revenue or to produce a deficit. No one can tell whether the passage of this resolution, if it shall be carried out in the spirit of the resolution, will produce revenue or produce a deficit. But everyone knows that the purpose of the law is not to produce revenue. The purpose of the law was to aid in the transaction of business, to aid in exports, to aid in the war, and not for the purpose of raising revenue. I doubt whether the gentleman from Massachusetts or anyone else will contend that Congress has the power to create corporations to engage in business for the purpose of raising the revenue of the Government.

The Speaker[2] quoted with approval a decision[3] by Mr. Speaker Carlisle on a similar question, holding that such questions were for the House rather than the Speaker, and after directing the clerk to again report the resolution, put the question:

Is the resolution of the gentleman from Massachusetts in order as a matter of privilege?

The question being taken it was decided in the negative, yeas 28, nays 142.

316. Decision by the Senate holding a bill proposing a gasoline tax in the District of Columbia to be a revenue producing measure and that under the Constitution it should originate in the House.

On January 16, 1925,[4] the Senate proceeded, as in Committee of the Whole, to the consideration of the bill (S. 120) to provide a tax on motor vehicle fuels sold within the District of Columbia.

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[1] Third session Sixty-sixth Congress, Record, p. 524; Journal, p. 51.

[2] Frederick H. Gillett, of Massachusetts, Speaker.

[3] Section 1501 of this work.

[4] First session Sixty-eighth Congress. Record. p. 1025.

Mr. Kenneth D. McKellar, of Tennessee, made the point of order that the bill was a revenue producing measure and that under the Constitution it should originate in the House of Representatives.

Mr. Heisler L. Ball, of Delaware, [1] said:

Mr. President, I do not think this is a revenue measure. There are certain measures the intent of which is to raise revenue. Those are revenue measures. The intent of this bill is to bring about automobile reciprocity with Maryland. I think the amendment that I suggest is such that the tax will not be increased and will not be materially lessened as received by the District. In other words, it does not affect the revenues of the United States, neither increasing nor lessening them. Incidentally there is a certain amount of revenue raised which offsets the revenue formerly raised by the taxation of the automobile itself. It is arranged so that the two will about equalize each other. There is no change in the amount of the revenue to be collected. It is clearly not the intention of the bill that it should be a revenue bill. It is merely an incidental fact that it does raise some revenue in that way.

Mr. McKellar said:

This bill provides for a tax which would be paid into the Treasury of the United States. It would be for general purposes. It would go into the Treasury of the United States just exactly as do the moneys which arise from tariff taxes or internal revenue taxes or any other taxes. The taxes raised by this bill would be mingled with and become a part of all the revenues of this Government. This is as completely a revenue bill as it is possible to make it. The funds are not to be set aside; they are to be intermingled with other funds of the Government. They would be a part of the general revenue of the Government, and it is impossible, it seems to me, that any theory could be urged against a measure of this kind originating in the House of Representatives, as is required by the plain terms of the Constitution.

The President pro tempore [2] said:

The Chair is of the opinion that he has no authority to declare a proposed act unconstitutional. The only precedent which the Chair has been able to find since the question arose was presented to the Senate in 1830, and the Vice President then in the chair ruled, holding that it was a question which must be submitted to the Senate and one which could not be ruled upon by the Chair, which entirely concurs with the views of the present occupant of the chair in the matter. The question before the Senate, therefore, is, shall the point of order made by the Senator from Tennessee [Mr. McKellar], which is that the bill now under consideration is unconstitutional and should have originated in the House of Representatives, be sustained? [Putting the question.] The "ayes" have it, and the point of order is sustained. The bill will be indefinitely postponed.

317. A point of order that a Senate bill proposing an increase in postage rates contravened the prerogative of the House was not sustained by the Senate.

The Senate having passed a bill with incidental provisions relating to revenue, the House returned the bill, holding it to be an invasion of constitutional prerogative.

A bill proposing an increase in rates of postage is a revenue bill within the constitutional requirement as to revenue bills.

On January 22, 1925,[3] the Senate, as in Committee of the Whole, proceeded to the consideration of the bill (S. 3674) reclassifying postal salaries and increasing postal rates to provide for such adjustment.

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[1] Albert B. Cummins, of Iowa, President pro tempore.

[2] Senate Journal, p. 101.

[3] Second session Sixty-eighth Congress, Record, P. 2273; Senate Journal, p. 109.

Mr. Claude A. Swanson, of Virginia, made a point of order that the portion of the bill relating to increase of rates was a proposition to raise revenue and under the Constitution must originate in the House of Representatives.

Mr. Swanson said:

The only defense which has ever been urged for such legislation as that contained in Title II is that the rates of postage provided constitute a charge for a service and are not proposed for the purpose of raising revenue. It is very hard, however, to make any such distinction where the money so raised goes into the Treasury to be used for all purposes of the Government. All the revenue collected by such charges goes into the Treasury to be appropriated by Congress. Consequently, it seems to me, that under the general principles governing such legislation, the rates proposed clearly can not be held to be charges for service rendered, as they are, when collected, covered into the Treasury with all the other revenues of the Government, and, therefore, must be considered as revenue going into the Treasury to be appropriated out of the Treasury by Congress, as are any other revenues.

There have been some cases in which it has been held as to some specific matters, where the Government makes specific charges for services, that amendments affecting such charges, proposed in the Senate, do not constitute revenue legislation. This, however, is a case where the money will go into the Treasury; it will go through all the ordinary processes of collection; and it can only be appropriated out of the Treasury by Congress as are other revenues.

Mr. George H. Moses, of New Hampshire, said:

This is not an appropriation bill within the meaning of the Constitution. We base that contention upon the fact that the provision giving absolute, complete control of revenue bills in their origination to the House of Representatives is found in one place in the Constitution, whereas the broad power of Congress to establish post offices and post roads, a concomitant portion of which power is the payment of salaries, is to be found in another place.

We maintain further, Mr. President, that the payments provided for in the schedule of rates in title 2 of the bill are not payments of revenue in the form of general taxation; that they are payments for specific services carefully enumerated in the body of the measure itself; and that they are paid by no one who does not enjoy those services. They are unlike a general levy of a tax burden upon the whole body of the people.

The Presiding Officer[1] held the Chair has no authority to pass upon the constitutionality of a bill and submitted to the Senate the question: "Shall the point of order be sustained?", which was decided in the negative, yeas 29 nays 50.

The bill passed the Senate January 30 and was received in the House January 31, where it was held on the Speaker's table. On February 3, 1925,[2] Mr. William R. Green, of Iowa, as a question of privilege, submitted the following:

Resolved, That the bill S. 3674, in the opinion of the House, contravenes the first clause of the seventh section of the first article of the Constitution and is an infringement of the privileges of this House, and that the said bill be taken from the Speaker's table and be respectfully returned to the Senate with a message communicating this resolution.

During consideration of the resolution, Mr. Green enumerated instances in which questions relating to the constitutional prerogative of the House in originating revenue measures had risen between the two Houses and said:

In all of these instances the Senate has finally yielded to and virtually acknowledged the principle that amendments which fix the rate of postage can not be introduced for the first time in the Senate. The practice in the House is fixed that with one or two important exceptions which

[1] Wesley L. Jones, of Washington, Presiding Officer.

[2] Record, p. 2941.

might possibly be mentioned, such as the instance when a bill authorizing the Postmaster General to fix the rates on air mail, which might be considered in the same category as this bill, came from the Senate; and when a bill raising fees in the Patent Office was passed by that body, a similar bill having been introduced in the House—with these exceptions, when the matter involved was so insignificant as to be unnoticed—the House has always insisted on its privilege and the Senate has always yielded.

The resolution was agreed to—yeas 225, nays 153—and was transmitted to the Senate with the bill, which was by the Senate referred to the Committee on Post Offices and Post Roads.

318. The question of the constitutional right of the House to originate revenue measures is properly raised at any time after the measure infringing the right has been messaged to the House.

The House, while disclaiming the establishment of a precedent, sent to conference a bill declared to involve a question of infringement of the constitutional prerogative of the House in the origination of revenue legislation.

On May 17, 1929,[1] Mr. Bertrand H. Snell, of New York, by direction of the Committee on Rules, called up a privileged resolution which was agreed to as follows:

Whereas, in the opinion of the House, there is a question as to whether or not section 10 of the amendment of the Senate to H.R. 1 contravenes the first clause of section 7 of Article I of the Constitution of the United States, and is an infringement on the rights and privileges of this House; but in view of the present legislative situation and the desire of this House to speedily pass legislation affording relief to agriculture, and with the distinct understanding that the action of the House in this instance shall not be deemed to be a precedent so far as the constitutional prerogatives of the House are concerned: Now, therefore, be it

Resolved, That upon the adoption of this resolution it shall be in order to move to take from the Speaker's table the bill H.R. 1, with a Senate amendment, disagree to the Senate amendment, and agree to conference asked by the Senate, and that the Speaker shall immediately appoint conferees.

The statement in the preamble that the bill referred to raised a question of the constitutional right of the House to originate revenue legislation was vigorously combated[2] in debate in both the House and the Senate.

During the consideration in the House, Mr. Otis Wingo, of Arkansas, as a parliamentary inquiry, asked when the question of infringement on the constitutional privilege of the House could properly be raised

The Speaker[3] said:

The Chair does not think anything can be done until a report has been made by the conferees, in case this resolution is agreed to.

10The Chair thinks that question could be raised at any time when the House has possession of the papers.

319. In 1930 the House insisted on its exclusive right to originate revenue measures and returned to the Senate a Senate concurrent resolution characterized as an infringement on its constitutional prerogative.—On January 16, 1928,[4] Mr. William R. Green, of Iowa, rising to a question of the privilege of the House, offered the following resolution:

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[1] First session Seventy-first Congress, Record, p. 1448.

[2] Record, p. 1605.

[3] Nicholas Longworth, of Ohio, Speaker.

[4] First session Seventieth Congress, Record, p. 1529.

Resolved, That Senate Concurrent Resolution 4 in the opinion of this House contravenes the first clause of the seventh section of the first article of the Constitution of the United States, and is an infringement of the privileges of this House, and that the said resolution be respectfully returned to the Senate with a message communicating this resolution.

At the request of Mr. Green the Senate concurrent resolution referred to was read by the Clerk as follows:

Resolved by the Senate (the House of Representatives concurring), That for the purpose of interpreting the meaning of the tariff act of 1922, with respect to imported broken rice, "broken rice" shall include only rice which falls within the class "brewers' milled rice" as defined in the United States standard for milled rice as promulgated by the Secretary of Agriculture.

In support of the resolution Mr. Green said:

Mr. Speaker, this Senate concurrent resolution, if it became a law and had any effect whatever—which, perhaps, may be doubted, as it is merely a resolution and not an amendment, in form, of the tariff law—would have the effect of changing the classification of broken rice, and, consequently, change the tariff rate upon it.

If it had any effect whatever it would have the effect desired by the party who introduced it to change the classification of rice, and a change of classification would change the duty and this would change the revenue.

How such a proposition ever got through the Senate is more than I can imagine. I can not understand how that body for a moment could think the House would receive such a resolution.

The pending resolution was then agreed to without division. The Senate concurrent resolution was accordingly returned to the Senate and no further record of its disposition appears.

320. Instance wherein the Senate declined to consider a bill challenged as an infringement on the right of the House to originate revenue measures.—On March 2, 1931,[1] it being the legislative day of February 17, in the Senate, Mr. Arthur Capper, of Kansas, moved that the Senate proceed to the consideration of the bill (S. 5818) to regulate commerce between the United States and foreign countries in crude petroleum and all products of petroleum, including fuel oil, and to limit the importation thereof.

Mr. Henry F. Ashurst, of Arizona, raised the question of order that the bill proposed to raise revenue, and was an infringement on the constitutional prerogative of the House to originate revenue bills.

The Vice President[2] submitted the question to the Senate, when Mr. Robert M. La Follette, Jr., of Wisconsin, proposed to lay the motion of the Senator from Kansas on the table.

The question being taken, it was decided in the affirmative, and the motion to proceed to the consideration of the bill was laid on the table.

321. Discussion of the right of the House to originate revenue legislation.

On April 11, 1912,[3] in the Senate, during the consideration of the Army appropriation bill, a discussion arose pertaining to the right of the House to originate

[1] Third session Seventy-first Congress, Record, p. 7606; Senate Journal, p. 317.

[2] Charles Curtis, of Kansas, Vice President.

[3] Second session Sixty-second Congress. Record. p. 4574.

supply bills, Mr. John Sharp Williams, of Mississippi, took the position that the right was of constitutional origin.

Mr. Francis E. Warren, of Wyoming, argued that it was the outgrowth of mere practice, the gradual development of a doctrine originally without specific constitutional sanction.

At the close of the discussion, Mr. Williams secured leave to print in the Record a statement of views and authorities, and on July 15,[1] submitted an exhaustive discussion of the question.

322. Instance where in proposed Senate amendments to a revenue bill were questioned in the House as an invasion of the constitutional prerogatives in relation to revenue legislation.

On July 25, 1917[2] Mr. Ebenezer J. Hill, Connecticut, rising to a question of privilege, and referring to the bill (H. R. 4280), the revenue bill, said:

> Mr. Speaker, it seems to me, as a member of the Committee on Ways and Means, that the prerogatives of this body are being invaded. I recognize under the Constitution that the power of issuing bonds and incurring indebtedness must originate in the House of Representatives. Weeks ago, we sent from this House a tax bill. It was derided and denounced all over the country, and in two days was to be re-formed and reconstructed and made perfect. Many things in it I did not approve, but it had one saving grace. It raised the money which the party in power said they needed. Eight weeks have gone by, and no report has come yet from the other body. And now in the press of to-day I find that the Secretary of the Treasury appeared before the Finance Committee of the Senate yesterday and proposed $5,000,000,000 of additional funds, part to be raised by bonds, the function of this House to originate; part to be raised by certificates of indebtedness, the function of this House to originate; the balance to be raised by taxation, which they have a perfect right to do, as an amendment to the tax bill which was sent to them. The bond issue that has been made, the certificates of indebtedness, authorized under a prior bill, passed weeks before that by this House of Representatives, have been issued, the bonds had been sold in part, and now, ignoring the law and ignoring the Constitution of the United States, it is proposed to more than double those things under the guise of an amendment to the tax bill, and the House of Representatives is absolutely ignored under the proposition, under the plea that it is an emergency.
>
> I feel it my duty, Mr. Speaker, to call the attention of the House of Representatives to this invasion of its prerogatives, so that in the future, when such a bill comes to us for consideration, if nobody else does it, I will move to send it back, as Mr. Sereno E. Payne once did under similar circumstances and the House refused to consider it. I think we ought to stand on our rights and I therefore call the attention of the House to this invasion of our prerogatives.

No action was taken by the House, and no further reference to the question appears.

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[1] Record, p. 9047.

[2] First session Sixty-fifth Congress, Journal, p. 313; Record, p. 5472.

Chapter CLXXXI.[1]

PREROGATIVES OF THE HOUSE AS TO TREATIES.

323. In 1909 the House originated, and the Senate agreed to, a resolution requesting the President to negotiate by treaty or otherwise with a foreign government.

On March 1, 1909,[2] the House, after brief debate, relating to the subject matter of the resolution rather than the propriety of the request, agreed to this joint resolution:

Whereas it is alleged that the Government of Russia has continued up to the present time to refuse to visa, recognize, or honor passports presented to its authorities issued by the American Government to American citizens on the ground that the holders thereof were of the Jewish faith: Therefore be it

Resolved, etc., That the President of the United States be, and is hereby, requested to renew negotiations with the Government of Russia to secure, by treaty or otherwise, uniformity of treatment and protection to American citizens holding passports duly issued by the authorities of the United States, in order that all American citizens shall have equal freedom of travel and sojourn in such country without regard to race, creed, or religious faith, including a provision, that the honoring or visaing of passports when duly issued and held by citizens of the United States shall not be withheld because or on account of the race, creed, or religious faith of their holders.

This joint resolution was agreed to by the Senate and approved by the President.

324. The question raised in the House as to whether a treaty modifying or repealing laws providing for revenue may be negotiated without action on the part of the House.

Argument that the treaty-making power is subject to the authority and power to originate revenue legislation specially delegated by the Constitution to the House.

Discussion of the right of the House to share in the treaty-making power.

On February 19, 1916,[3] Mr. J. Hampton Moore, of Pennsylvania, proposing to rise to a question of privilege, the Speaker[4] announced:

The Chair would like to state, without objection, that this matter which the gentleman from Pennsylvania wishes to bring up is a far-reaching matter and a very important one, and the

[1] Supplemental to Chapter XLVIII.

[2] Second session Sixtieth Congress, Journal, p. 378; Record, p. 3505.

[3] First session Sixty-fourth Congress, Record, p. 2829.

[4] Champ Clark, of Missouri, Speaker.

Chair, before ruling upon whether it is privileged or not, ought to have an abundance of time to decide it. After a consultation between the gentleman from North Carolina (Mr. Kitchin) and the gentleman from Pennsylvania and the Chair it was agreed that in order to give time for investigation the gentleman from Pennsylvania should ask unanimous consent to address the House for 20 minutes.

There being no objection, Mr. Moore addressed the House on the following resolution:

Whereas it is proposed under the treaty-making power of the Government, and without any action whatever on the part of the House of Representatives, or by Congress, to negotiate with Colombia a treaty that will operate to supplant, change, or repeal duties on imports under laws enacted by Congress and approved by the Executive for the purpose of raising revenue: Now therefore be it

Resolved, That the Committee on Ways and Means be directed to fully investigate the question whether or not the President, by and with the advice and consent of the Senate, independently of any action on the part of the House of Representatives, may negotiate a treaty with Colombia by which duties levied under an act of Congress for the purpose of raising revenue may be modified or repealed, and report the result of such investigation to the House.

In explanation of the situation which had given rise to the question, Mr. Moore said:

Mr. Speaker, the President has forwarded to the Senate, and the Senate has under consideration, a treaty with Colombia which proposes, by the payment of $25,000,000 of United States money and the remission of certain import duties and charges that would ordinarily and by law accrue to the Treasury of the United States, to make reparation for certain alleged violations by the United States of certain alleged injuries which Colombia is supposed to have sustained through the loss of certain alleged rights in the Isthmus of Panama. This treaty, so directly affecting the morals and the revenues of the United States, is being considered, as we are informed, as if the power to make such a treaty, so involving the money of the people, rested exclusively with the President and the Senate, irrespective of the authority and power specially delegated by the Constitution to the House of Representatives to originate revenue legislation. It is with respect to this apparent invasion of the prerogative of the House that I propose to put the House upon notice.

Mr. Moore then presented an exhaustive discussion of the constitutional prerogatives of the House in initiating revenue legislation, and the right of the House under that authority to share in the treaty-making power. He asserted the right of the House to deny appropriations whether authorized by treaties or otherwise, and urged the maintenance, as an historic and constitutional prerogative, of the right of the House to participate in the negotiations of all treaties with foreign powers affecting the revenue.

The Committee on Rules to which the resolution was referred made no report thereon.

325. Discussion of the prerogatives of the House as to treaties.—On May 16, 1922,[1] Mr. Theodore E. Burton, of Ohio, discussed at length the constitutional prerogatives of the House as to international treaties.

On May 2, 1932[2] Mr. J. Charles Linthicum, of Maryland, under leave to extend remarks, discussed the same question, citing various authorities on the subject.

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[1] Second session Sixty-seventh Congress, Record, p. 7069.

[2] First session Seventy-second Congress, Record, p. 9392.

Chapter CLXXXII.[1]

PREROGATIVES OF THE HOUSE AS TO FOREIGN RELATIONS.

1. House asserts right to a voice as to foreign relations. Section 326.
2. Conflicts with the Executive as to diplomatic relations. Section 327.
3. Expressions as to events abroad. Sections 328, 329.

326. Instance wherein the House declared its attitude on a question of foreign policy and expressed its readiness to participate in the enactment of legislation relative thereto.

Discussion of the prerogatives of the House in relation to treaties, commercial and otherwise, and its obligation in the enactment of supplementary legislation.

While conceding that its prerogative relative to participation in foreign relations has not been definitely established, the House asserted its right to originate legislation relating to foreign affairs upon which the injunction of secrecy is not imposed and questions appertaining to an international judiciary in particular.

The participation by the United States in a World Court of International Justice is a subject within the jurisdiction of the Committee on Foreign Affairs.

On February 24, 1925,[2] Mr. Theodore E. Burton, of Ohio, from the Committee on Foreign Affairs, to which had been referred various resolutions relating to the World Court of International Justice, reported as a substitute for such resolutions the following:

Whereas a World Court, known as the Permanent Court of International Justice, has been established and is now functioning at The Hague; and

Whereas the traditional policy of the United States has earnestly favored the avoidance of war and the settlement of international controversies by arbitration or judicial processes; and

Whereas this court in its organization and probable development promises a new order in which controversies between nations will be settled in an orderly way according to principles of right and justice: Therefore be it

Resolved, That the House of Representatives desires to express its cordial approval of the said court and an earnest desire that the United States give early adherence to the protocol establishing the same, with the reservations recommended by President Harding and President Coolidge.

Resolved further, That the House expresses its readiness to participate in the enactment of such legislation as will necessarily follow such approval.

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[1] Supplementary to Chapter XLIX.

[2] Second session Sixty-eighth Congress, House Report No. 1569.

The committee, in addition to citing the resolutions upon which the substitute was predicated, thus affirm their further right to jurisdiction over the subject:

A recommendation of President Coolidge for membership in the court was contained in his messages to Congress of December 6, 1923, and December 3, 1924, and so much of that message as related to foreign affairs, including that recommendation, was referred to the House Committee on Foreign Affairs, thus giving to this committee a jurisdiction upon this subject.

After discussing at length various methods employed for the prevention of war, and the constitution and function of the Permanent Court of International Justice, with reasons for and against the participation of the United States therein, the report thus treats of the right of the House to participation in foreign relations:

The importance of the pending proposition renders it desirable to consider what action by the House of Representatives is right and proper in participation in foreign relations. This has been the subject of frequent discussion ever since the formation of the Government. It has been maintained on the one hand that a treaty presented by the President and duly ratified by the Senate is final and binding and that the House is under obligation to adopt the necessary legislation to carry it into effect. This view was maintained by President Washington; by Alexander Hamilton; by Mr. Ellsworth, a delegate to the Federal Convention of 1787, afterwards Chief Justice; by Chancellor Kent; by Mr. Caleb Cushing, Attorney General, in interpreting a treaty with Great Britain in 1854. In support of this view it is stated that, when it was proposed in the Federal Convention by Mr. James Wilson, that the words "and the House of Representatives" be added to the constitutional provision requiring the advice and consent of the Senate, the motion received only the support of one State, that of Pennsylvania. And on this subject Mr. Crandall, in his review of the discussions of the convention concluded: "From these debates it appears that the House was excluded from participation in the making of treaties by the framers of the Constitution with the understanding that treaties were to have the force of law." It is even conceded that a treaty, if valid and binding, supersedes a statute.

The opposite view to the effect that action by the House is necessary, at least whenever the agreements contained in the treaty are executory in their nature, was maintained by Mr. Jefferson; by Mr. Madison; by Mr. Calhoun when a member of the House of Representatives, though he expressed a different opinion when Secretary of State in 1844; by Mr. Clay; and Mr. Blaine.

This right, the report concedes, can not be regarded as having been as yet definitely settled, and classifies the controversies which have given rise to discussions of the issue as those (1) relating to the binding force of treaties involving expenditures from the Treasury; (2) affecting revenue legislation or the raising or lowering of duties; and (3) touching regulations of commerce with foreign nations.

As to treaties involving expenditures, the report says:

Among the disputed questions that have arisen throughout the controversy has been the one relating to the binding force of treaties which involve expenditures from the Treasury. Upon this it is contended that the House, claiming the initiative in the making of appropriations, and being one of the constituent branches of Congress, can by refusal nullify any treaty that has been made. In practically every instance in which a treaty has involved a payment of money, the President has sent a message to the House of Representatives in which the necessity for an appropriation is set forth. Special mention should be made of that for the Louisiana Purchase in 1803; for the purchase of Alaska in 1867, which required a payment of $7,200,000 in gold; for the payment of $20,000,000 for the Philippines under the treaty with Spain, ratified February 6, 1899; for the treaty of November 18, 1903, with Panama, providing a payment of $10,000,000 and further payment of $250,000 per annum, and very recently the treaty with Colombia involving payment of $25,000,000. In several instances the appropriation has been voted before the presentation of the treaty.

As to treaties affecting revenue:

A more serious controversy has arisen over another class of treaties affecting revenue legislation or the raising or lowering of duties. In these treaties a condition has often been inserted to the effect that the changes provided in the proposed treaty should not become effective without the concurrence of Congress. This has especially been true, beginning in 1854, with the treaty with Great Britain for reciprocity with Canada, followed by that with Hawaii in 1875 and then by the treaty with Cuba in 1902, in all of which there were regulations as to duties, and a provision was inserted that the treaty must be approved by Congress. In section 3, of the tariff act of 1897, there is a general authority given to the President to enter into reciprocal commercial conventions with other countries under specified conditions. The proposed reciprocity treaty with Canada in 1911, which failed because of the non-concurrence of Canada, was submitted to Congress for approval. The necessity of the concurrence by the House in such cases has been very generally asserted by that body and acquiesced in by the Senate. Among numerous other questions there has been much discussion as to whether territory can be acquired or ceded by treaty without action of Congress. There seems to have been no agreement on this point in any debate which has occurred in Congress.

As to treaties regulating commerce:

Questions as to limitations upon treaty-making power may be raised also on regulations of commerce with foreign nations—Article I, clause 3, of the Constitution, the naturalization of aliens, and agreements to engage in war or refrain from it, and in regard to limitations on the size of the Navy. The Constitution contains clauses in regard to all these subjects giving authority to Congress. The uniform course of the House, however, has been to pass the necessary legislation to carry treaties into effect.

While it is not argued that the House should act upon all treaties or upon slight occasion, yet, because it may be deemed to express the preferences of the people represented more adequately than any other body, there is not only a right but a duty to express itself upon certain important international policies. It will be observed that the question of the right of the House to take action is in this instance affected by the fact that two successive Presidents have, in communications to the Senate, or by messages to the Congress, urged adherence to the court.

The report then enumerates chronologically precedents since the establishment of the Government for action by the House upon the resolution reported, and concludes:

It seems clear that, by a resolution originating in the House, adherence to the World Court could be secured by legislation, though such a method is subject to the palpable objection that negotiations with numerous powers for acceptance of reservations would be necessary and thus the ordinary methods by treaty are altogether preferable.

Policies of the Nation, both foreign and domestic, are supposed to be expressive of the opinions of the people. Treaties and foreign relations are no exception to this rule.

The constitutional provision for the advice and consent of one of the two Houses of Congress is largely based upon the necessity for secrecy and dispatch. No injunction of secrecy has been imposed upon the recommendation for a World Court and as regards dispatch, only one day less than two years has elapsed since it was presented to the Senate by President Harding.

It is not assumed that all the statements and expressions of opinion contained in this report are approved by all the members of the Committee on Foreign Affairs, but the committee, after extended hearings and most careful consideration, recommend the passage of the resolution.

On March 3,[1] on motion of Mr. Burton, after debate, the rules were suspended and the resolution was agreed to, yeas 303, nays 28.

[1] Record, p. 5404. Journal, p. 383.

327. In 1920 the Senate requested the concurrence of the House in a resolution proposing to restrict the power of the President in the negotiation of foreign affairs.

On June 1, 1920,[1] after extended debate, the Senate passed and transmitted to the House for concurrence the concurrent resolution of the Senate (S. Con. Res. 27) providing:

Resolved by the Senate (the House of Representatives concurring), That the Congress hereby respectfully declines to grant to the Executive the power to accept a mandate over Armenia as requested in the message of the President dated May 24, 1920.

In the House the resolution was by the Committee on Foreign Affairs reported[2] without amendment, and referred to the Committee of the Whole. No further action was taken by the House.

328. Instance wherein a committee of the House reported a resolution declaring the attitude of the United States on a question of foreign policy.

On February 3, 1911,[3] Mr. John N. Garner, of Texas, from the Committee on Foreign Affairs, reported the following resolution:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following resolution adopted by a unanimous vote of the Trans-Mississippi Commercial Congress, at San Antonio, Texas, November twenty-fourth, nineteen hundred and ten, be, and hereby is, commended to the President of the United States, and his action in accordance with the sentiment of the resolution is earnestly requested:

"Whereas in the opinion of the Trans-Mississippi Commercial Congress, now in convention, the peace and the commercial development of the American Continent would be more certainly and speedily secured if the various South, Central, and North American Governments were reasonably assured against the forced permanent loss of territory as a consequence of war or otherwise: Therefore be it

"Resolved, That the President and the Secretary of State of the United States be requested to enter into negotiations for the making of a treaty that will forever quiet the territorial titles of the various American States; and be it further

"Resolved, That this Congress heartily indorses the idea of the arbitration of all international disputes and their settlement, if necessary, in the great peace court of the world at The Hague."

This resolution was referred[4] to the Committee of the Whole House.

329. In 1916 the House originated and the Senate agreed to a measure authorizing the President to invite a conference of Governments of the world to consider the establishment of a Court of Arbitration.

On May 24, 1916,[5] the Committee on Naval Affairs reported as a part of the naval appropriation bill the following:

Upon the conclusion of the war in Europe, or as soon thereafter as it may be done, the President of the United States is authorized to invite all the great Governments of the world to send

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[1] Second session, Sixty-sixth Congress, Record, p. 8073.

[2] House Report No. 1101.

[3] Third session Sixty-first Congress, House Report No. 2057.

[4] Record, p. 1930; Journal, p. 252.

[5] First session Sixty-fourth Congress, Record, p. 9143.

representatives to a conference which shall be charged with the duty of suggesting an organization, court of arbitration, or other body, to which disputed questions between nations shall be referred for adjudication and peaceful settlement, and to consider the question of disarmament and submit their recommendation to their respective Governments for approval. The President is hereby authorized to appoint nine citizens of the United States, who shall be qualified for the mission by eminence in the law and by devotion to the cause of peace, to be representatives of the United States in such a conference.

This provision remained unchanged in the passage of the bill by the House. The Senate added an amendment declaring it the policy of the United States to adjust international disputes through arbitration that war might be honorably avoided.

The House having concurred in the amendment, the bill carrying the provision as amended was approved [1] by the President.

[1] 39 Stat. L., p. 618.

Chapter CLXXXIII.[1]

PREROGATIVES AS RELATED TO THE EXECUTIVE.

330. The President having transmitted to the House a message reflecting on the integrity of its membership, the House declared it a breach of privilege and ordered it laid on the table.

On December 11, 1908,[2] Mr. James B. Perkins, of New York, offered, as involving the privilege of the House, a preamble and resolution reading as follows:

Whereas there was contained in the sundry civil appropriation bill, which passed Congress at its last session and became a law, a provision in reference to the employment of the Secret Service in the Treasury Department; and

Whereas in the message of the President of the United States to the two Houses of Congress it was stated in reference to that provision, "It is not too much to say that this amendment has been of benefit only, and could be of benefit only, to the criminal classes," and it was further stated," The chief argument in favor of the provision was that the Congressmen did not themselves wish to be investigated by Secret Service men," and it was further stated, "But if this is not considered desirable a special exception could be made in the law, prohibiting the use of the Secret Service force in investigating Members of Congress. It would be far better to do this than to do what actually was done, and strive to prevent or at least hamper effective action against criminals by the executive branch of the Government." Now, therefore, be it

Resolved, That a committee of five Members of this House be appointed by the Speaker to consider the statements contained in the message of the President and report to the House what action, if any, should be taken in reference thereto.

The resolution was agreed to, and the Speaker appointed as members of the select committee thus authorized: Messrs. James B. Perkins, of New York; Edwin Denby, of Michigan; John W. Weeks, of Massachusetts; John Sharp Williams, of Mississippi; and James T. Lloyd, of Missouri.

On December 17, Mr. Perkins, from the select committee, reported the following preamble and resolution, with the unanimous recommendation of the committee that it be agreed to:

Whereas there was contained in the sundry civil appropriation bill which passed Congress at its last session and became a law a provision in reference to the employment of the Secret Service in the Treasury Department; and

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[1] Supplementary to Chapter L.

[2] Second session, Sixtieth Congress, Record, p. 140.

Whereas in the last annual message of the President of the United States to the two Houses of Congress it was stated in reference to that provision, "It is not too much to say that this amendment has been of benefit only, and could be of benefit only, to the criminal classes," and it was further stated, "The chief argument in favor of the provision was that the Congressmen did not themselves wish to be investigated by secret-service men," and it was further stated, "But if this is not considered desirable, a special exception could be made in the law, prohibiting the use of the secret-service force in investigating Members of Congress. It would be far better to do this than to do what actually was done, and strive to prevent, or at least to hamper, effective action against criminals by the executive branch of the Government" and

Whereas the plain meaning of the above words is that the majority of the Congressmen were in fear of being investigated by secret-service men, and that Congress as a whole was actuated by that motive in enacting the provision in question; and

Whereas your committee appointed to consider these statements of the President and to report to the House can not find in the hearings before committees nor in the records of the House or Senate any justification of this impeachment of the honor and integrity of the Congress; and

Whereas your committee would prefer, in order to make an intelligent and comprehensive report, just to the President as well as to the Congress, to have all the information which the President may have to communicate: Now, therefore, be it

Resolved, That the President be requested to transmit to the House any evidence upon which he based his statements that the "chief argument in favor of the provision was that the Congressmen did not themselves wish to be investigated by secret-service men," and also to transmit to the House any evidence connecting any Member of the House of Representatives of the Sixtieth Congress with corrupt action in his official capacity, and to inform the House whether he has instituted proceedings for the punishment of any such individual by the courts or has reported any such alleged delinquencies to the House of Representatives.

The resolution was agreed to, and in response thereto the President, on January 4, 1909,[1] transmitted to the House a message, which, after quoting the resolution in full, said:

I am wholly at a loss to understand the concluding portion of the resolution. I have made no charges of corruption against Congress nor against any Member of the present House. If I had proof of such corruption affecting any Member of the House in any matter as to which the Federal Government has jurisdiction, action would at once be brought, as was done in the cases of Senators Mitchell and Burton, and Representatives Williamson, Hermann, and Driggs, at different times since I have been President. This would simply be doing my duty in the execution and enforcement of the laws without respect to persons. But I do not regard it as within the province or the duties of the President to report to the House "alleged delinquencies" of Members, or the supposed "corrupt action" of a Member "in his official capacity." The membership of the House is by the Constitution placed within the power of the House alone. In the prosecution of criminals and the enforcement of the laws the President must resort to the courts of the United States.

In the third and fourth clauses of the preamble it is stated that the meaning of my words is that "the majority of the Congressmen are in fear of being investigated by secret-service men" and that "Congress as a whole was actuated by that motive in enacting the provision in question," and that this is an impeachment of the honor and integrity of the Congress. These statements are not, I think, in accordance with the facts. The portion of my message referred to runs as follows:

The portion of the message referred to is here set out in full and the message continues:

A careful reading of this message will show that I said nothing to warrant the statement that "the majority of the Congressmen were in fear of being investigated by the secret-service men," or "that Congress as a whole was actuated by that motive." I did not make any such

[1] Journal, p. 85; Record, p. 373.

statement in this message. Moreover I have never made any such statement about Congress as a whole, nor, with a few inevitable exceptions, about the Members of Congress, in any message or article or speech. On the contrary I have always not only deprecated but vigorously resented the practice of indiscriminate attack upon Congress, and indiscriminate condemnation of all Congressmen, wise and unwise, fit and unfit, good and bad alike. No one realizes more than I the importance of cooperation between the Executive and Congress, and no one holds the authority and dignity of the Congress of the United States in higher respect than I do. I have not the slightest sympathy with the practice of judging men, for good or for ill, not on their several merits, but in a mass, as members of one particular body or one caste. To put together all men holding or who have held a particular office, whether it be the office of President, or judge, or Senator, or Member of the House of Representatives, and to class them all, without regard to their individual differences, as good or bad, seems to me utterly indefensible; and it is equally indefensible whether the good are confounded with the bad in a heated and unwarranted championship of all, or in a heated and unwarranted assault upon all. I would neither attack nor defend all executive officers in a mass, whether Presidents, governors, Cabinet officers, or officials of lower rank; nor would I attack or defend all legislative officers in a mass. The safety of free government rests very largely in the ability of the plain, every-day citizen to discriminate between those public servants who serve him well and those public servants who serve him ill. He can not thus discriminate if he is persuaded to pass judgment upon a man, not with reference to whether he is a fit or unfit public servant, but with reference to whether he is an executive or legislative officer, whether he belongs to one branch or the other of the Government.

This allegation in the resolution, therefore, must certainly be due to an entire failure to understand my message.

The message takes up the request of the House for evidence as follows:

The resolution continued: "That the President be requested to transmit to the House any evidence upon which he based his statements that 'the chief argument in favor of the provision was that the Congressmen did not themselves wish to be investigated by Secret Service men.'" This statement, which was an attack upon no one, still less upon the Congress, is sustained by the facts.

If you will turn to the Congressional Record for May 1 last, pages 5553 to 5560, inclusive, you will find the debate on this subject. Mr. Tawney of Minnesota, Mr. Smith of Iowa, Mr. Sherley of Kentucky, and Mr. Fitzgerald of New York, appear in this debate as the special champions of the provision referred to. Messrs. Parsons, Bennet, and Driscoll were the leaders of those who opposed the adoption of the amendment and upheld the right of the Government to use the most efficient means possible in order to detect criminals and to prevent and punish crime. The amendment was carried in the Committee of the Whole, where no votes of the individual members are recorded, so I am unable to discriminate by mentioning the members who voted for and the members who voted against the provision, but its passage, the Journal records was greeted with applause. I am well aware, however, that in any case of this kind many Members who have no particular knowledge of the point at issue, are content simply to follow the lead of the committee which had considered the matter, and I have no doubt that many Members of the House simply followed the lead of Messrs. Tawney and Smith, without having had the opportunity to know very much as to the rights and wrongs of the question.

I would not ordinarily attempt in this way to discriminate between Members of the House, but as objection has been taken to my language, in which I simply spoke of the action of the House as a whole, and as apparently there is a desire that I should thus discriminate, I will state that I think the responsibility rested on the Committee on Appropriations, under the lead of the Members whom I have mentioned.

Now as to the request of the Congress that I give the evidence for my statement that the chief argument in favor of the provision was that the Congressmen did not themselves wish to be investigated by Secret Service men.

The part of the Congressional Record to which I have referred above entirely supports this statement. Two distinct lines of argument were followed in the debate. One concerned the

question whether the law warranted the employment of the Secret Service in departments other than the Treasury, and this did not touch the merits of the service in the least. The other line of argument went to the merits of the service, whether lawfully or unlawfully employed, and here the chief if not the only argument used was that the service should be cut down and restricted because its members had "shadowed" or investigated members of Congress and other officers of the Government. If we examine the debate in detail it appears that most of what was urged in favor of the amendment took the form of the simple statement that the committee held that there had been a "violation of law" by the use of the Secret Service for other purposes than suppressing counterfeiting (and one or two other matters which can be disregarded), and that such language was now to be used as would effectually prevent all such "violation of law" hereafter. Mr. Tawney, for instance, says: "It was for the purpose of stopping the use of this service in every possible way by the departments of the Government that this provision was inserted;" and Mr. Smith says: "Now, that was the only way in which any limitation could be put upon the activities of the Secret Service." Mr. Fitzgerald followed in the same vein, and by far the largest part of the argument against the employment of the Secret Service was confined to the statement that it was in "violation of law." Of course such a statement is not in any way an argument in favor of the justice of the provision. It is not an argument for the provision at all. It is simply a statement of what the gentlemen making it conceive to have been the law. There was both by implication and direct statement the assertion that it was the law, and ought to be law, that the Secret Service should only be used to suppress counterfeiting; and that the law should be made more rigid than ever in this respect.

The message then discusses at length the Secret Service, and legislation affecting it, and concludes:

In conclusion, I most earnestly ask, in the name of good government and decent administration, in the name of honesty and for the purpose of bringing to justice violators of the Federal laws wherever they may be found, whether in public or private life, that the action taken by the House last year be reversed.

I also urge that the Secret Service be placed where it properly belongs, and made a bureau in the Department of Justice, as the Chief of the Secret Service has repeatedly requested; but whether this is done or not, it should be explicitly provided that the Secret Service can be used to detect and punish crime wherever it is found.

THEODORE ROOSEVELT.

The White House, *January 4, 1909.*

On January 8, 1913,[1] Mr. Perkins offered, as privileged, the following resolution:

Whereas the annual message of the President contained the following paragraph:

"Last year an amendment was incorporated in the measure provided for the Secret Service, which provided that there should be no detail from the Secret Service and no transfer therefrom. It is not too much to say that this amendment has been of benefit only, and could be of benefit only, to the criminal classes. If deliberately introduced for the purpose of diminishing the effectiveness of war against crime it could not have been better devised to this end. It forbade the practices that had been followed to a greater or less extent by the executive heads of various departments for twenty years. To these practices we owe the securing of the evidence which enabled us to drive great lotteries out of business and secure a quarter of a million of dollars in fines from their promoters. These practices have enabled us to discover some of the most outrageous frauds in connection with the theft of Government land and Government timber by great corporations and by individuals. These practices have enabled us to get some of the evidence indispensable in order to secure the conviction of the wealthiest and most formidable criminals with whom the Government has to deal, both those operating in violation of the antitrust law and others. The amendment in question was of benefit to no one excepting to these criminals, and it seriously hampers the Government in the detection of crime and the securing of justice. Moreover, it not only affects

[1] Record, p. 458.

departments outside of the Treasury, but it tends to hamper the Secretary of the Treasury himself in the effort to utilize the employees of his department so as to best meet the requirements of the public service. It forbids him from preventing frauds upon the Customs Service, from investigating irregularities in branch mints and assay offices, and has seriously crippled him. It prevents the promotion of employees in the Secret Service, and this further discourages good effort. In its present form the restriction operates only to the advantage of the criminal, of the wrongdoer. The chief argument in favor of the provision was that the Congressmen did not themselves wish to be investigated by Secret Service men. Very little of such investigation has been done in the past; but it is true that the work of the Secret Service agents was partly responsible for the indictment and conviction of a Senator and a Congressman for land frauds in Oregon. I do not believe that it is in the public interest to protect criminals in any branch of the public service, and exactly as we have again and again during the past seven years prosecuted and convicted such criminals who were in the executive branch of the Government, so in my belief we should be given ample means to prosecute them if found in the legislative branch. But if this is not considered desirable a special exception could be made in the law prohibiting the use of the Secret Service force in investigating Members of the Congress. It would be far better to do this than to do what actually was done, and strive to prevent or at least to hamper effective action against criminals by the executive branch of the Government."

Understanding this language to be a reflection on the integrity of its membership, and aware of its own constitutional duty as to its membership, the House in respectful terms called on the President for any information that would justify the language of the message or assist it in its constitutional duty to purge itself of corruption.

The President in his message of January 4, denies that the paragraph of the annual message casts reflections on the integrity of the House; attributes to the House "an entire failure to understand my message;" declares that he has made no charge of corruption against any Member of this House, and by implication states that he has no proof of corruption on the part of any Member of this House.

Whether the House in its resolution of December 17, 1908 correctly interpreted the meaning of the words used by the President in his annual message, or whether it misunderstood that language, as the President implies, will be judged now and in the future according to the accepted interpretations of the English language. This House, charged only with its responsibility to the people of the United States and its obligation to transmit unimpaired to the future the representative institutions inherited from the past, and to preserve its own dignity, must insist on its own capacity to understand the import of the President's language. We consider the language of the President in his message of December 8, 1908, unjustified and without basis fact and that it constitutes a breach of the privileges of the House: Therefore be it

Resolved, That the House, in the exercise of its constitutional prerogatives, declines to consider any communication from any source which is not in its judgment respectful; and be it further

Resolved, That the special committee and the Committee of the Whole House on the state of the Union be discharged from any consideration of so much of the President's annual message as relates to the Secret Service, and is above set forth, and that the said portion of the message be laid on the table; and be it further

Resolved, That the message of the President sent to the House on January 4, 1909, being unresponsive to the inquiry of the House and constituting an invasion of the privileges of this House by questioning the motives and intelligence of Members in the exercise of their constitutional rights and functions, be laid on the table.

After extended debate, the resolution was agreed to—yeas 212, noes 36.

331. In cases where its investigations have suggested the culpability of executive officers, the Senate has by resolution submitted advice or suggestions to the Executive.

The Senate having adopted a resolution advising the Executive as to matters within the sphere of his duties, the latter in a statement to the press announced that no official recognition would be accorded it.

On February 11, 1924,[1] the Senate, after debate, by a vote of yeas 47, nays 34, agreed to the following:

Whereas the United States Senate did on January 31, 1924, by a unanimous vote adopt Senate Joint Resolution No. 54 to procure the annulment of certain leases in the naval oil reserves of the United States; and

Whereas the said resolution, among other things, declared as follows:

"Whereas it appears from evidence taken by the Committee on Public Lands and Surveys of the United States Senate that certain lease of naval reserve No. 3, in the State of Wyoming, bearing date April 7, 1922, made in form by the Government of the United States, through Albert B. Fall, Secretary of the Interior, and Edwin Denby, Secretary of the Navy, as lessor, to the Mammoth Oil Co., as lessee, and that certain contract between the Government of the United States and the Pan American Petroleum & Transport Co., dated April 25, 1922, signed by Edward C. Finney, Acting Secretary of the Interior, and Edwin Denby, Secretary of the Navy, relating, among other things, to the construction of oil tanks at Pearl Harbor, Territory of Hawaii, and that certain lease of naval reserve No. 1, in the State of California, bearing date December 11, 1922, made in form by the Government of the United States through Albert B. Fall, Secretary of the Interior, and Edwin Denby, Secretary of the Navy, as lessor, to the Pan American Petroleum Co., as leesee, were executed under circumstances indicating fraud and corruption; and

"Whereas the said leases and contract were entered into without authority on the part of the officers purporting to act in the execution of the same for the United States and in violation of the laws of Congress; and

"Whereas such leases and contract were made in defiance of the settled policy of the Government, adhered to through three successive administrations, to maintain in the ground a great reserve supply of oil adequate to the needs of the Navy in any emergency threatening the national security."

Therefore be it

Resolved, That it is the sense of the United States Senate that the President of the United States immediately request the resignation of Edwin Denby, as Secretary of the Navy.

On motion of Mr. Joseph T. Robinson, of Arkansas, by a vote of yeas 51, nays 34, the Secretary of the Senate was directed to transmit a copy of the resolution to the President of the United States.

On February 13, 1925,[2] on motion of Mr. Henry Cabot Lodge, of Massachusetts, by unanimous consent, a statement issued by the President to the press was printed in the Record as follows:

No official recognition can be given to the passage of the Senate resolution relative to their opinion concerning members of the Cabinet or other officers under Executive control.

As soon as special counsel can advise me as to the legality of these leases and assemble for me the pertinent facts in the various transactions I shall take such action as seems essential for the full protection of the public interests. I shall not hesitate to call for the resignation of any official whose conduct in this matter in any way warrants such action upon my part. The dismissal of an officer of the Government, such as is involved in this case, other than by impeachment, is exclusively an Executive function. I regard this as a vital principle of our Government.

In discussing this principle Mr. Madison has well said: "It is laid down in most of the constitutions or bills of rights in the Republics of America; it is to be found in the political writings of the most celebrated civilians, and is everywhere held as essential to the preservation of liberty that the three great departments of government be kept separate and distinct."

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[1] First session Sixty-eighth Congress, Record, p. 2245.

[2] Record, p. 2335.

President Cleveland likewise stated the correct principle in discussing requests and demands made by the Senate upon him and upon different departments of the Government, in which he said: "They assume the right of the Senate to sit in judgment upon the exercise of my exclusive discretion and Executive function, for which I am solely responsible to the people from whom I have so lately received the sacred trust of office. My oath to support and defend the Constitution, my duty to the people who have chosen me to execute the powers of their great office and not to relinquish them, and my duty to the Chief Magistracy, which I must preserve unimpaired in all its dignity and vigor, compel me to refuse compliance with these demands."

The President is responsible to the people for his conduct relative to the retention or dismissal of public officials. I assume that responsibility, and the people may be assured that as soon as I can be advised so that I may act with entire justice to all parties concerned and fully protect the public interests I shall act.

I do not propose to sacrifice any innocent man for my own welfare, nor do I propose to retain in office any unfit man for my own welfare. I shall try to maintain the functions of the Government unimpaired, to act upon the evidence and the law as I find it, and to deal thoroughly and summarily with every kind of wrongdoing.

In the meantime such steps have been and are being taken as fully to protect the public interests.

Chapter CLXXXIV.

POWER TO PUNISH FOR CONTEMPT.

1. Case of Charles C. Glover. Sections 332, 333.
2. Senate case of Paul R. Mallon. Section 334.

332. The contempt case of Charles C. Glover before the House in 1913.[2]

After debate the House ordered a warrant to issue for arrest of a person who had violated its privileges by assaulting a Member.

The investigation of a breach of the privilege of the House was committed to a select committee appointed by the Speaker.

The constitutional immunity for words spoken in debate guarantees exemption from questioning not only within but also without the courts.

An assault upon a Member of the House for words spoken in debate is a breach of its privileges and a contempt of the House.

Assault committed on a Member for words spoken in debate constitutes a contempt of the House in which he is then sitting although the words may have been spoken in a prior House.

The House is empowered under the Constitution to punish as a contempt against it a breach of its privileges committed by assault on one of its Members for words spoken in debate.

On April 21, 1913,[3] the House agreed to the following resolution, presented as a question of the privilege of the House by Mr. Finis J. Garrett, of Tennessee:

Whereas it has been published in various newspapers circulating in the city of Washington, D. C., and elsewhere, and otherwise currently reported, that on Friday, April 18, 1913, Thetus W. Sims, a Representative in Congress from the State of Tennessee, was, in a public park in said city, while on his way from his place of residence to a department of the Government for the purpose of transacting official business, and while in attendance upon the Congress as such Representative, set upon and physically assaulted by one C. C. Glover, a citizen of the District of Columbia; and

Whereas said assault is alleged to have been made because of words spoken by said Representative on the floor of the House while it was in regular session; and

Whereas said assault, if made, constitutes a breach of the privileges of the House and of its Members and demands immediate action on the part of the House for the protection of its rights and the rights of its Members in the performance of official duties: Therefore be it

Resolved, That a select committee of five members be appointed forthwith by the Speaker of the House to investigate and report:

First, whether such assault was made by said C. C. Glover upon the said Representative, Thetus W. Sims; and if so, then,

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[1] Supplementary to Chapter LI.

[2] For preliminary proceedings in this case see section 7811 of Chapter CXCVII.

[3] First session Sixty-third Congress, Record, p. 281.

Second, a course of procedure to be followed in dealing with the said C. C. Glover, to the end that the rights and the privileges of the House of Representatives and its Members shall be maintained and protected.

For the purpose of ascertaining the fact herein required to be reported upon, the said committee shall have power to send for persons and papers, and to examine witnesses upon oath administered by the chairman or any member thereof.

Said committee shall report not later than Saturday, April 26, 1913.

On April 26,[1] Mr. John W. Davis, of West Virginia, from the select committee appointed pursuant to this resolution, submitted a report setting forth the following findings of fact:

That Representative Thetus W. Sims while on his way from his residence in the city of Washington to the Post Office Department on official business on Friday morning, April 18, 1913, was accosted in Farragut Square, in the city of Washington, by Charles C. Glover, who, after applying to him certain epithets, assaulted him by striking him in the face.

That the said Charles C. Glover committed the assault upon Representative Sims because of statements made by Representative Sims in debate on the floor of the House of Representatives at several times during the session of the House in the Sixty-second Congress, in which Congress the said Representative Sims was also a Representative from the State of Tennessee.

The committee then report as their conclusions:

First. That for the purpose of this inquiry it is not necessary to consider what privileges, if any, the House of Representatives or its Members may possess other than those expressly stated in the Constitution.

It may be thought by some that the constitutional immunity implied in the words "for any speech or debate in either House they shall not be questioned in any other place" relates merely to lifelong immunity from legal proceedings against the Member. The term "questioned," however, has always been construed liberally.

This immunity guarantees exemption from questioning not only within but also without the courts. Obviously, if one may not question a Member for words spoken in debate under the processes of law, he can not do so by taking the law in his own hand.

Second. An assault upon a Member of the House of Representatives for words spoken in debate is a breach of its privileges and a contempt of the House.

This has not only been the uniform opinion of the House of Representatives from the earliest times, but is necessarily true because of the reasons which lie at the foundation of the constitutional provision. As just stated, it was conceived that absolute freedom of speech and of debate in the Legislative Assembly was essential to the public welfare, and it was intended that the voice of a Member, and of his constituents speaking through him, should not be silenced by any fear of legal or personal consequences. A Member, of course, may plead his constitutional privilege in bar of any action based upon his utterances, but unless his person is likewise immune from attack for the same cause, the purpose of the Constitution would be but half accomplished.

Nor is the House as a collective whole less concerned in preserving this freedom of debate than are the individual Member and his constituency. In order that the final action of any deliberate body may represent the joint wisdom of its members, there must be unrestrained exchange of thought and opinion, and whatever tends to silence one subtracts just so much from the efficiency of the whole. A breach of a Member's privilege of unconditional freedom of debate therefore reacts upon the House; and the House in treating it as a contempt against itself does so with no desire to magnify its office nor to vindicate its wounded dignity, but to preserve and defend its legislative integrity and power. Of this legislative integrity and power it is the sole guardian, and it may at all times protect that integrity and power by appropriate action taken for and by itself.

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[1] House Report No. 6.

Third. Such an assault, when committed on the person of a Member for words spoken in debate, constitutes a contempt of the House in which he is then sitting, although the words may have been spoken in a prior House.

It will be observed that the speeches made by Representative Sims in the House of Representatives which Mr. Glover admits constituted the provocation for this assault were delivered by Representative Sims during the Sixty-second Congress; but, while this raises a question not discussed in earlier precedents, it does not change, in our opinion, the status of the case. This becomes clear when we contrast the individual privileges of the Member and the collective privilege of the House.

It is obvious that the Constitution, in providing that Senators and Representatives shall not be questioned in any other place for any speech or debate in either House extends an immunity unlimited as to space and unrestricted in point of time. One who has been a Member of either body, whether longer so or not, can nevertheless plead this constitutional immunity against any attack which may be made upon him at any time by reason of any speech or debate which took place during his service. The shield of the Constitution, once extended, protects him so long as he may live.

The House, on the other hand, being simply the aggregate of its membership, is itself concerned with those things which affect the freedom and efficiency of its constituent Members. A Member of the Sixty-second Congress, for instance, who enters the Sixty-third Congress brings with him his constitutional immunity against question for his action in the former body; and in order that he may be free to perform, without fear or hindrance, his duties in the latter, it is both its right and duty to resent as an attack upon itself any violation of his constitutional privilege. Its attention should properly be directed, not to the time when this privilege accrued, but to the time when it was violated.

Fourth. The House of Representatives has power under the authority of the Constitution to punish as a contempt against it such a breach of its privileges as is involved in the assault upon Representative Sims by the said C. C. Glover.

Both parliamentary precedent and high authority support this power.

After citing judicial decisions and Congressional precedents in support of these conclusions, the committee conclude:

The House of Representatives is vitally concerned with the safeguarding of its privileges and the preservation of its legislative integrity and dignity. It is just as seriously concerned, however, with the maintenance of such a course of conduct on the part of each of its individual Members as will assure to every citizen in the land protection from defamation on the floor of the House. The power of the House over its Members is of the broadest character. The breach of the privileges of the House by a Member gives to the House ample power of punishment. It must become to be understood, therefore, that as the privileges of the House in so far as the public is concerned will be enforced by prompt punishment for contempt in the event of their breach, the House, in the future, as often in the past, will also fully protect all citizens from unjust assaults upon their character by censure or other punishment administered to an offending Member.

The committee calls attention to the written communication received from Mr. Glover, which will be found in full in the appendix containing the testimony accompanying this report.

This letter, it will be observed, contains a frank avowal of fault and a voluntary disclaimer of any intentional contempt toward this body. The testimony, however, establishes the fact that his act was the result of some premeditation and design extending over a period sufficiently long for him to have informed himself, if ignorant, of the privilege of the House; and his disclaimer. while full and free in form, is accompanied by a challenge, though without discourtesy, of the jurisdiction of the House in the premises.

The committee therefore recommend the adoption of the following resolution:

Resolved, That the Speaker do issue his warrant directed to the Sergeant at Arms commanding him to take in custody, wherever to be found, the body of Charles C. Glover, of the city of Washington. in the District of Columbia, and the same in custody keep, and that the said Charles C.

Glover be brought to the bar of the House of Representatives on a day to be fixed in said warrant to answer the charge that he, on Friday, April 18, 1913, in the city of Washington, D.C., committed an assault upon the person of Representative Thetus W. Sims, a Representative in the Sixty-third Congress from the State of Tennessee, because of words spoken by the said Representative Sims in debate on the floor of the House of Representatives while the House was in regular session during the Sixty-second Congress, and that in committing said assault Charles C. Glover has been guilty of a breach of the privileges and a contempt of the House of Representatives; and that the said Charles C. Glover be furnished with a copy of this resolution and a copy of the report of the select committee of the House of Representatives appointed to investigate the charge made against him in the House of Representatives.

Resolved, That when Charles C. Glover shall be brought to the bar of the House to answer the charge of having violated the privilege of the House of Representatives by having made an assault upon Representative Thetus W. Sims, of the State of Tennessee, for words spoken by said Representative Sims on the floor of the House of Representatives, the Speaker shall then cause to be read to the said Charles C. Glover the findings of facts by the special committee of the House charged with the duty of investigating whether or not the said assault had in fact been committed as alleged, and whether or not the said Charles C. Glover had violated the privileges of the House of Representatives by said assault. The Speaker shall then inquire of the said Charles C. Glover if he desires to be heard, and to have counsel, on the charge of being in contempt of the House of Representatives for having violated its privileges. If the said Charles C. Glover desires to avail himself of either of these privileges, the same shall be granted him, if not the House shall thereupon proceed to take order in the matter.

333. The case of Charles C. Glover continued.

A citizen having assaulted a Member for words spoken in debate, the House arrested, arraigned, and censured him.

The Speaker held that Members might not confer with a respondent arraigned at the bar of the House.

Censure inflicted by the Speaker on a citizen and his apology to the House appear in full in the Journal.

Form of proceedings at the arraignment and censure of Charles C. Glover.

On May 9, 1913,[1] the first section of the resolution recommended by the committee was offered, as of privilege, by Mr. Davis, and after extended debate was amended by the addition of the second section recommended by the committee, and agreed to as amended, yeas 200, nays 4.

Whereupon[2] Mr. J. Harry Covington, of Maryland, inquired:

Is the Speaker now about to execute the action in warrant for the apprehension of Mr. Glover?

The Speaker[3] said:

That is exactly what he is about to do. The Chair has been informed that Mr. Glover is within the building and can be very easily found. The precedents in the case seem to show that when Mr. Glover is brought in Members will not be allowed to confer with him until the matter is finished.

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[1] First session Sixty-third Congress, Journal, p. 141.

[2] Record, p. 1431.

[3] Champ Clark, of Missouri, Speaker.

The Speaker thereupon signed and delivered to the Sergeant at Arms of the House the following warrant:

HOUSE OF REPRESENTATIVES, UNITED STATES OF AMERICA,

Ninth day of May, 1913, ss:

TO ROBERT B. GORDON, *Sergeant at Arms, greeting:*

Whereas the House of Representatives of the United States on the 9th day of May, 1913, then being in session in the city of Washington, DC, did resolve that the Speaker do issue his warrant directed to the Sergeant at Arms commanding him to take into custody wherever to be found the body of Charles C. Glover, of the city of Washington, DC, and the same in custody to keep, and that the said Charles C. Glover be brought to the bar of the House of Representatives on the 9th day of May, 1913, to answer the charge that he, on Friday, April 18, 1913, in the city of Washington, DC, committed an assault upon the person of Representative Thetus W. Sims, a Representative in the Sixty-third Congress from the State of Tennessee, because of words spoken by the said Representative Sims in debate on the floor of the House of Representatives while the House was in regular session during the Sixty-second Congress, and that in committing said assault he, the said Charles C. Glover, has been guilty of a breach of the privileges and a contempt of the House of Representatives:

These are therefore to require you, Robert B. Gordon, Sergeant at Arms for the House of Representatives of the United States, forthwith to take into your custody the body of said Charles C. Glover, of the city of Washington, DC, and him safely to keep, and to bring him before the bar of the House of Representatives on the 9th day of May, 1913; and all marshals and deputy marshals, civil officers of the United States, and every other person are hereby required to be aiding and assisting you in the execution thereof, for which this shall be your sufficient warrant.

Given under my hand this 9th day of May, 1913.

CHAMP CLARK,
Speaker of the House of Representatives.

In testimony of the authority of this warrant, witness the seal of the House of Representatives of the United States this 9th day of May, 1913.

SOUTH TRIMBLE,
Clerk of the House of Representatives.

Upon this warrant the Sergeant at Arms made returns as follows:

HOUSE OF REPRESENTATIVES,

Washington, D.C. 9th day of May, 1913, ss:

To Hon. CHAMP CLARK, *Speaker, greeting:*

Received the within warrant on the 9th day of May, A. D. 1913, and pursuant to its command I did, on the 9th day of May, A. D. 1913, as directed, take into custody the body of said Charles C. Glover there in named and brought him forthwith to the bar of the House of Representatives.

Given under my hand this 9th day of May, 1913.

R.B. GORDON,
Sergeant at Arms, House of Representatives.

The Sergeant at Arms appeared at the bar of the House having in custody the respondent, Charles C. Glover.

By direction of the Speaker the Clerk read as follows:

That Representative Thetus W. Sims while on his way from his residence in the city of Washington to the Post Office Department on official business on Friday morning, April 18, 1913, was accosted in Farragut Square, in the city of Washington, by Charles C. Glover, who, after applying to him certain epithets, assaulted him by striking him in the face.

That the said Charles C. Glover committed the assault upon Representative Sims because of statements made by Representative Sims in debate on the floor of the House of Representatives at several times during the session of the House in the Sixty-second Congress, in which Congress the said Representative Sims was also a Representative from the State of Tennessee.

In response to an inquiry by the Speaker if the respondent desired to be heard or to have counsel, Charles C. Glover answered:

Mr. Speaker, I admit the facts to be as found, but earnestly disclaim all intention to show disrespect to this House or its Members, or to invade their privileges. Nor did I know, at the time of the occurrence, that I was doing either.

I express my deep regret and offer my sincere apology.

A seat was provided for the respondent.

Then, on motion of Mr. Charles R. Crisp, of Georgia, in behalf of the special committee appointed in charge of this investigation, it was—

Resolved, That the Speaker do reprimand Charles C. Glover, now at the bar of the House, for the breach of privileges of the House by him committed; and that the said Charles C. Glover be thereupon discharged from further custody.

The respondent rose.

The Speaker said:

Charles C. Glover, the House of Representatives, after thorough and patient investigation of both the law and the facts, made by a special committee of five eminent lawyers of the House, appointed by the Speaker, brought in a resolution declaring that you had violated the privileges of the House and acted in a manner derogatory to the dignity of the body by assaulting a Member for words spoken in debate on the floor of the House; and after full debate the House almost unanimously adopted that resolution.

The freedom of speech and the immunity from being questioned elsewhere for words spoken in debate on the floor of the House and also of the Senate, guaranteed by the Constitution, lie at the very root of our free institutions. You violated both grossly by your conduct. In your anger you struck a blow at constitutional government.

From the very inception of parliamentary government among English-speaking peoples the principles which I have stated have been universally adopted and practiced.

This is not a case of a Member of Congress against the prisoner at the bar. It is the House of Representatives in its assembled capacity asserting its freedom of speech and the dignity of the House, which are necessary for the free and wise transaction of the public business. It is not so much to punish an individual as it is for the public good, to the end that the Republic may endure.

The House passed a resolution directing the Speaker to issue his warrant and deliver it to the Sergeant at Arms for your arrest, and the same has been done. The mandate of the warrant has been complied with by the Sergeant at Arms by bringing your body to the bar of the House.

Acting with the moderation, the care, the wisdom, and the justice with which people of our race act, they gave you a chance to be heard either in person or by counsel in mitigation before they would determine the punishment for your very grave offense against the Constitution of your country. You elected to be heard in your own proper person; you have acknowledged the facts as charged; you have apologized to the House; you have expressed your regrets; you have asserted your ignorance of the fact that you were violating the privileges of the House and the Constitution of the United States. This statement on your part, no doubt, influenced the Members in the leniency of the punishment which they determined upon, and that was that the Speaker should reprimand you for your very grave offense.

It must be apparent that a Representative or a Senator in his individual capacity has no more rights than any other citizen of the Republic, and he is clothed by the Constitution with the immunity from being questioned elsewhere for words uttered in debate on the floor of the House so that they may speak their minds freely without fear and without embarrassment. This is for the public weal. If one person is permitted to go unpunished for an assault upon one Representative for words spoken in debate on the floor of the House, every person can assault a Representative for words used in debate on the floor of the House, and free speech is at an end, free government is at an end.

Not only that, but to assault a Representative or a Senator for words spoken in debate on the floor of either House might compel a good man who does not want to kill anybody to perform that very act.

The Chair therefore reprimands you, Charles C. Glover, in the name of and by direction of the House of Representatives, and directs the Sergeant at Arms to remove you from the Hall of the House and to discharge you from custody.

Thereupon Charles C. Glover was escorted from the Hall of the House in the custody of the Sergeant-at-Arms.

334. In 1929 a Senate committee recommended the denial of the privilege of the floor to a newspaper reporter charged with publication of proceedings of an executive session.—On May 21, 1929,[1] in the Senate, Mr. John J. Blaine, of Wisconsin, was granted leave to print in the Record as a part of his remarks a newspaper article purporting to give the vote of the Senate in executive session on the confirmation of certain nominees of the President for judicial appointments.

On the following day,[2] Mr. David A. Reed, of Pennsylvania, announced that the Committee on Rules had unanimously agreed to a resolution excluding Paul R. Mallon, the author of the article, and the United Press Association which he represented, from the further privileges of the floor of the Senate, and that witnesses had been summoned to appear in an inquiry authorized by the committee to learn what Senator or Senate employee had disclosed the information reported in the article.

Mr. Reed then introduced the following resolution:

Resolved, That the report and publication of the proceedings of the Senate in executive session on the 17th day of May, 1929, is a breach of the privileges of the Senate, made possible only by a violation of the rules of the Senate by some Member or officer of the Senate; that this is a willful disregard of the obligation of duty and honor resting upon every one admitted to an executive session, tending to bring contempt upon the Senate, and deserves and should receive severe censure and punishment.

The resolution was ordered printed and placed on the calendar. No further action on the resolution or record of the inquiry appears.

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[1] First session Seventy-First Congress, Record, p. 1624.

[2] Record, p. 1726.

Chapter CLXXXV.[1]

PUNISHMENT OF WITNESSES FOR CONTEMPT.[2]

335. A statute penalizes recalcitrancy of witnesses summoned to testify before either House or any committee of either House.

Witnesses summoned to testify may not excuse themselves under the plea that their testimony would compromise them.

Sections 192–194 of title 2 of the United States Code provide:

Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, willfully makes default, or who having appeared, refuses to answer any questions pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100, and imprisonment in a common jail for not less than one month nor more than twelve months.

No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous.

Whenever a witness summoned as mentioned fails to testify, and the facts axe reported to either House, the President of the Senate or the Speaker of the House, as the case may be, shall certify the fact under the seal of the Senate or House to the district attorney for the District of Columbia, whose duty it shall be to bring the matter before the grand jury for their action.

336. The case of Harry F. Sinclair, a recalcitrant witness, in 1924.

Counsel for a contumacious witness, present at the examination and transgressing the bounds of propriety, was admonished.

For declining to testify or to obey a subpoena duces tecum commanding him to produce certain papers, Harry F. Sinclair was certified to the district attorney for contempt.

Form of subpoena duces tecum issued by order of the Senate.

A committee in reporting the recusancy of a witness, included a transcript of the testimony, so as to show in what the contempt consisted.

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[1] Supplementary to Chapter LIII.

[2] See also the case of Marshall, sections 350–354, Chapter CCII, in this volume; also section 542 of the same chapter.

While certification of a contumacious witness to the district attorney for contempt is administrative, a motion authorizing certification has been admitted.

Discussion of the remedies open to the Senate under the statute.

On March 24, 1924,[1] in the Senate, Mr. Edwin F. Ladd, of North Dakota, presented a report from the Committee on Public Lands and Surveys, stating that the committee was charged under a resolution of the Senate adopted April 29, 1922, with the duty of making inquiry into the entire subject of leases upon naval oil reserves, and under a further resolution, adopted June 5, 1922, was authorized to require the attendance of witnesses and the production of books, papers, and documents, with the further authorization under resolutions adopted April 21, 1922, and May 15, 1922, to sit either en banc or by subcommittee during the sessions or the recesses of the Senate until otherwise ordered by the Senate. Pursuant to power thus conferred, the committee had entered upon this investigation, and had on March 22, 1924, caused to be served upon Harry F. Sinclair, the following subpoena duces tecum:

UNITED STATES OF AMERICA,
Congress of the United States.

To HARRY F. SINCLAIR,
Sinclair Consolidated Oil Co., New York City.

Greeting:

Pursuant to lawful authority, you are hereby commanded to appear before the Senate Committee on Public Lands and Surveys of the Senate of the United States on Friday, March 21, 1924, at 10 o'clock a. m., at their committee room in the Senate Office Building, Washington, D. C., then and there to testify what you may know relative to the subject matters under consideration by said committee, and bring with you all the books and records of the Hyva Corporation.

Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

To David S. Barry, Sergeant at Arms of the Senate of the United States, to serve and return.

Given under my hand, by order of the committee, this 19th day of March, in the year of our Lord, one thousand nine hundred and twenty-four.

(Signed) E. F. LADD,
Chairman, Committee on Public Lands and Surveys.

(Indorsed on the reverse by signature of David S. Barry, Sergeant at Arms of the Senate of the United States.)

On being called to the stand as a witness before the committee Harry F. Sinclair refused, by advice of counsel, to answer any question propounded to him by the committee or to produce the books and records required in the subpoena, duces tecum.

Questions pertinent to the inquiry and which had been addressed by the committee to the witness and which the witness had severally declined to answer were appended to the report. The report concluded:

And now your committee reports to the Senate that the said Harry F. Sinclair, having appeared as a witness before your said committee, refused to answer questions pertinent to the question under inquiry, and is in contempt of the said committee and of the Senate.

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[1] Second session Sixty-eighth Congress, Record, p. 4785.

In the transcript appended the following appears:

Mr. LITTLETON. If I have any rights at all here—I am counsel for the witness—I certainly object to your putting into this record what you imagine the witness would have answered when he has claimed his rights here under the law. I protest most earnestly against it as an outrage.

Senator WALSH of Montana. I protest, Mr. Chairman, against any such remarks from counsel as an abuse of his privilege. Counsel yesterday, here by the courtesy of this committee, said that certain things that this committee propose to do were monstrous, and now we are told this morning that what I offered to do, with the privilege of the committee, is an outrage. That is an abuse of the privilege of counsel, and I desire the chairman to admonish counsel to that effect.

The CHAIRMAN. It is the opinion of the Chairman that counsel went, beyond his rights, both yesterday and to-day, in his statements.

On motion of Mr. Thomas J. Walsh, of Montana, the report of the committee was adopted and the President of the Senate was by the Senate directed to certify to the district attorney for the District of Columbia the facts as reported in the report of the Committee on Public Lands and Surveys.

In presenting the report, Mr. Walsh cited [1] sections 101, 102, 103, and 104 of the Revised Statutes providing penalties for refusal of witnesses to testify when summoned by the authority of either House of Congress, and said:

Mr. President, in view of the recusancy of the witness shown by the report just submitted, there are two questions open to the Senate, either to bring the witness before the bar of the Senate and, persisting in his contumacy, to commit him to the custody of the Sergeant at Arms for imprisonment until he shall consent to answer, or to report the matter, as contemplated by the statute which I have just read, for appropriate action by the district attorney of the District of Columbia and a grand jury.

I am sure that either of the remedies is exclusive of the other as matter of law, but as matter of practice they become practically so. The situation would be this: If the witness were brought before the bar of the Senate and an order, after his commitment, were made to the effect that he should stand committed until he should answer—I assume that he is in perfect good faith in the objection that he makes and in the position that he takes—he would, of course, then sue out a writ of habeas corpus, and he would be held under that writ. If the court should decide against him, that his objection is not well taken, he would be remanded to the custody of the Sergeant at Arms. He would then sue out a writ of error, and he would be entitled to bail under that writ of error.

In speaking to the motion, Mr. Walsh added: [2]

Mr. President, this is one of the gravest matters that can possibly have the attention of this body, affecting, as it does, the power to proceed in an orderly way to secure such information as it may need to aid it in the all-important task confided to this body by the Constitution and by the people. A contempt of a court, however humble that court may be, is always a matter of supreme importance. A contempt of this high tribunal can not be measured by any words.

An effort has been made, Mr. President, to impress the public mind with the idea, in the first place, that the power of the Senate of the United States to require witnesses to attend before it or before its committees in connection with matters of legislation, and particularly to require from such witnesses, as it is said, information of a "private" character and in relation to the "private" business of the witness is involved in "very grave doubt"; that it is a matter that requires the adjudication of the courts and of the highest tribunal of the Nation. I do not think, Mr. President, that either of the questions suggested, or any of those which have been raised as a ground for the refusal of the witness to testify are involved in this "serious doubt." I can

[1] Record, p. 4725.

[2] Record, p, 4789.

not read the decisions touching the power of either branch of Congress to compel the attendance of witnesses and to compel witnesses to testify as suggesting in any way that the question is one of "grave doubt" that can justify anyone in attempting, as a speculative matter, to secure an adjudication upon the subject. I think it involves the very life of the effective existence of the House of Representatives of the United States and of the Senate of the United States.

337. The case of Harry F. Sinclair, continued.

A witness refusing to testify before a committee of the Senate was indicted and tried in the district court.

Decision of the district court on the right of the Senate to compel testimony and the production of papers and records.

Pursuant to the order of the Senate [1] a formal certificate was issued, signed by the acting President pro tempore, and transmitted to the district attorney. A grand jury returned an indictment on March 31, 1924, and the case was tried in the Supreme Court of the District of Columbia.

338. The case of Harry F. Sinclair, continued. While emphasizing the importance of protecting the individual from unreasonable and arbitrary disclosures of his private affairs, the court holds that either House of Congress is authorized to require testimony in aid of legislation.

The fact that testimony sought by a committee of the House might militate against the interest of the witness in a pending suit was held not to excuse him from supplying information properly within the scope of the inquiry.

The trial resulting in a conviction and a sentence of imprisonment and fine having been imposed, the case was carried to the appellate court, which requested the United States Supreme Court to instruct it on certain points of law involved in the case. The Supreme Court, however, elected to consider the entire record and pass on all phases of the appeal instead of answering the specific questions.

Mr. Justice Pierce Butler delivered the opinion of the court on April 8, 1929. After citing the statute [2] under which indictment was returned, and reviewing the history of the case, the opinion thus outlines the contention of the appellant:

> Appellant contends that his demurrer to the several counts of the indictment should have been sustained and that a verdict of not guilty should have been directed. To support that contention he argues that the questions related to his private affairs and to matters cognizable only in the courts wherein they were pending, and that the committee avowedly had departed from any inquiry in aid of legislation.
>
> He maintains that there was no proof of any authorized inquiry by the committee or that he was legally summoned or sworn or that the questions propounded were pertinent to any inquiry it was authorized to make, and that because of such failure he was entitled to have a verdict directed in his favor.
>
> He insists that the court erred in holding that the question of pertinency was one of law for the court and in not submitting it to the jury and also erred in excluding evidence offered to sustain his refusal to answer.

The court first considers the contention of the appellant as to the limitations upon the power of Congress to inquire into private affairs and the importance of

[1] Second session Sixty-eighth Congress, Record, p. 4791.

[2] 279 U.S. 263, 749.

protecting the individual from unreasonable and arbitrary disclosures of purely personal matters:

It has always been recognized in this country, and it is well to remember, that few if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary, or unreasonable inquiries and disclosures in respect of their personal and private affairs.

The opinion, however, holds that the issues in the pending case do not relate merely to private or personal affairs and says:

But it is clear that neither the investigation authorized by the Senate resolutions above mentioned nor the question under consideration related merely to appellant's private or personal affairs. Under the Constitution (Art. IV, sec. 3) Congress has plenary power to dispose of and to make all needful rules and regulations respecting the naval oil reserves, other public lands and property of the United States. And undoubtedly the Senate had power to delegate authority to its committee to investigate and report what had been and was being done by executive departments under the leasing act, the naval oil reserve act, and the President's order in respect of the reserves and to make any other inquiry concerning the public domain.

While appellant caused the Mammoth Oil Company to be organized and owned all its shares, the transaction purporting to lease to it the lands within the reserve can not be said to be merely or principally the personal or private affair of appellant. It was a matter of concern to the United States. The title to valuable Government lands was involved. The validity of the lease and the means by which it had been obtained under existing law were subjects that properly might be investigated in order to determine what if any legislation was necessary or desirable in order to recover the leased lands or to safeguard other parts of the public domain.

Neither Senate Joint Resolution 54 nor the action taken under it operated to divest the Senate or the committee of power further to investigate the actual administration of the land laws. It may be conceded that Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits; but the authority of that body, directly or through its committees, to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits.

The record does not sustain appellant's contention that the investigation was avowedly not in aid of legislation. He relies on the refusal of the committee to pass the motion directing that the inquiry should not relate to controversies pending in court and the statement of one of the members that there was nothing else to examine appellant about. But these are not enough to show that the committee intended to depart from the purpose to ascertain whether additional legislation might be advisable. It is plain that investigation of the matters involved in suits brought or to be commenced under Senate Joint Resolution 54 might directly aid in respect of legislative action.

The court holds that the resolution empowering the committee to conduct the investigation was ample authorization for summoning witnesses and eliciting testimony:

There is some merit in appellant's contention that a verdict should have been directed for him because the evidence failed to show that the committee was authorized to make the inquiry, summon witnesses, and administer oaths. Resolutions 282 and 294 were sufficient until the expiration of the Sixty-seventh Congress during which they were adopted, but it is argued that Resolution 434 was not effective to extend the power of the committee. As set out in the indictment and shown by the record, Resolution 434 does not mention 294 or refer to the date of its adoption. The former so far as material follows: "Resolved, That Senate Resolution 282, agreed to April 21, 1922, and Senate Resolution 292, agreed to May 15, 1922, authorizing and directing the Committee on Public Lands and Surveys to investigate the entire subject of leases upon naval oil reserves, with particular reference to the protection of the rights and equities of the Government of the United States and the

preservation of its natural resources, and to report its findings and recommendations to the Senate * * * be * * * continued in full force and effect until the end of the Sixty-eighth Congress. The committee * * * is authorized to sit * * * after the expiration of the present Congress until the assembling of the Sixty-eighth Congress and until otherwise ordered by the Senate."

There is enough in that resolution to show that where "292" appears 294 was meant. The subject of the investigation is specifically mentioned. That is the only matter dealt with. The sole purpose was to authorize the committee to carry on the inquiry. It would be quite unreasonable, if not indeed absurd, for the Senate to direct investigation by the committee and to allow its power to summon and swear witnesses to lapse. The context and circumstances show that Resolution 294 was intended to be kept in force.

The court then rules that the questions propounded were within the scope of this authorization:

Appellant earnestly maintains that the question was not shown to be pertinent to any inquiry the committee was authorized to make. The United States suggests that the presumption of regularity is sufficient without proof. But, without determining whether that presumption is applicable to such a matter, it is enough to say that the stronger presumption of innocence attended the accused at the trial. It was therefore incumbent upon the United States to plead and show that the question pertained to some matter under investigation. Appellant makes no claim that the evidence was not sufficient to establish the innuendo alleged in respect of the question; the record discloses that the proof on that point was ample.

Congress, in addition to its general legislative power over the public domain, had a the powers of a proprietor and was authorized to deal with it as a private individual may deal with lands owned by him. The committee's authority to investigate extended to matters affecting the interest of the United States as owner as well as to those having relation to the legislative function.

Before the hearing at which appellant refused to answer, the committee had discovered and reported facts tending to warrant the passage of Senate Joint Resolution 54 and the institution of suits for the cancellation of the naval oil reserve leases. Undoubtedly it had authority further to investigate concerning the validity of such leases, and to discover whether persons, other than those who had been made defendants in the suit against the Mammoth Oil Company, had or might assert a right or claim in respect of the lands covered by the lease to that company.

The contract and release made and given by Bonfils and Stack related directly to the title to the lands covered by the lease which had been reported by the committee as unauthorized and fraudulent. The United States proposed to recover and hold such lands as a source of supply of oil for the Navy. (S. J. Res. 54.) It is clear that the question so propounded to appellant was pertinent to the committee's investigation touching the rights and equities of the United States as owner.

Moreover, it was pertinent for the Senate to ascertain the practical effect of recent changes that had been made in the laws relating to oil and other mineral lands in the public domain. The leases and contracts charged to have been unauthorized and fraudulent were made soon after the Executive order of May 31, 1921. The title to the lands in the reserves could not be cleared without ascertaining whether there were outstanding any claims or applications for permits, leases, or patents under the leasing act or other laws. It was necessary for the Government to take into accounts the rights, if any there were, of such claimants. The reference in the testimony of Bonfils to the contract referred to in the question propounded was sufficient to put the committee on inquiry concerning outstanding claims possibly adverse and superior to the Mammoth Oil Company's lease. The question propounded was within the authorization of the committee and the legitimate scope of investigation to enable the Senate to determine whether the powers granted to or assumed by the Secretary of the Interior and the Secretary of the Navy should be withdrawn, limited, or allowed to remain unchanged.

The opinion concludes:

The reasons for holding relevancy and materiality to be questions of law in cases such as those above referred to apply with equal force to the determination of pertinency arising under section

102. The matter for determination in this case was whether the facts called for by the question were so related to the subjects covered by the Senate's resolutions that such facts reasonably could be said to be "pertinent to the question under inquiry." It would be incongruous and contrary to well-established principles to leave the determination of such a matter to a jury.

The conviction was accordingly affirmed.

339. The case of M. S. Daugherty, in the Senate, in 1924.

A witness having declined to attend and produce documents, the Senate by resolution ordered his arrest.

A witness in the custody of the Sergeant at Arm having procured a writ of habeas corpus, the Senate requested the President to direct the Attorney General to defend the suit.

On April 26, 1924[1] (legislative day of April 24), the Senate agreed to the following:

Whereas the select committee of the Senate, elected pursuant to Senate Resolution 157, Sixty-eighth Congress, first session, has submitted a report to the Senate; and

Whereas it appears from such report that M. S. Daugherty, as president of the Midland National Bank, Washington Court House, Ohio, was on March 22, 1924, duly served with a subpoena to appear forthwith before such committee in Washington, D. C., and then and there to testify relative to subject matters and to produce specified files, records, and books pertinent to the matter under inquiry, and was on April 11, 1924, duly served with a subpoena to appear forthwith before the committee in Washington Court House, Ohio, and then and there to testify relative to subject matters pertinent to the matter under inquiry; and

Whereas it appears from such report that the said M. S. Daugherty has, in disobedience of such subpoenas, failed so to appear or answer, or to produce such files, records, and books; and

Whereas the appearance and testimony of the said M. S. Daugherty is material and necessary in order that the committee may properly execute the functions imposed upon it and may obtain information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper: Therefore be it

Resolved, That the President of the Senate pro tempore issue his warrant commanding the Sergeant at Arms or his deputy to take into custody the body of the said M. S. Daugherty wherever found, to bring the said M. S. Daugherty before the bar of the Senate, then and there to answer such questions pertinent to the matter under inquiry as the Senate may order the President of the Senate pro tempore to propound; and to keep the said M. S. Daugherty in custody to await the further order of the Senate.

On May 1[2] (legislative day of April 24), the President pro tempore laid before the Senate a communication from the Sergeant at Arms in which the latter reported to the Senate that in pursuance to this resolution M. S. Daugherty has been arrested and taken into custody but had been released on writ of habeas corpus granted by the United States District Court of the Southern District of Ohio, Western Division, at Cincinnati.

Whereupon the Senate passed the following resolution:

Whereas under Senate Resolution No. 157 the special committee appointed to investigate the conduct of the office of Attorney General Harry M. Daugherty and his assistants did summon M. S. Daugherty to appear before it in person and to produce certain books and papers at room 410, Senate Office Building, Washington, D. C., which summons he disregarded, and the Senate thereupon ordered the arrest of said M. S. Daugherty, which order was executed by the Deputy

[1] First session Sixty-eighth Congress, Record, p. 7217.

[2] Record, p. 7592.

Sergeant at Arms. Thereupon the said M. S. Daugherty procured a writ of habeas corpus in the United States District Court of the Southern District of Ohio, the same being assigned for hearing at Cincinnati, Ohio, on May 10, 1924; and

Whereas the said committee did summon said M. S. Daugherty to appear before a subcommittee in person at Washington Court House, Ohio, which summons he disregarded, and thereupon brought an injunction suit in the Ohio court of common pleas in said city against Smith W. Brookhart and Burton K. Wheeler, said subcommittee, requiring them to answer on May 10, 1924:

Resolved, therefore, That the President of the United States be respectfully requested to direct the Attorney General to defend said suits on behalf of the Senate of the United States.

340. The case of M. S. Daugherty, continued.

A recalcitrant witness having been released from the custody of the Sergeant at Arms by judgment of a district court, the Senate authorized an appeal to the Supreme Court.

M. S. Daugherty was permanently discharged from the custody of the Sergeant at Arms on May 31,[1] by the district court, which pointed out that the investigation by the committee was on the initiative of the Senate only and not of both Houses of Congress; that the authorizing resolution failed to set forth the purpose of the investigation and gave no intimation that it was in aid of legislation; that the investigation committee was without warrant of law to exercise a judicial function, and the effort to compel attendance of witnesses and production of documents was under the circumstances an infringement on the rights of a citizen under the Constitution.

An appeal to the Supreme Court was authorized by the following resolution agreed to June 5,[2] S. Res. 247 (legislative day of June 3):

Whereas in a proceeding in the United States District Court for the Southern District of Ohio, western division, entitled "In the matter of the application of Harry S. Daugherty for writ of habeas corpus," an opinion has been handed down and judgment entered by the judge hearing said cause, which seriously affects the constitutional rights and power of the Senate of the United States and of the Congress; and

Whereas it is believed that said opinion and judgment are erroneous; and

Whereas it is highly desirable to have the law in the matter settled by the Supreme Court: Therefore be it

Resolved, That the Attorney General, on behalf of the Senate and the respondent in said cause, be requested to have the proper officials of his department, including counsel heretofore designated in the cause, take the necessary steps for a prompt review and determination thereof by the Supreme Court.

And the special committee appointed under Senate Resolution No. 157 is hereby authorized and empowered to secure the services of such other counsel, to act in conjunction with the Attorney General, as to it may seem necessary and advisable.

341. The case of M. S. Daugherty, continued.

Decision by the Supreme Court on the power of Congress to compel testimony.

Deputies with authority to execute warrants may be appointed by the Sergeant at Arms under a standing order of the Senate.

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[1] Record, p. 10480.

[2] Record, p. 10635.

Subpoenas issued by a committee of the Senate summoning witnesses to testify in an investigation authorized by the Senate are as if issued by the Senate itself.

At the January term of 1927,[1] Justice Van Devanter delivered the opinion of the Supreme Court.

As to the authority of deputies appointed by the Sergeant at Arms to execute warrants under a standing order of the Senate the court finds its validity established by long practice and ample provision of law, and says:

The witness challenges the authority of the deputy to execute the warrant on two grounds—that there was no provision of law for a deputy, and that, even if there were such a provision, a deputy could not execute the warrant because it was addressed simply to the Sergeant at Arms. We are of opinion that neither ground is tenable.

The Senate adopted in 1889 and has retained ever since a standing order declaring that the Sergeant at Arms may appoint deputies "to serve process or perform other duties" in his stead, that they shall be "officers of the Senate," and that acts done and returns made by them "shall have like effect and be of the same validity as if performed or made by the Sergeant at Arms in person." In actual practice the Senate has given full effect to the order; and Congress has sanctioned the practice under it by recognizing the deputies—sometimes called assistants—as officers of the Senate, by fixing their compensation and by making appropriations to pay them. Thus there was ample provision of law for a deputy.

The Court further finds that such warrants may be addressed to the Sergeant at Arms only, in pursuance of a Senate resolution contemplating service by either and holds:

The fact that the warrant was addressed simply to the Sergeant at Arms is not of special significance. His authority was not to be tested by the warrant alone. Other criteria were to be considered. The standing order and the resolution under which the warrant was issued plainly contemplated that he was to be free to execute the warrant in person or to direct a deputy to execute it. They expressed the intention of the Senate; and the words of the warrant were to be taken, as they well could be, in a sense which would give effect to that intention. Thus understood, the warrant admissibly could be executed by a deputy if the Sergeant at Arms so directed, which he did.

The requirement of the fourth amendment that a warrant for arrest be supported by oath is held to be complied with on the committee's report under the sanction of their oaths of office as follows:

The witness points to the provision in the Fourth Amendment to the Constitution declaring "no warrants shall issue but upon probable cause supported by oath or affirmation" and contends that the warrant was void because the report of the committee on which it was based was unsworn. We think the contention overlooks the relation of the committee to the Senate and to the matters reported, and puts aside the accepted interpretation of the constitutional provision.

The committee was a part of the Senate, and its members were acting under their oath of office as senators. The matters reported pertained to their proceedings and were within their own knowledge. They had issued the subpoenas, had received and examined the officer's returns thereon (copies of which accompanied the report), and knew the witness had not obeyed either subpoena or offered any excuse for his failure to do so.

The constitutional provision was not intended to establish a new principle but to affirm and preserve a cherished rule of the common law designed to prevent the issue of groundless warrants. In legislative practice committee reports are regarded as made under the sanction of the oath of office of its members; and where the matters reported are within the committee's knowledge and

[1] McGrain *v.* Daugherty, 273 U. S. 135.

constitute probable cause for an attachment such reports are acted on and given effect without requiring that they be supported by further oath or affirmation. This is not a new practice but one which has come down from an early period. It was well recognized before the constitutional provision was adopted, has been followed ever since, and appears never to have been challenged until now. Thus it amounts to a practical interpretation, long continued, of both the original common law rule and the affirming constitutional provision, and should be given effect accordingly.

The principle underlying the legislative practice has also been recognized and applied in judicial proceedings. This is illustrated by the settled rulings that courts in dealing with contempts committed in their presence may order commitments without other proof than their own knowledge of the occurrence, and that they may issue attachments, based on their own knowledge of the default, where intended witnesses or jurors fail to appear in obedience to process shown by the officer's return to have been duly served. A further illustration is found in the rulings that grand jurors, acting under the sanction of their oaths as such, may find and return indictments based solely on their own knowledge of the particular offenses, and that warrants may be issued on such indictments without further oath or affirmation; and still another is found in the practice which recognizes that where grand jurors, under their oath as such, report to the court that a witness brought before them has refused to testify, the court may act on that report, although otherwise unsworn, and order the witness brought before it by attachment.

We think the legislative practice, fortified as it is by the judicial practice, shows that the report of the committee—which was based on the committee's own knowledge and made under the sanction of the oath of office of its members—was sufficiently supported by oath to satisfy the constitutional requirement.

As to whether subpoenas issued by a committee of the Senate possess the validity of subpoenas issued by the Senate itself and whether in event of disobedience the act that the contumacy related only to testimony sought by a committee is a valid objection the opinion continued:

The witness also points to the provision in the warrant and in the resolution under which it was issued requiring that he be "brought before the bar of the Senate, then and there" to give testimony "pertinent to the subject under inquiry," and contends that an essential prerequisite to such an attachment was wanting, because he neither had been subpoenaed to appear and testify before the Senate nor had refused to do so. The argument in support of the contention proceeds on the assumption that the warrant of attachment "is to be treated precisely the same as if no subpoena had been issued by the committee, and the same as if the witness had not refused to testify before the committee." In our opinion the contention and the assumption are both untenable. The committee was acting for the Senate and under its authorization; and therefore the subpoenas which the committee issued and the witness refused to obey are to be treated as if issued by the Senate. The warrant was issued as an auxiliary process to compel him to give the testimony sought by the subpoenas; and its nature in this respect is not affected by the direction that his testimony be given at the bar of the Senate instead of before the committee. If the Senate deemed it proper, in view of his contumacy, to give that direction it was at liberty to do so.

342. The case of M. S. Daugherty, continued.

Each House of Congress has power through its own process to summon a private individual before one of its committees to give testimony which will enable it the more efficiently to exercise its constitutional legislative function.

A witness may rightfully refuse to answer where the committee exceeds its power or where questions submitted are not pertinent to the matter under inquiry.

It is to be presumed that the object of the Senate in ordering an investigation is to secure information which will aid it in legislating

In a resolution ordering an inquiry it is not necessary for the House or Senate to specify its legislative purposes; for inasmuch as this is the only legitimate purpose under which such investigations may be conducted, in the absence of evidence to the contrary, such purpose is presumed.

The doctrine that the Houses of Congress are empowered to require the testimony of individuals in the exercise of their legislative functions is thus established:

The first of the principal questions—the one which the witness particularly presses on our attention—is, as before shown, whether the Senate—or the House of Representatives, both being on the same plane in this regard—has power, through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution.

The Constitution provides for a Congress consisting of a Senate and House of Representatives and invests it with "all legislative powers" granted to the United States, and with power "to make all laws which shall be necessary and proper" for carrying into execution these powers and "all other powers" vested by the Constitution in the United States or in any department or officer thereof. (Art. I, secs. 1, 8.) Other provisions show that, while bills can become laws only after being considered and passed by both houses of Congress, each house is to be distinct from the other, to have its own officers and rules, and to exercise its legislative function independently. (Art. I, secs. 2, 3, 5, 7.) But there is no provision expressly investing either house with power to make investigations and exact testimony to the end that it may exercise its legislative function advisedly and effectively. So the question arises whether this power is so far incidental to the legislative function as to be implied.

In actual legislative practice power to secure needed information by such means has long been treated as an attribute of the power to legislate. It was so regarded in the British Parliament and in the Colonial legislatures before the American Revolution; and a like view has prevailed and been carried into effect in both houses of Congress and in most of the State legislatures.

The court, however, recognizes the restrictions which govern, the Houses in the exercise of such powers and the limitations upon their right to inquire into purely personal affairs. After citing a number of cases confirming that opinion the court says:

While these cases are not decisive of the question we are considering, they definitely settle two propositions which we recognize as entirely sound and having a bearing on its solution: One, that the two houses of Congress, in their separate relations, possess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective; and the other, that neither house is invested with "general" power to inquire into private affairs and compel disclosures, but only with such limited power of inquiry as is shown to exist when the rule of constitutional interpretation just stated is rightly applied.

When such limitations are exceeded the right of a witness to decline to answer is thus upheld by the court:

We come now to the question whether it sufficiently appears that the purpose for which the witness's testimony was sought was to obtain information in aid of the legislative function. The court below answered the question in the negative and put its decision largely on this ground, as is shown by the following excerpts from its opinion:

"It will be noted that in the second resolution the Senate has expressly avowed that the investigation is in aid of other action than legislation. Its purpose is to 'obtain information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper.' This indicates that the Senate is contemplating the taking of action other than legislative, as the outcome of the investigation, at least the possibility of so doing. The extreme personal cast of the original resolutions; the spirit or hostility toward the then Attorney General which they

breathe; that it was not avowed that legislative action was had in view until after the action of the Senate had been challenged; and that the avowal then was coupled with an avowal that other action was had in view—are calculated to create the impression that the idea of legislative action being in contemplation was an afterthought."

"That the Senate has in contemplation the possibility of taking action other than legislation as an outcome of the investigation, as thus expressly avowed, would seem of itself to invalidate the entire proceeding. But, whether so or not, the Senate's action is invalid and absolutely void, in that, in ordering and conducting the investigation, it is exercising the judicial function, and power to exercise that function, in such a case as we have here, has not been conferred upon it expressly or by fair implication. What it is proposing to do is to determine the guilt of the Attorney General of the shortcomings and wrongdoings set forth in the resolutions. It is 'to hear, adjudge, and condemn.' In so doing it is exercising the judicial function."

"What the Senate is engaged in doing is not investigating the Attorney General's office; it is investigating the former Attorney General. What it has done is to put him on trial before it. In so doing it is exercising the judicial function. This it has no power to do."

We are of opinion that the court's ruling on this question was wrong, and that it sufficiently appears, when the proceedings are rightly interpreted, that the object of the investigation and of the effort to secure the witness's testimony was to obtain information for legislative purposes.

The court then applies the rule to the pending case as follows:

It is quite true that the resolution directing the investigation does not in terms avow that it is intended to be in aid of legislation; but it does show that the subject to be investigated was the administration of the Department of Justice—whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers—specific instances of alleged neglect being recited. Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit. This becomes manifest when it is reflected that the functions of the Department of Justice, the powers and duties of the Attorney General, and the duties of his assistants are all subject to regulation by congressional legislation, and that the department is maintained and its activities are carried on under such appropriations as in the judgment of Congress axe needed from year to year.

The court accordingly deduces:

The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating; and we think the subject matter was such that the presumption should be indulged that this was the real object. An express avowal of the object would have been better; but in view of the particular subject matter was not indispensable.

343. The case of M. S. Daugherty, continued.

It is not a valid objection to such investigation that it might disclose wrongdoing by a public official named in the resolution.

The Senate as a continuing body may continue its committees through the recess following the expiration of a Congress.

Jefferson's Manual and Hinds' Precedents are cited by the Supreme Court as authorities in parliamentary procedure.

As to the objection advanced by the appellee that information elicited in such an interrogatory might incriminate a public official, the opinion declares:

Of course, our concern is with the substance of the resolution and not with any nice questions of propriety respecting its direct reference to the then Attorney General by name. The resolution, like the charges which prompted its adoption, related to the activities of the department while he

was its supervising officer; and the reference to him by name served to designate the period to which the investigation was directed.

We think the resolution and proceedings give no warrant for thinking the Senate was attempting or intending to try the Attorney General at its bar or before its committee for any crime or wrongdoing. Nor do we think it a valid objection to the investigation that it might possibly disclose crime or wrongdoing on his part.

The corroborative effect of a resolution directing the arrest of a witness in supplementing the inference of the earlier resolution that the information desired was sought as a basis for legislative action regardless of the suggestion of "other action" is thus set out in the opinion:

The second resolution—the one directing that the witness be attached—declares that his testimony is sought with the purpose of obtaining "information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper." This avowal of contemplated legislation is in accord with what we think is the right interpretation of the earlier resolution directing the investigation. The suggested possibility of "other action" if deemed "necessary or proper" is of course open to criticism in that there is no other action in the matter which would be within the power of the Senate. But we do not assent to the view that this indefinite and untenable suggestion invalidates the entire proceeding. The right view in our opinion is that it takes nothing from the lawful object avowed in the same resolution and rightly inferable from the earlier one. It is not as if an inadmissible or unlawful object were affirmatively and definitely avowed.

We conclude that the investigation was ordered for a legitimate object; that the witness wrongfully refused to appear and testify before the committee and was lawfully attached; that the Senate is entitled to have him give testimony pertinent to the inquiry, either at its bar or before the committee; and that the district court erred in discharging him from custody under the attachment.

The right of the Senate as a continuing body to continue its committees through the recess following the expiration of a Congress is affirmed as follows:

Another question has arisen which should be noticed. It is whether the, case has become moot. The investigation was ordered and the committee appointed during the Sixty-eighth Congress. That Congress expired March 4, 1925. The resolution ordering the investigation in terms limited the committee's authority to the period of the Sixty-eighth Congress; but this apparently was changed by a later and amendatory resolution authorizing the committee, to sit at such times and places as it might deem advisable or necessary. It is said in Jefferson's Manual: "Neither House can continue any portion of itself in any parliamentary function beyond the end of the session without the consent of the other two branches. When done, it is by a bill constituting them commissioners for the particular purpose." But the context shows that the reference is to the two houses of Parliament when adjourned by prorogation or dissolution by the King. The rule may be the same with the House of Representatives whose members are all elected for the period of a single Congress; but it can not well be the same with the Senate, which is a continuing body whose members are elected for a term of six years and so divided into classes that the seats of one-third only become vacant at the end of each Congress, two-thirds always continuing into the next Congress, save as vacancies may occur through death or resignation.

Mr. Hinds in his collection of precedents says: "The Senate, as a continuing body, may continue its committees through the recess following the expiration of a Congress"; and, after quoting the above statement from Jefferson's Manual, he says: "The Senate, however, being a continuing body, gives authority to its committees during the recess after the expiration of a Congress." So far as we are advised the select committee having this investigation in charge has neither made a final report nor been discharged; nor has it been continued by an affirmative order. Apparently its activities have been suspended pending the decision of this case. But, be this as it may, it is certain that the committee may be continued or revived now by motion to that effect,

and, if continued or revived, will have all its original powers. This being so, and the Senate being a continuing body, the case can not be said to have become moot in the ordinary sense. Our judgment may yet be carried into effect and the investigation proceeded with from the point at which it apparently was interrupted by reason of the habeas corpus proceedings.

The final order of the lower court in discharging the witness from custody is therefore reversed.

344. The case of Robert W. Stewart.

A witness having refused to answer questions the committee of inquiry reported to the Senate which issued a warrant for his arrest and directed the Sergeant at Arms to take him into custody.

Instance wherein the courts denied an application for writ of habeas corpus asked by a recusant witness and remanded the petitioner to the custody of the Senate.

Contention that the Senate is without power to arrest a witness while in attendance in obedience to a subpoena was characterized by the courts as frivolous.

A contention that the Senate may not inquire into private and personal affairs of a witness was overruled by the court on the ground that the Houses of Congress are authorized to call for information essential for the exercise of their power of legislation.

On February 1[1] (calendar day, February 3, 1928), in the Senate Mr. Thomas J. Walsh, of Montana, from the Committee on Public Lands and Surveys, authorized by resolution[2] to inquire into the disposition of certain Liberty bonds acquired by the Continental Trading Co., reported that one Robert W. Stewart summoned as a witness had declined to answer certain questions propounded by the committee.

By direction of the Senate a warrant[3] was issued, and the recusant witness having been apprehended and detained in the custody of the Sergeant at Arms of the Senate, petitioned the Supreme Court of the District of Columbia for a writ of habeas corpus.

Mr. Justice Jennings Bailey in delivering the opinion of the court denying the petition first considered the issue raised by the petitioner as to the power of the Senate to arrest witnesses:

> The warrant was issued and executed and the petitioner now claims that he is being unlawfully detained by the respondents, the Sergeant at Arms of the Senate and his deputy. He rests his claim upon three propositions.
>
> First:
>
> "The Senate is without power to arrest and attach petitioner for the purpose of compelling him to attend as a witness before the Senate when at the time of the arrest the witness was in attendance before the Senate committee under and in obedience to a subpoena, issued by it."
>
> If the committee was seeking information as a basis for legislation by Congress and if the questions asked the petitioner were pertinent to such inquiry and did not invade any of his constitutional rights, it was his duty to answer, and his refusal to do so could be treated as an act of contempt of the Senate. The Senate might thereupon have had him attached to be brought before

[1] First session Seventieth Congress, Senate Report No. 229.

[2] Senate Resolution No. 101.

[3] Record, p. 2440.

the bar of the Senate to answer for his contempt, as has been done in several cases, but instead took a more lenient course in having him brought before the bar of the Senate to answer such pertinent questions as might be asked him there. There was no question but that he had refused to answer as reported by the committee, and he has no ground to complain that he was to be given an opportunity to purge himself of his contempt by giving his testimony before the Senate instead of being brought before its bar for punishment. The attachment could properly be based on his recalcitrant conduct as a witness before the committee. The Senate is not necessarily controlled by the practice of the courts in similar cases.

The contention of the petitioner that the Senate was not authorized to inquire into the personal affairs and private affairs is thus treated by the court:

Petitioner's second and third propositions are:

"Resolution 101 does not call for information essential for the exercise of the power of legislation, but is an attempt at exercising judicial function, beyond the powers of the Senate, and authorizes an inquiry into the private affairs of individuals."

"Petitioner answered every question put to him of public interest with respect to the disposition of the bonds held by the Continental Trading Co. The questions he refused to answer dealt with private and personal matters, the answers to which could in no way furnish information essential to the efficient performance of any legislative function of the Senate."

Resolution 101 authorizes an investigation supplementary to one theretofore authorized, and of which the committee had made no final report. The former investigation had resulted in legislation directing the prosecution of suits, one of which had resulted in the recovery of valuable property of the Government, and in other legislation, and it may be assumed that the Senate had in mind the possibility of the need of further legislation when the latest resolution was passed. The failure to specify such purpose is not fatal to the inquiry. Where the particular investigation has already formed the basis of legislation, the court will not assume that some particular phase of a later investigation supplementary to the former can not be made for the purpose of legislation and that the Senate is transcending its functions under the Constitution.

The petitioner states that he appeared voluntarily before the committee to give his testimony. He took an oath to tell "the truth, the whole truth, and nothing but the truth." He raised no general objection to the scope of the inquiry, but after he had proceeded to answer numerous questions he finally refused to answer as to his knowledge of anyone who received the Liberty bonds mentioned in the resolution or whether he had discussed any of the bond transactions with Sinclair, and other questions of similar character. He voluntarily testified in part, but refused to tell the whole truth, and a partial truth may be as misleading as a falsehood. These questions were clearly relevant to the inquiry and involved no question of privilege. They did not involve the private affairs of the witness, and the witness can not make such a claim on behalf of others when he does not appear to be acting in a representative capacity. But even such a ground would not be an excuse for failure to answer questions relevant to any matters which were the subject of proper inquiry.

The opinion concludes:

In my opinion the grounds upon which the petitioner refused to testify were frivolous and without legal bases and his attachment was justified.

The writ of habeas corpus will be discharged and the petitioner remanded to the custody of the respondents.

The witness appealed from the order of the court but pending the appeal elected to appear before the committee [1] and answer the questions from which he had previously excused himself.

The Senate accordingly adopted the following resolutions vacating the order of arrest.

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[1] Senate Report No. 897.

Resolved, That the order of the Senate heretofore made on the 3d day of February, 1928, directing the Sergeant at Arms to take into custody one Robert W. Stewart and bring him before the bar of the Senate is hereby vacated.

This order shall not be construed as any intimation on the part of the Senate that the indictment heretofore returned against the said Robert W. Stewart for refusal to answer questions propounded to him by the Committee on Public Lands and Surveys should be dismissed.

Simultaneously, the Senate—

Ordered, That the Secretary of the Senate be, and he is hereby, directed to transmit a copy of the report submitted this day by the Committee on Public Lands and Surveys to the United States district attorney for the District of Columbia with a view to having said district attorney determine whether Robert W. Stewart should not be presented to a grand jury for indictment on the charge of perjury.

345. The case of Robert W. Stewart, continued.

A witness giving contradictory testimony while under order for arrest for refusing to answer questions propounded by a committee of inquiry, the Senate vacated the order and referred the case to the district attorney.

In order to support a charge of perjury it must be shown that a quorum of the committee of investigation was present at the time the offense was committed.

The recording of members of a committee as present on their telephonic request does not constitute attendance and physical presence is necessary to make a quorum for the transaction of business.

If a quorum be present and subsequently Members leave temporarily or otherwise a quorum is presumed to be present until and unless the question of no quorum is raised.

A rule adopted by a Senate committee providing that the presence of six Senators should constitute a quorum of the committee was held by the courts to be invalid because adopted at a meeting at which less than a quorum of the committee was present.

The witness was indicted for perjury and tried in the Supreme Court of the District of Columbia and acquitted on the ground that a quorum of the committee was not present on the occasion of the inquiry which resulted in the indictment.

Justice Jennings Bailey in charging the jury said in part:

The first thing that must be proved in this case is that the defendant was sworn to testify before a competent tribunal. If the tribunal before which he testified was not a competent tribunal, he can not be convicted of perjury, no matter how false his testimony may have been. The indictment alleges that he testified before a meeting of the Committee on Public Lands and Surveys of the Senate. To constitute a meeting of a committee, there must be present a majority of the committee, and by "present" I mean actually, physically present. You have heard the testimony as to marking certain members as present with the word quorum after their names when they were not actually, physically present, but when the Senator or his secretary had telephoned the clerk of the committee to mark him as present. That is not such a presence as would be sufficient, even if a majority of such members so telephoned, to constitute a meeting of the committee.

A meeting means a meeting of at least a majority of the committee. In this case, the committee being composed of fifteen, before there could be a meeting of the committee, there must have been present at least eight members of that committee physically in the committee room.

If such a committee so met; that is, if eight members, did meet, and thereafter during the progress of the hearing some of them left temporarily or otherwise and no question was raised as

to the lack of a quorum, then the fact that the majority did not remain there would not affect, for the purposes of this case, the existence of that committee as a competent tribunal, but before the oath was administered, and before the testimony of the defendant was given, there must have been as many as eight members of that committee present.

346. The case of Thomas W. Cunningham, recusant witness.

A witness having refused to answer certain questions propounded to him by a special committee of the Senate duly authorized to investigate the subject of inquiry, the Senate issued a warrant for his arrest and certified its committee's report of the circumstances to the district attorney.

Decision of the Supreme Court on the right of the Senate to subpoena witness and compel testimony.

On March 22, 1928,[1] Mr. William H. King of Utah, on behalf of the special committee authorized to investigate expenditures in senatorial primaries and elections, submitted the report [2] of that committee setting forth the refusal of a witness, Thomas W. Cunningham, to answer certain questions pertinent to the matter under inquiry. Whereupon the Senate agreed to a resolution directing the President of the Senate to issue his warrant to the Sergeant at Arms commanding him to apprehend and detain the witness in custody to await the further order of the Senate.

Subsequently,[3] the Sergeant at Arms having made his return showing the arrest of the witness and his release on a writ of habeas corpus under bail, the Senate certified to the United States District attorney its committee's report of the circumstances.

The witness was indicted by the grand jury in the Supreme Court of the District of Columbia and the case reached the United States Supreme Court and was finally passed on at the May term, 1929.[4]

347. The case of Thomas W. Cunningham, recusant witness, continued.

In providing for the arrest of a recalcitrant witness it is unnecessary for the Senate in inditing the resolution to determine whether the testimony sought and refused was pertinent to the inquiry.

The exercise by the Senate of its judicial powers to judge election returns and the qualifications of its members necessarily involves the power to compel testimony.

In the exercise of its right to pass on the eligibility of its members the Senate may act directly or through a committee.

It is presumed that in the eliciting of testimony the Senate will observe all constitutional restraints.

Mr. Justice Sutherland delivered the opinion of the Court. The opinion refers specifically to the following resolution [5] of the Senate:

Whereas it appears from the report of the Special Committee Investigating Expenditures in Senatorial Primary and General Elections that a witness, Thomas W. Cunningham, twice called before the committee making inquiry as directed by the Senate under Senate Resolution 195 of

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[1] First session Seventieth Congress, Record, p. 5144.

[2] Senate report No. 604.

[3] Record, p. 5353.

[4] Barry *v.* U. S. Ex rel Cunningham, 279 U. S. 597.

[5] S. Res. No. 179.

the Sixty-ninth Congress, declined to answer certain questions relative and pertinent to the matter then under inquiry:

Resolved, That the President of the Senate issue his warrant commanding the Sergeant at Arms or his deputy to take into custody the body of said Thomas W. Cunningham wherever found, and to bring the said Thomas W. Cunningham before the bar of the Senate, then and there or elsewhere as it may direct, to answer such questions pertinent to the matter under inquiry as the Senate, through its said committee, or the President of the Senate, may propound, and to keep the said Thomas W. Cunningham in custody to await further order of the Senate.

The court construes this resolution as expressing the purpose of the Senate to elicit testimony in response to questions to be propounded at its bar and holds that in deciding whether the witness must attend it is not material to consider whether the information sought to be elicited from him by the committee is pertinent to the inquiry which it has been directed to make. The court says:

The correct interpretation of the Senate's action is that given by the district judge and by Judge Woolley. It is true the special committee in its report to the Senate recited Cunningham's contumacy and recommended that he be adjudged in contempt, but the resolution passed by the Senate makes it entirely plain that this recommendation of the committee was not followed. The Senate resolution, after a recital of Cunningham's refusal to answer certain questions, directs that he be attached and brought before the bar of the Senate, not to show cause why he should not be punished for contempt, but "to answer such questions pertinent to the matter under inquiry as the Senate through its said committee or the President of the Senate may propound. * * *" We must accept this unequivocal language as expressing the purpose of the Senate to elicit testimony in response to questions to be propounded at the bar of the Senate, and the question whether the information sought to be elicited from Cunningham by the committee was pertinent to the inquiry which the committee had been directed to make may be put aside as immaterial.

The court holds that the exercise by the Senate of its Constitutional power to judge the election and qualification of its members necessarily involves the ascertainment of facts, the attendance of witnesses and the power to compel answers to pertinent questions, and says:

Generally, the Senate is a legislative body, exercising in connection with the House only the power to make laws. But it has had conferred upon it by the Constitution certain powers which are not legislative but judicial in character. Among these is the power to judge of the elections, returns and qualifications of its own Members. That power carries with it authority to take such steps as may be appropriate and necessary to secure information upon which to decide concerning elections. Exercise of the power necessarily involves the ascertainment of facts, the attendance of witnesses, the examination of such witnesses, with the power to compel them to answer pertinent questions, to determine the facts and apply the appropriate rules of law, and, finally, to render a judgment which is beyond the authority of any other tribunal to review.

As to the latitude allowed the Senate in taking testimony itself or through its committees the opinion continues:

In exercising this power, the Senate may, of course, devolve upon a committee of its Members the authority to investigate and report; and this is the general, if not the uniform practice. When evidence is taken by a committee, the pertinency of questions propounded must be determined by reference to the scope of the authority vested in the committee by the Senate. But undoubtedly, the Senate, if it so determine, may in whole or in part dispense with the services of a committee and itself take testimony; and, after conferring authority upon its committee, the Senate, for any reason satisfactory to it and at any stage of the proceeding, may resume charge of the inquiry and conduct it to a conclusion or to such extent as it may see fit.

The court holds, however, that in the interrogation of witnesses by the Senate it is assumed that all constitutional restraints will be observed. The opinion proceeds:

In that event, the limitations put upon the committee obviously do not control the Senate; but that body may deal with the matter, without regard to these limitations, subject only to the restraints imposed by or found in the implications of the Constitution. We can not assume, in advance of Cunningham's interrogation at the bar of the Senate, that these restraints will not faithfully be observed. It sufficiently appears from the foregoing that the inquiry in which the Senate was engaged, and in respect of which it required the arrest and production of Cunningham, was within its constitutional authority.

It is said, however, that the power conferred upon the Senate is to judge of the elections, returns, and qualifications of its "Members," and, since the Senate had refused to admit Vare to a seat in the Senate or permit him to take the oath of office, that he was not a Member. It is enough to say of this, that upon the face of the returns he had been elected and had received a certificate from the governor of the State to that effect. Upon these returns and with this certificate he presented himself to the Senate, claiming all the rights of membership. Thereby, the jurisdiction of the Senate to determine the rightfulness of the claim was invoked and its power to adjudicate such right immediately attached by virtue of section 5 of Article I of the Constitution.

348. The case of Thomas W. Cunningham, recusant witness, continued.

Whether inquiry into the qualifications of a Senator-elect shall be made prior or subsequent to the administration of the oath is within the discretion of the Senate.

Refusal by the Senate to seat a claimant pending an investigation does not deprive the State of its "equal suffrage in the Senate," within the purview of the Constitution.

The power of the Senate to require testimony of witnesses is in no wise inferior to that exercised by a court of justice and includes under comparable circumstances the power to compel attendance.

A warrant for the arrest of a recalcitrant witness may issue without previous subpoena where service on the witness is a question of doubt.

The mooted question of whether inquiry into the qualifications of a Senator-elect shall be made prior to or subsequent to his admission to membership is thus decided:

Whether, pending this adjudication, the credentials should be accepted, the oath administered, and the full right accorded to participate in the business of the Senate was a matter within the discretion of the Senate. This has been the practical construction of the power by both Houses of Congress, and we perceive no reason why we should reach a different conclusion. When a candidate is elected to either House, he of course is elected a Member of the body; and when that body determines, upon presentation of his credentials, without first giving him his seat, that the election is void, there would seem to be no real substance in a claim that the election of a "Member" has not been adjudged. To hold otherwise would be to interpret the word "Member" with a strictness in no way required by the obvious purpose of the constitutional provision, or necessary to its effective enforcement in accordance with such purpose, which, so far as the present case is concerned, was to vest the Senate with authority to exclude persons asserting membership who either had not been elected or, what amounts to the same thing, had been elected by resort to fraud, bribery, corruption, or other sinister methods having the effect of vitiating the election.

The contention that the refusal to sweax a claimant pending an investigation of his qualifications served to deprive a State of its "equal suffrage in the Senate" is thus disposed of:

Nor is there merit in the suggestion that the effect of the refusal of the Senate to seat Vare pending investigation was to deprive the State of its equal representation in the Senate. The equal representation clause is found in Article V, which authorizes and regulates amendments to the Constitution, "provided, * * * that no State, without its consent, shall be deprived of its equal suffrage in the Senate. This constitutes a limitation upon the power of amendment and has nothing to do with a situation such as the one here presented. The temporary deprivation of equal representation which results from the refusal of the Senate to seat a Member pending inquiry as to his election or qualification is the necessary consequence of the exercise of a constitutional power and no more deprives the State of its "equal suffrage" in the constitutional sense than would a vote of the Senate vacating the seat of a sitting Member or a vote of explusion.

The opinion thus compares the power of the Senate with that exercised by a court of justice and its authority to issue warrants of arrest to compel attendance of witnesses:

In exercising the power to judge of the elections, returns, and qualifications of its Members, the Senate acts as a judicial tribunal, and the authority to require the attendance of witnesses is a necessary incident of the power to adjudge, in no wise inferior under like circumstances to that exercised by a court of justice. That this includes the power in some cases to issue a warrant of arrest to compel such attendance, as was done here, does not admit of doubt. (McGrain *v.* Daugherty, 273 U. S. 135, 160, 180.) That case dealt with the power of the Senate thus to compel a witness to appear to give testimony necessary to enable that body efficiently to exercise a legislative function; but the principle is equally, if not a fortiori, applicable where the Senate is exercising a judicial function.

That such warrants may issue without previous subpoena when there are reasons to doubt the appearance of the witness the opinion agrees:

The real question is not whether the Senate had power to issue the warrant of arrest but whether it could do so under the circumstances disclosed by the record. The decision of the court of appeals is that, as a necessary prerequisite to the issue of a warrant of arrest, a subpoena first should have been issued, served, and disobeyed. And undoubtedly the courts recognize this as the practice generally to be followed. But undoubtedly also a court has power in the exercise of a sound discretion to issue a warrant of arrest without a previous subpoena, when there is good reason to believe that otherwise the witness will not be forthcoming. A statute of the United States (U. S. C., title 28, sec. 659) provides that any Federal judge, on application of the district attorney, and being satisfied by proof that any person is a competent and necessary witness in a criminal proceeding in which the United States is a party or interested, may have such person brought before him by a warrant of arrest, to give recognizance, and that such person may be confined until removed for the purpose of giving his testimony, or until he gives the recognizance required by said judge. The constitutionality of this statute apparently has never been doubted. Similar statutes exist in many of the States and have been enforced without question.

The rule is stated by Wharton, 1 Law of Evidence, section 385, that where suspicions exist that a witness may disappear, or be spirited away, before trial, in criminal cases, and when allowed by statute in civil cases, he may be held to bail to appear at the trial and may be committed on failure to furnish it, and that such imprisonment does not violate the sanctions of the Federal or State constitutions.

349. The case of Thomas W. Cunningham, recusant witness, continued. The Senate having sole authority under the Constitution to judge of the election returns and qualifications of its members, may exercise in its own right the incidental power of compelling the attendance of witnesses without the aid of a statute.

The same presumption of regularity attaches to action by the Senate in directing the arrest of a recusant witness that applies to the proceedings of the courts.

It is assumed that the Senate will deal with a witness in accordance with recognized rules and discharge him from custody upon proper assurance that he will appear to testify when required.

A witness in custody for refusing to testify may invoke the action of the courts only on a clear showing of arbitrary and improvident use of the power amounting to a denial of due process of law.

The court interprets the Constitution as conferring on the Senate sole authority to judge of the elections and qualifications of its Members and the incidental power of compelling the attendance of witnesses without the aid of a statute. The opinion deduces:

> The validity of acts of Congress authorizing courts to exercise the power in question thus seems to be established. The Senate, having sole authority under the Constitution to judge of the elections, returns, and qualifications of its Members, may exercise in its own right the incidental power of compelling the attendance of witnesses without the aid of a statute. The following appears from the report of the committee to the Senate upon which the action here complained of was taken: "A subpoena was issued for his appearance early in June. A diligent search failed to locate him. Finally, Representative Golder, of the fourth district of Pennsylvania, communicated with the committee, stating that Cunningham would accept service. His whereabouts was disclosed and he was served." Upon examination by the committee he repeatedly refused to answer questions which the committee deemed relevant and of great importance, not upon the ground that the answers would tend to incriminate him but that they involved personal matters. These questions have already been recited, and it is impossible for us to say that the information sought and refused would not reflect light upon the validity of Vare's election.

That the act of the Senate in issuing warrants for the arrest of witnesses is attended by all the presumption of regularity applying to the proceedings of the courts the opinion affirms:

> It is not necessary to determine whether the information sought was pertinent to the inquiry before the committee, the scope of which was fixed by the provisions of the Senate resolution. But it might well have been pertinent in an inquiry conducted by the Senate itself, exercising the full, original, and unqualified power conferred by the Constitution. If the Senate thought so, and, from the facts before it reasonably believing that this or other important evidence otherwise might be lost, issued its warrant of arrest, it is not for the court to say that in doing so the Senate abused its discretion. The presumption in favor of regularity, which applies to the proceedings of courts, can not be denied to the proceedings of the Houses of Congress, when acting upon matters within their constitutional authority.

And that in dealing with witnesses the Senate will conform to well-established usage:

> It fairly may be assumed that the Senate will deal with the witness in accordance with well-settled rules and discharge him from custody upon proper assurance, by recognizance or otherwise, that he will appear for interrogation when required. This is all he could properly demand of a court under similar circumstances.

As to the invocation of judicial interference by a person arrested by the Senate the opinion concludes:

> Here the question under consideration concerns the exercise by the Senate of an indubitable power; and if judicial interference can be successfully invoked it can only be upon a clear showing

of such arbitrary and improvident use of the power as will constitute a denial of due process of law. That condition we are unable to find in the present case.

The judgment of the court of appeals holding the arrest void and the witness to be justified in refusing to testify was therefore reversed.

350. The case of Thomas W. Cunningham, recusant witness, continued. Further decision of the Supreme Court with particular reference to the relation of the question of pertinency of interrogatories propounded by the committee.

A resolution of the Senate giving the chronology of the case.

On May 13, 1930,[1] Mr. George W. Norris, of Nebraska, in the Senate, moved this resolution:

Whereas on the 19th day of May, 1926, the Senate of the United States by resolution created a committee of five members and authorized and directed said committee "to investigate what moneys, emoluments, rewards, or things of value, including agreements or understandings of support for appointment or election to office have been promised, contributed, made, or expended, or shall hereafter be promised, contributed, expended, or made by any person, firm, corporation, or committee, organization, or association, to influence the nomination of any person as a candidate of any political party or organization for membership in the United States Senate, or to contribute to or promote the election of any person as a Member of the United States Senate"; and

Whereas in pursuance of its duty under said resolution the committee held a meeting at Washington, in the District of Columbia, on February 21, 1927, at which meeting Thomas W. Cunningham, in obedience to the subpoena of said committee, appeared as a witness; and

Whereas the said Thomas W. Cunningham refused to answer certain pertinent questions propounded to him by said committee; and

Whereas said Thomas W. Cunningham, by virtue of said refusal, violated section 102 of the Revised Statutes of the United States; and

Whereas the said Thomas W. Cunningham was thereafter, to wit, on April 20, 1928, indicted by a grand jury in the Supreme Court of the District of Columbia for refusing to answer the questions so propounded to him by said committee; and

Whereas the said Thomas W. Cunningham was afterwards, by virtue of a warrant issued on account of said indictment, arrested in the city of Philadelphia; and

Whereas the said Thomas W. Cunningham swore out a writ of habeas corpus in the District Court of the United States for the Eastern District of Pennsylvania; and

Whereas upon the hearing in said district court the said Thomas W. Cunningham was remanded to the custody of the United States marshal for removal to the District of Columbia; and

Whereas the said Thomas W. Cunningham appealed from said order of the district court of the United States to the Circuit Court of Appeals for the Third Circuit; and

Whereas upon such appeal the said circuit court of appeals, by a divided opinion reversed the said district court and ordered the said Thomas W. Cunningham discharged from custody; and

Whereas on the same state of facts and on account of the refusal of the said Thomas W. Cunningham to answer said questions as above set forth, the Senate of the United States issued its warrant directed to the Sergeant at Arms of the Senate, commanding the Sergeant at Arms to bring the said Thomas W. Cunningham before the Senate to answer the questions which he had refused to answer before said committee; and

Whereas in said case arising out of the same condition and the same state of facts, the said Thomas W. Cunningham in like manner swore out a writ of habeas corpus in the same courts above named and with like result; and

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[1] Second session Seventy-first Congress, Record, p. 8834.

Whereas in said last-mentioned case the Senate of the United States directed the committee to take an appeal to the Supreme Court of the United States, and the Supreme Court, upon the hearing of said appeal, reversed the order of the said Circuit Court of Appeals for the Third Circuit and reinstated the judgment of the district court, thereby holding that the said Thomas W. Cunningham was in contempt of the Senate for refusing to answer the questions above referred to and in effect holding that the circuit court of appeals in ordering the discharge of the said Thomas W. Cunningham was in error, and in effect reversing said decision (279 U.S. 597); and

Whereas after said decision of the Supreme Court of the United States the United States attorney filed a motion for a rehearing in the case above referred to wherein the Circuit Court of Appeals for the Third Circuit had ordered the discharge of said Thomas W. Cunningham; and

Whereas the said Thomas W. Cunningham has never been tried upon the indictment above referred to and there exists under the decision of the Supreme Court of the United States above referred to no reason why the said Thomas W. Cunningham should not be brought to trial in the Supreme Court of the District of Columbia upon said indictment: Therefore be it

Resolved, That the Hon. Leo. A. Rover, United States attorney for the District of Columbia, be, and he is hereby, directed to report to the Senate—

(1) Whether said motion for a rehearing in the Circuit Court of Appeals for the Third Circuit has been disposed of.

(2) If said motion for a rehearing has been disposed of and decided adversely to the contention of the United States, whether he, the said Leo A. Rover, has taken an appeal therefrom to the United States Supreme Court.

(3) If said motion for a rehearing has not been disposed of, why has the same been delayed?

(4) If said motion has been disposed of by the Circuit Court of Appeals for the Third Circuit, and the said Thomas W. Cunningham has been remanded to the United States marshal for the District of Columbia, why has the said Thomas W. Cunningham not been put upon trial upon the charges contained in said indictment?

In discussing the resolution Mr. Norris said:

I will say if there is any misstatement of fact in the whereases, I am unaware of it. The resolution is a little difficult to understand from a cursory reading of the whereases, but the Senate ought to realize the facts. Under the law, when a witness is subpoenaed before a committee of either branch of Congress and refuses to answer pertinent questions propounded to him, two things happen: First, he has committed a crime, a misdemeanor, by such refusal under section 102 of the Revised Statutes; and, second, he is in contempt of the Senate or the House, as the case may be. Then two courses can be pursued, or either one of them. In this instance both courses were pursued. When Mr. Cunningham refused to answer the questions of the then Senator Reed, of Missouri, the chairman of the committee, Senator Reed brought the matter before the Senate by proper resolution. The Senate referred the case to the United States district attorney for the District of Columbia for his attention, and also ordered the arrest of Mr. Cunningham. So there were two cases then pending against Cunningham arising out of the same state of facts.

It is a little difficult for a person who is not an attorney to realize that there are really two cases, that they axe exactly alike, that there is no difference in the facts, that they are exactly the same in each case. One was a prosecution for a violation of the statute, and one was action by the Senate to compel a witness who refused to answer proper questions.

351. The case of Thomas W. Cunningham, recusant witness, continued.

A further decision by the Supreme Court affirming the power of the Senate to compel testimony.

A recalcitrant witness having been committed for refusal to testify, the Supreme Court sustained the dismissal of a petition for a writ of habeas corpus.

The district judge ordered the commitment of the witness, who thereupon filed a petition for a writ of habeas corpus in the Federal district court. The court dismissed the petition; but on appeal to the Circuit Court of Appeals for the Third Circuit, the order of the district court was reversed [1] on the ground that the questions propounded by the committee of the Senate to the witness were not pertinent to the inquiry.

The case again coming up to the Supreme Court for review on a writ of certiorari, Mr. Justice Sutherland delivered the opinion [2] of the court, reversing the judgment of the court of appeals and holding that the order of commitment was proper and should have been sustained.

352. The case of Bishop James Cannon, jr.

Witnesses having refused to answer questions not contemplated in the resolution authorizing the inquiry, the committee formally declined to insist.

A committee of investigation decided that the powers granted by the resolution authorizing its appointment did not extend to questions propounded in the course of the inquiry and laid the transcript of the record before the Senate.

On June 19, 1930,[3] in the Senate, Mr. T.H. Caraway, of Arkansas, from the subcommittee of the Committee on the Judiciary, authorized to make a special investigation of lobbying, submitted a report from that committee as follows:

Resolved, That it is the sense of the subcommittee of the Committee on the Judiciary investigating lobbying that it should not insist on answers to questions propounded to Bishop James Cannon, jr., and that the transcript of the whole record be laid before the Senate.

Senator Walsh assents to this order only because of the doubt raised as to the authority of the committee under the resolution pursuant to which it is acting.

Mr. Caraway in speaking to the report of the subcommittee quoted in full the resolution [4] empowering the subcommittee to subpoena witnesses and designating the subjects of inquiry as follows:

Whereas it is charged that the lobbyists, located in and around Washington, filch from the American public more money under a false claim that they can influence legislation than the legislative branch of this Government costs the taxpayer; and

Whereas the lobbyists seek by all means to capitalize for themselves every interest and every sentiment of the American public which can be made to yield an unclean dollar for their greedy pockets: Now, therefore, be it

Resolved, That the Committee on the Judiciary of the United States Senate, or a subcommittee thereof be appointed by the chairman of the committee, is empowered and instructed to inquire into the activities of these lobbying associations and lobbyists.

To ascertain of what their activities consist, how much and from what source they obtain their revenues.

How much of these moneys they expend and for what purpose and in what manner.

What effort they put forth to affect legislation.

Said committee shall have the power to subpoena witnesses, administer oaths, send for books and papers, to employ a stenographer, at a cost not exceeding 25 cents per 100 words, to report

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[1] *United States ex rel. Cunningham* v. *Mathues, United States Marshal*, 50 Federal (2d) 449.

[2] *Fetters, U.S. Marshal*, v. *United States ex rel. Cunningham*, 283 U.S. 638.

[3] Second session Seventy-first Congress, House Report No. 43, part 10.

[4] Senate Resolution No. 20.

such hearings as may be had on any subject before said committee or subcommittee thereof, and do those things necessary to make the investigation thorough.

All the expenses for said purposes shall be paid out of the contingent fund of the Senate. For the purposes of this investigation the expenditure of $10,000 is authorized, or such part thereof as may be necessary.

Mr. Caraway in support of the resolution reported by the subcommittee said:

No one would contend that the resolution empowered the Senate committee to go into purely political activities.

That view of the authority and scope of the committee, and the limitations upon it, was announced by the chairman of the committee whenever the question arose. It first rose when the chairman of the Republican National Committee was before the committee. At that time a question was asked by myself touching a transaction that I recognize was political, although at the time that suggestion had not occurred to me. The Senator from Indiana, Mr. Robinson, objected. I conceded that the Senator from Indiana was correct, and I withdrew the question.

The same question arose six times subsequent to that while the same witness was before the committee, and it was, decided the same way each time. So, as I have indicated, that rule was invoked seven times to protect the chairman of the Republican National Committee from answering any inquiry touching political activities, and the question was decided in the same way each time.

The rule was also invoked to protect Mr. Curran, in charge of the National Association Against the Prohibition Amendment, and the decision previously made was adhered to without objection. The same rule was invoked to protect Josephus Daniels when he was before the committee, by the Senator from Montana, Mr. Walsh, who contended that a question asked of Mr. Daniels was outside the power of the committee and concerned a matter which it was beyond the scope of the committee to make inquiry, and the objection was sustained.

Every time that question arose it was held and decided by the committee, without a division of sentiment, so far as I know, in the same way.

353. The case of Bishop James Cannon, jr., continued.

In 1931 a committee of the Senate investigated campaign contributions and expenditures with special reference to violations of the Federal corrupt practices act involving false statements of campaign expenditures and the fraudulent conversion of campaign funds to private uses.

An instance wherein the Clerk of the House, without an order from the House, produced before a Senate committee of investigation, after the expiration of the statutory period provided for their preservation, statements filed in his office in compliance with the provisions of the Federal corrupt practices act.

Instance wherein a witness, summoned in pursuance and by virtue of the authority conferred on a committee to elicit testimony, declined to testify.

On April 10, 1930 [1] (legislative day of April 8), the Senate agreed to the resolution (S. Res. 403) as follows:

Resolved, That a special committee consisting of five Senators, to be appointed by the Vice President, is hereby authorized and directed to investigate the campaign expenditures of the various candidates for the United States Senate, the names of the persons, firms, or corporations subscribing, the amount contributed, the method of expenditure of said sums, and all facts in relation thereto, not only as to the subscriptions of money and expenditures thereof but as to the use of any other means or influence, including the promise or use of patronage, and all other facts in relation thereto which would not only be of public interest but which would aid the Senate in

[1] Second session Seventy-first Congress, Record, p. 6841.

enacting any remedial legislation or in deciding any contest which might be instituted involving the right to a seat in the United States Senate.

The investigation hereby provided for, in all the respects above enumerated, shall apply to candidates and contests before senatorial primaries, senatorial conventions, and the contests and campaign terminating in the general election in November, 1930.

No Senator shall be appointed upon said committee from a State in which a Senator is to be elected in the general election in 1930.

Said committee is hereby authorized to act upon its own initiative and upon such information as in its judgment may be reasonable or reliable. Upon complaint being made before said committee, under oath, by an person, persons, senatorial candidate, or political committee, setting forth allegations as to facts which, under this resolution it would be the duty of said committee to investigate, the said committee shall investigate such charges as fully as though it were acting upon its own motion, unless, after a hearing upon such complaint, the committee shall find that the allegations in said complaint are immaterial or untrue.

Said committee is hereby authorized, in the performance of its duties, to sit at such times and places, either in the District of Columbia or elsewhere, as it deems necessary or proper. It is specifically authorized to require the attendance of witnesses by subpoena or otherwise; require the production of books, papers, and documents; and to employ counsel, experts, clerical, and other assistants; and to employ stenographers at a cost not exceeding 25 cents per one hundred words.

Said committee is hereby specifically authorized to act through any subcommittee authorized to be appointed by said committee. The chairman of said committee or any member of any subcommittee may administer oaths to witnesses and sign subpoenas for witnesses; and every person duly summoned before said committee, or any subcommittee thereof, who refuses or fails to obey the process of said committee or who appears and refuses to answer questions pertinent to said investigation, shall be punished as prescribed by law.

The expenses of said investigation, not exceeding in the aggregate $100,000, shall be paid from the contingent fund of the Senate on vouchers signed by the chairman of the committee or the chairman of any subcommittee.

All hearings before said committee shall be public, and all orders or decisions of the committee shall be public.

The committee shall make a full report to the Senate on the first day of the next session of the Congress.

This resolution was supplemented on January 19, 1931[1] (legislative day of January 5), by the passage of the following:

Resolved, That the special committee of the Senate to investigate campaign expenditures, created under authority of S. Res. 215, adopted April 10, 1930, is hereby further authorized and directed to investigate any complaint made before such committee by any responsible person or persons, alleging (1) the violation, at any time within two years preceding the adoption of the aforesaid resolution, of any provision of the Federal corrupt practices act, 1925, involving a false statement of campaign expenditures, or (2) a fraudulent conversion to private uses, at any time within such period of two years, of any campaign funds contributed for use in any election as defined in the Federal corrupt practices act, 1925. The committee shall investigate fully the allegations in all such complaints, and shall, as soon as practicable, make a full report thereon to the Senate.

Under this authorization, the special committee thus constituted held hearings on February 11, 1931, which were attended by Bishop James Cannon, jr., and at which certain testimony adduced at former hearings before the subcommittee of the Committee on the Judiciary, in the form of memoranda relating to checks credited to the account of Bishop Cannon at various banks, were ordered incorporated in the record.

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[1] Third session Seventy-first Congress, Record, p. 2576.

In the course of the hearings William Tyler Page, clerk of the House of Representatives, appeared voluntarily before the committee and, being asked by the chairman to submit, from the files of the House, certain statements of campaign contributions and expenditures filed in the office of the Clerk of the House in the 1928 [1] campaign, without being sworn, testified as follows:

I am in a somewhat peculiar position with respect to these papers. For many years it has been the practice and policy of the House rather jealously to safeguard its archives, even from being produced upon a subpoena duces tecum before a court or even a committee of the Senate, without its consent. Having known of that practice for many years, and having observed it during my incumbency as Clerk of the House, I hesitated somewhat in coming here until I could rather clarify the situation, and make my coming voluntary altogether, and present to the committee certain statements which I think I am at liberty to present.

The Federal corrupt practices act in regard to statements filed under it in the office of the Clerk of the House says they "shall be preserved by the Clerk or Secretary for a period of two years from the date of filing, shall constitute a part of the public records of his office, and shall be open to public inspection."

Now this is what I find, that I have all of the statements filed in my office that pursuant to that law, by the so-called Anti-Smith Democrats in the campaign of 1928, were filed prior to the expiration of the 2-year period, or, in other words, they have been in my office now for more than two years, with one exception, and that is the statement dated February 15, 1929, filed by the treasurer of the so-called Anti-Smith Democrats with headquarters in Richmond, Va. The 2-year period with respect to that paper will have expired on next Sunday.

Now, in regard to these other papers, the time is past and, under the law, if I so choose I could utterly destroy them. That is not my policy, however. I keep these papers on file and have kept them since the campaign of 1920, for public inspection.

I only mention that to excuse myself from doing anything that might seem to be contrary to the policy of the House. Therefore I have brought these papers here, those antedating, or, rather, those that have been on file for two years or more, feeling at liberty so to do.

I find that in the testimony adduced before the lobby investigation, page 4857, and so forth, all of these statements filed by the treasurer of the Anti-Smith Democrats are set forth. I dare say somebody who had the right to do so, since these papers are open for public inspection, came in there and made copies of them.

Now, in regard to the statement of February 15, 1929, I have made a certificate as to its accuracy except in one respect. I found certain figures here that did not correspond with the original, and changed the statement accordingly, and embraced the change in my certificate, which I will give to the committee.

Now, let me say this, Mr. Chairman, if you please, that I feel at perfect liberty to make this certificate, because the making of a certificate is an exception to the general rule laid down some years ago in the House by the Judiciary Committee and by the House itself in regard to furnishing papers to court and committees under subpoena duces tecum, that where Congress has published a document, a certified copy thereof, if it be a House or Senate document, may be made, and this being a Senate document and the original paper being in my office and not in the Senate file, I feel at liberty to make this certificate.

Personally, I should have been glad to have appeared before this committee of the Senate, of course, and even under oath make any statement that might be desired, but I feel some hesitancy in going that far, but I did feel at liberty to come here and make the statement I have made.

On May 7, 1931,[2] in response to a subpoena, one Ada L. Burroughs appeared before the committee and, being questioned by the chairman and other members of

[1] Third session Seventy-first Congress, Hearings on S. Res. 215 and S. Res. 403, pp. 8, 9.

[2] Ibid, p. 68.

the committee, submitted a statement protesting the jurisdiction of the committee and declined to testify.

Bishop Cannon also submitted a statement and brief, questioning the jurisdiction of the committee and entering formal protest against the legality of Senate Resolution 403 and the investigation being conducted under its authorization.

In prosecution of this protest Bishop Cannon petitioned the Supreme Court of the District of Columbia for a writ of prohibition. The arguments by counsel being heard, the court, in an opinion delivered by Justice Joseph W. Cox, on August 13, 1931,[1] dismissed the petition. An appeal by the relator was dismissed in the Court of Appeals on November 2, 1931.[2]

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[1] Case No. 80100, Supreme Court of the District of Columbia.

[2] Bishop Cannon and Ada L. Burroughs were subsequently defendants in a case brought on indictment for violation of the corrupt practices act which was decided in their favor (65 Federal 2nd 796; 289 U.S. 159).

Chapter CLXXXVI.[1]

THE POWER OF INVESTIGATION.

354. Review of decisions of the Supreme Court relative to the scope and extent of congressional investigations.

Decisions of the Supreme Court relating to immunity of witnesses testifying in congressional investigations.

Decisions of the Supreme Court relating to the punishment of contumacious witnesses.

Form of resolution providing for a congressional investigation.

On May 16, 1911,[2] Mr. James R. Mann inserted in the Record, by unanimous consent, the following memorandum on the subject of congressional investigations:

In drafting a resolution or a law creating a committee or a commission and authorizing it to conduct an investigation for the purpose of securing information to be subsequently reported to Congress, certain principles, announced by the courts in cases involving the legality of governmental investigations, should be borne in mind. A review of the decisions of the Supreme Court in this class of cases discloses the fact that previous investigations which have failed met the disapproval of the courts because the acts of Congress authorizing them were insufficient, and not because of any lack of power in that body to make investigations. It is therefore of the utmost importance that mistakes and errors pointed out by the courts in the laws authorizing previous investigations be avoided. The leading cases announce the following principles:

SCOPE AND EXTENT OF CONGRESSIONAL INVESTIGATIONS.

Congress may authorize a committee or a commission to obtain information upon any subject which, in its judgment, it may be important to possess. (In re Pacific Ry. Com., 32 F. R., 241, 250; 1887.)

Interstate Commerce Commission *v.* Brimson (154 U. S., 447, 472; 1893) holds, in effect, that the Constitution having given to Congress full power in the matter of regulating commerce that body may investigate the whole subject and in that way obtain full and accurate information; that for the purpose of regulating commerce Congress may invest a commission with authority to require and compel the attendance and testimony of witnesses and the production of papers and documents relating to any matter legally committed to it for investigation.

This case holds also that the twelfth section of the interstate-commerce act is constitutional and valid so far as it authorizes and requires the circuit courts of the United States to use their process in aid of inquiries which it holds Congress may lawfully authorize the Interstate Commerce Commission to make. That part of the draft of the proposed resolution, herewith submitted, which authorizes the same aid, follows the language of that section.

[1] Supplementary to Chapter LIV.

[2] First session Sixty-second Congress, Record, p, 1231.

But the courts will not permit a governmental investigation to delve into the purely private affairs of the citizen unless it affirmatively appears that such investigation is material to matters over which Congress has jurisdiction and concerning which it may take some lawful action. I. C. C. *v.* Brimson, 154 U. S., 447, 481, et seq., 1894; Ertick *v.* Carrington, 19 Howell's State Trials, 1029; Kilbourne *v.* Thompson, 103 U. S., 168, 190–6, 1880; In re Chapman, 166 U. S., 661, 668–71, 1896.)

In Kilbourne *v.* Thompson (103 U. S., 168, 1880) a resolution, appointing a special committee and authorizing an investigation into the matter and history of the real-estate pool and the Jay Cooke & Co. settlement was held defective because it did not appear that the subject matter of the investigation was one concerning which Congress had jurisdiction or with reference to which it could take lawful action (p. 193).

The situation may be summarized thus: While Congress may authorize the collection, in the ordinary way, of information on any subject which it may deem of importance to possess, it may authorize the exercise of the extraordinary power of compelling the giving of testimony and the production of documents and papers only in cases where the information required is material to matters over which Congress has jurisdiction and concerning which it may take some lawful action. It is at this point that the power of the Government and the constitutional rights of the citizen meet, and it is here that governmental investigation reaches its limit.

In order, therefore, to lawfully entitle an investigating commission to forcibly compel the giving of testimony and the production of documents and papers, three things are essential.

First. The subject matter of the investigation must be one concerning which Congress has jurisdiction and with reference to which it may take lawful action.

Second. The resolution or statute creating the commission must describe in express terms the subject matter and should indicate clearly the object or purpose proposed to be accomplished by the investigation.

Third. The testimony, or the information contained in the papers and documents, which the commission forcibly seeks must be material and relevant to the subject matter which it is authorized to investigate.

If, therefore, a law authorizing an investigation contains these essential elements, the information pointed out may be secured notwithstanding it may be of a, private or personal nature, providing, of course, the law contains a clause granting to witnesses immunity from future prosecution with respect to information which might tend to criminate them.

In this connection it is to be observed that if the information sought is material to the subject matter which the commission is authorized to investigate it may not be withheld on the ground that it is also material to some other subject which it has no right to inquire into. Inquiries of a commission of this character are not narrowly constrained by technical rules as to the admissibility of proof. Its function is one of inquiry, and it should not be hampered by those narrow rules which prevail in trials at common law where a strict correspondence is required between allegation and proof. (I. C. C. *v.* Baird, 194 U. S., 25, 44, 1904.)

PROVISIONS SUFFICIENT TO GRANT IMMUNITY TO WITNESSES.

Counselman *v.* Hitchcock (142 U. S., 547, 586, 1892) held that section 860, Revised Statutes, did not supply a complete protection against all the perils against which the fifth amendment to the Constitution was designed to guard, and was not a full substitute for that prohibition; that a statutory enactment to be valid must afford to a witness absolute immunity against future prosecution for the offense to which the question relates. While this case involved an investigation instituted by the Interstate Commerce Commission, section 12 of the interstate commerce act, as it then stood, does not appear to have been passed on. That section followed the language of section 860, Revised Statutes, above referred to, however, and when that provision was declared insufficient and ineffectual that part of section 12 of the interstate commerce act then in force was apparently abandoned. The act of February 11, 1893, was then passed to supply a provision which would be sufficient and effectual. It has so been held in Brown *v.* Walker (161 U. S., 591, 1895). The immunity provision of the draft of the proposed resolution herewith submitted follows the language of that act, which has been passed on and declared sufficient by the Supreme Court.

It is well to note, however, that the jurisdiction of an investigating commission is not extended because the resolution or act appointing it contains a provision granting to witnesses immunity from future prosecution. A statute granting immunity to witnesses does no more than deprive them of their right to refuse to answer questions or produce documents or papers which are material to the subject matter of a lawful investigation. It does not extend the jurisdiction of the commission; it only aids it in conducting investigations which it has a right to make.

PUNISHMENT OF CONTUMACIOUS WITNESSES.

As to the punishment of contumacious witnesses the case of Interstate Commerce Commission *v.* Brimson (154 U. S., 447, 485; 1893), holds that:

"Except in the particular instances enumerated in the Constitution and considered in Anderson *v.* Dunn (6 Wheat., 204) and in Kilbourn *v.* Thompson (103 U. S., 168, 190) of the exercise by either House of Congress of its right to punish disorderly behavior upon the part of its Members, and to compel the attendance of witnesses and the production of papers in election and impeachment cases, and in cases that may involve the existence of those bodies, the power to impose fine and imprisonment in order to compel the performance of a legal duty imposed by the United States, can only be exerted, under the law of the land, by a competent judicial tribunal having jurisdiction in the premises. See Whitcomb's case (120 Mass., 118) and authorities there cited."

In re Chapman (166 U. S., 661, 1897) holds that sections 102 and 104, Revised Statutes, for enforcing the attendance of witnesses, etc., are not open to the objection that they conflict with the Constitution; that Congress possesses constitutional power to enact a statute to enforce the attendance of witnesses and to compel them to make disclosure of evidence to enable the respective bodies to discharge their legislative functions; while Congress can not divest itself, or either of its Houses, of the inherent power to punish for contempt, it may provide that contumacy in a witness called to testify in a matter properly under consideration by either House, and deliberately refusing to answer questions pertinent thereto, shall be a misdemeanor against the United States.

In Interstate Commerce Commission *v.* Brimson (53 F. R. 476, 480; 1892), the court said:

"Undoubtedly Congress may confer upon a nonjudicial body authority to obtain information necessary for legitimate governmental purposes, and make refusal to appear and testify before it touching matters pertinent to any authorized inquiry an offense punishable by the courts," or subject witnesses "to penalties or forfeitures. A prosecution or an action for violation of such a statute would be clearly an original suit or controversy between parties within the meaning of the Constitution."

This part of the opinion of the lower court was expressly affirmed by the Supreme Court, notwithstanding the fact that in other particulars the decision was reversed. (I. C. C. *v.* Brimson, 154 U. S., 447, 469; 1894.)

That clause of the draft of the proposed resolution herewith submitted follows the language of the provision passed on in these cases, except that it omits the penalty of imprisonment which was stricken out by the Elkins law.

ALPHABETICAL LIST OF CASES CITED.

Anderson *v.* Dunn, 6 Wheat., 204 (1821); Counselman *v.* Hitchcock, 142 U. S., 547, 586 (1891); Ertick *v.* Carrington, 19 Howell's State Trials, 1029; 1. C. C. *v.* Baird, 194 U. S., 25 (1904); I. C. C. *v.* Brimson, 53 F. R., 476 (1892); 1. C. C. *v.* Brimson, 154 U. S., 447 (1893); In re Chapman, 166 U. S., 661 (1896); In re Pacific Ry Co., 32 F. R., 241 (1987); Kilbourn *v.* Thompson, 103 U. S., 168 (1880); Whitcomb's case, 120 Mass., 118.

TENTATIVE DRAFT OF PROPOSED RESOLUTION.

Whereas (here state the subject matter or thing to be investigated, the power under which Congress sets, and the purpose of the investigation).

Resolved, etc. (This clause should authorize the appointment of a committee; authorize and direct such committee to inquire into and investigate the subject described, and require it to report. Provisions with reference to compelling the giving of testimony and the production of documents, papers, etc., should be included, substantially as follows:

For the purposes of this investigation the committee shall have power to administer oaths and to require, by subpoena, the attendance and testimony of witnesses and the production of all book, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States at any designated place of hearing. And, in case of disobedience to a subpoena, the committee may invoke the aid of any court in the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this action.

And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, issue an order requiring such person to appear before said committee (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements, and documents before the committee, or in obedience to the subpoena of the committee, whether such subpoena be signed or issued by one or more of the members of such committee, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before such committee, or in obedience to its subpoena, or the subpoena of any member thereof: Provided, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements, and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the committee shall be guilty of an offense, and, upon conviction thereof by a court of competent jurisdiction, shall be punished by line not less than $100 nor more than $5,000.

365. Congress has power to obtain information to be used as an aid in formulating legislation, and may require witnesses to testify for that purpose.

Decision of Federal court confirming the right of duly constituted Congressional committees of investigation to inquire into matters pertaining to primary elections.

In an inquiry before a congressional committee, testimony relative to contributions made by one candidate to another candidate for nomination in the same primary was held to be within the scope of the committee's power of investigation.

Where a subcommittee has been authorized to pursue an investigation, hearings opened and conducted by one member are as legal and authoritative as if all members of the subcommittee were present.

For testifying falsely before a congressional committee of investigation a witness was certified to the district attorney and indicted by a Federal grand jury.

An instance wherein, under exceptional circumstances, a committee authorized to investigate matters pertaining to a campaign then in progress held hearings prior to the election.

On May 13, 1931, the Federal court for the Lincoln Division of the District of Nebraska handed down an opinion [1] in the case of The United States of America *v.* Victor Seymour.

The opinion cites the resolution [2] adopted by the Senate on April 8, 1930,[3] providing for the appointment of a committee of five to "investigate the campaign expenditures of the various candidates for the United States Senate."

Under authority conferred by this resolution the Vice President appointed a committee of five Senators, including Mr. Gerald P. Nye, of North Dakota, as chairman. The records of the committee relate that at a regular session attended by four members of the committee—

> A discussion of future procedure was had. The chairman was unanimously authorized to act as a subcommittee and to appoint subcommittees of one or more members to hold hearings as in his judgment was desirable.

Pursuant to this authorization, Mr. Nye held hearings at which it was alleged that one Victor Seymour, on July 2, 1930, testified falsely relative to his knowledge of the candidacy of a certain George W. Norris of Broken Bow, Nebr., in the primary election to nominate a candidate for United States Senator on the Republican ticket, in which primary Senator George W. Norris, of McCook, Nebr., was also a candidate.

The discrepancy in testimony being certified by the subcommittee to the district attorney, was presented to the United States grand jury, which returned an indictment charging perjury, and the case coming to trial, Judge Munger delivered the decision of the court.

The opinion confirms the constitutional grant of power authorizing the Senate committee to elicit testimony, in this language:

> In the arguments offered upon the demurrer it is conceded that the power of the committee of the Senate to make inquiry of the defendant depended upon some constitutional grant of power, express or implied, whereby the Senate committee was authorized to make the investigation which was outlined in the Senate resolution under which Senator Nye purported to act. This constitutional limitation of such an inquiry is well established.

The right of the Senate to investigate matters pertaining to primary elections with a view to acquiring data in contemplation of the formulation of legislation is sustained as follows:

> The inquiries made of the defendant in this case relate to his testimony concerning his knowledge and acts in connection with a campaign preceding a primary election in Nebraska, at which party candidates for United States Senator were to be selected. The seventeenth amendment to the United States Constitution provides for the election of such Senators by the people of each State, by voters having qualifications requisite for electors of the most numerous branch of the State legislature. * * *
>
> In support of the indictment the Government asserts that the inquiries propounded to, and the testimony given by, the defendant was material to the investigation authorized by the Senate resolution and was within the scope of the Senate's right of investigation, because it was in aid of legislation which the United States Senate could enact under section 4 of Article I of the United States Constitution, which reads as follows:

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[1] 50 U. S. 930.

[2] See see. 353, infra.

[3] Second session Seventy-first Congress, Record, p. 6841.

"The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

There can be no doubt of the power of Congress to obtain information as to legislation which it is authorized to enact and that it may require witnesses to testify for that purpose.

* * * The right of Congress to legislate with reference to primary elections similar to such primary elections as were permissible in Nebraska in 1930 has been the subject of decisions in adjudicated cases.

In this connection the court differentiates between the Newberry case [1] and the case at bar, and discusses at length various cases subscribing to this doctrine, in this wise:

In view of the decision in the Newberry case, the defendant in this case contends that Congress could enact no valid legislation as to which the testimony given by the defendant could be of any assistance. Section 4 of article I of the United States Constitution authorizes Congress to make or alter regulations as to the times and manner of holding elections for Senators and Representatives in Congress. The decision in the Newberry case dealt with a specific statute, which directly undertook the regulation of primary elections where United States Senators were nominated for election. The inquiry in this case has a much broader scope. The manner of holding elections for United States Senators and Representatives which has been in general use in recent years in the United States has been by the use of written or printed ballots, cast by qualified voters at a designated time and before qualified election officers. Since the adoption of the system known as the Australian ballot law, it has been provided by statutes that the only manner in which an election could be conducted in many of the States for the election of a Senator or Representative has been by the use of a printed official ballot, furnished to the voters by public officers, and that upon such ballots no names of nominees for Representative or Senator could be printed unless such nominee had been regularly chosen, as provided by other statutes, at a primary election preceding the general election. (See Corp. Jr. 140, 141.) It has further been a part of the manner of holding such general elections in many States that the names of those who have been otherwise regularly nominated for public office could not be printed upon the ballots to be used by the voters at a general election unless such nominees should first file a sworn statement of the amount of money which had been received and expended by such nominees in procuring their nominations. Other statutes require similar statements as to money contributed to or disbursed by any campaign committee or others acting on behalf of such nominee.

Congress at different times has exerted the power of controlling the manner of holding elections for members of Congress. In the case of *Ex parte Siebold*, the court was considering the provisions of sections 2011, 2012, 2016, 2017, 2021, 2022, 5515, and 5522 of the Revised Statutes of the United States providing for Federal supervisors of elections and the duties imposed upon them and upon officers of elections and forbidding interferences with such elections. Other acts of Congress have provided for the election of Representatives by districts, and that election should be by ballot or by voting machine.

In view of these decisions, it is not perceived why Congress may not enact valid legislation providing that the manner of elections for Senators and Representatives shall be by the use of a printed official ballot, that upon such ballot there shall be printed the names of those nominees only for such offices as shall have duly made and filed with some public officer a sworn statement of all contributions and expenditures which have been made by or for the benefit of such candidate, to his knowledge, in obtaining the nomination for such office, and the names of those contributing and of those to whom money was paid, also requiring, as a prerequisite to the printing of such nominee's name upon the ballot, that the officers of a campaign committee acting on behalf of such candidate should file a similar statement.

It would relate directly to the manner of holding the elections for Senators and Representatives. As an aid to the advisability and the scope of such legislation, the testimony of the defend-

[1] 256 U. S. 41.

ant in this case as to contributions alleged to have been made by W. M. Stebbins as an alleged candidate for nomination for United States Senator, and to alleged agents of George W. Norris of Broken Bow, Nebr., as an alleged candidate for nomination for United States Senator, was pertinent to the inquiry which was directed to be made by the resolution of the United States Senate. It would be difficult to say that such testimony was pertinent to no other possible legislation that Congress could enact, and it is not necessary to assert such a sweeping negative. In view of the conclusion reached it is not necessary to consider whether the inquiry directed by the resolution was authorized by clause I of section 5 of article 4 of the Constitution, as an investigation of the qualifications of candidates, one of whom might thereafter become a Member elect of the Senate.

The opinion in this case also decides inferentially questions pertaining to the number of members of a committee or subcommittee required to legally conduct hearings of this character. In the opening the hearings[1] at Broken Bow, Nebr., on July 19, 1930, Mr. Nye announced:

The question may now arise as to the authority for only one member of the committee conducting the hearing here today. That possibility was taken care of by a resolution of the committee itself, providing that a subcommittee of one could conduct hearings upon such occasions as it was found impossible for more than one to attend. So I will conduct this hearing to-day as a subcommittee of one of that Senate committee which is charged with the duties which have been outlined by me in the reading of this resolution.

Mr. Nye at this hearing[2] also called attention to the departure of his subcommittee in this inquiry from the custom of congressional committees of investigations in prosecuting such inquiries prior to election and during the progress of the campaign it was proposed to investigate. Mr. Nye said:

We are establishing here to-day something of a precedent for our committee. Until now it has not been our purpose, nor have we resorted to the holding of hearings in any State prior to the conduct or prior to the holding of the primary election. The committee did not make this a hard and fast rule, yet we had not anticipated what occasion might cause us to want to conduct hearings prior to the conduct of a primary; but in this specific case a new condition presented itself to the committee, a condition which found one candidate for the United States Senate filing for that office as a candidate and then absenting himself completely, so far as was known, from the State of Nebraska itself; and in the face of such allegations as were filed with the committee and conveyed to the committee through other means, the committee has deemed it highly advisable and quite the proper thing to conduct such a hearing as we are about to conduct here to-day.

356. Various instances of investigations by the House.

On March 29, 19 10,[3] the House authorized the investigation of changes reflecting on the integrity of Members of the House arising out of the interest of the Merchant Marine League in legislation relating to the American merchant marine.

357. On August 21, 1911,[4] the House on recommendation[5] of the Committee on Labor, authorized the appointment of a special committee to investigate systems of shop management, with special reference to their applicability to Government work.

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[1] Hearings on S. Res. 215, p. 2.

[2] Ibid.

[3] Second session Sixty-first Congress, Record, p. 3890.

[4] First session Sixty-second Congress, Record, p. 4364.

[5] House Report No. 52.

The report[1] of the committee, submitted on March 9, 1912, was referred to the House Calendar, and was not further acted upon.

358. On April 18, 1921,[2] the House agreed to a resolution creating and empowering a select committee to investigate the escape of Grover Cleveland Bergdoll, convicted by Army general court-martial as a draft deserter and sentenced to confinement in the United States disciplinary barracks.

The report of the select committee accompanied by minority views was submitted on August 18,[3] and was referred to the Committee of the Whole House.

359. On March 12, 1924,[4] the Senate agreed to a resolution authorizing the appointment of five Members, three of the majority and two of the minority party, to investigate the Bureau of Internal Revenue.

Thereupon the acting President of the Senate pro tempore appointed as members of this committee Messrs. James E. Watson, of Indiana; Richard P. Ernst, of Kentucky; James Couzens, of Michigan; Andrieus A. Jones of New Mexico; and William H. King, of Utah.

On May 6, 1924,[5] a resolution offered by Mr. Watson proposing to discharge the special committee from the further consideration of the subject under inquiry was indefinitely postponed.

Subsequently Mr. Watson resigned as chairman of the committee and Mr. Couzens was appointed to succeed him.

The committee held exhaustive hearings and submitted a report[6] in the first session of the Sixty-ninth Congress.

360. On March 24, 1924,[7] the House agreed to a resolution authorizing the appointment by the Speaker of a select committee of five Members to investigate the preparation, distribution, sale, payment, retirement, surrender, cancellation, and destruction of Government bonds and other securities. Pursuant to the resolution, the Speaker appointed Messrs. Louis T. McFadden, of Pennsylvania; James G. Strong, of Kansas; Edward J. King, of Illinois; Henry B. Steagall, of Alabama; and W. F. Stevenson, of South Carolina.

The committee was subsequently authorized to employ clerical assistance and to incur expenses not exceeding $10,000.

The report of the select committee was submitted March 2, 1925[8] accompanied by separate minority views signed by Mr. McFadden and Mr. Strong, respectively, and was referred to the House calendar.

361. On June 7, 1924,[9] the Senate, without debate or record vote, agreed to the following resolution:

Resolved, That a special committee of five Senators be elected forthwith to investigate and report to the Senate on December 5, 1924, the campaign expenditures made by or on behalf of,

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[1] Second session Sixty-second Congress, House Report No. 403.

[2] First session Sixty-seventh Congress, Journal, p. 103; Record, p. 412.

[3] House report No. 534.

[4] First session Sixty-eighth Congress, Record, p. 4023.

[5] Record, p. 7934.

[6] Senate Report No. 27.

[7] First session Sixty-eighth Congress, Journal, p. 363; Record, p. 4817.

[8] House Report. No. 1635.

[9] First session Sixty-eighth Congress, Record, p. 11139.

or in support of, or in opposition to, any and all candidates for President and Vice President and presidential electors; the names of the persons, firms, or corporations contributing to the said candidate or candidates or their party committee or committees, or any other agency, the amounts contributed, pledged, loaned, or otherwise made available for use, the method of expenditure of said sums, and all the facts in relation thereto, not only as to the subscriptions of money and the expenditures thereof but as to the use of any other means of influence, including the promise of patronage, and all other facts in relation thereto that would not only be of public interest but would aid the Congress in any necessary remedial legislation.

The said committee is hereby empowered to sit and act during the adjournment of Congress at such time and place as it may deem necessary; to require by subpoena, or otherwise, the attendance of witnesses, the production of books, papers, and documents; to employ stenographers at a cost of not exceeding 25 cents per hundred words. The chairman of the committee, or any member thereof, may administer oaths to witnesses. Subpoenas for witnesses shall be issued under the signature of the chairman or any member of the committee. Every person who, having been summoned as a witness by authority of said committee, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the investigation heretofore authorized, shall be held to the penalties provided by section 102 of the Revised Statutes of the United States.

The expenses thereof shall be paid from the contingent fund of the Senate on vouchers ordered by said committee, signed by the chairman thereof, and approved by the Committee to Audit and Control the Contingent Expenses of the Senate.

Immediately upon the passage of this resolution, on motion of Mr. Henry Cabot Lodge, of Massachusetts, Messrs. William E. Borah, of Idaho; Wesley L. Jones, of Washington; Henrik Shipstead, of Minnesota; T. H. Caraway, of Arkansas; and Thomas F. Bayard, of Delaware, were elected as members of the special committee of investigation.

Hearings were held by the committee, and on February 12, 1925 [1] (legislative day of February 3), Mr. Borah submitted the report of the committee, incorporating itemized records of contributions and expenditures of major political parties, and recommending the enactment of a corrupt practices act.

362. On February 10, 1925 [2] Mr. Homer P. Snyder, of New York, from the Committee on Indian Affairs, submitted the report from the Subcommittee of the Committee on Indian Affairs, appointed under authority of House Resolution 348 to inquire into and investigate the situation with reference to the administration of Indian Affairs in Oklahoma.

The subcommittee consisted of Messrs. Homer P. Snyder, of New York; Scott Leavitt, of Montana; George F. Brumm, of Pennsylvania; Sam B. Hill, of Washington; M. C. Garber, of Oklahoma; Carl Hayden, of Arizona; and W. W. Hastings, of Oklahoma. Under the authorizing resolution [3] expenses of the investigation were limited to $5,000.

The report consisted largely of findings of facts relating to the conduct of personal estates of four Indian wards of the Government, with recommendations relating to the administration of the affairs of the Five Civilized Tribes, and was accompanied by minority views signed by Mr. Hill and Mr. Hastings.

The report was referred to the House Calendar and was not acted upon by the House.

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[1] Senate Report No. 1100.

[2] Second session Sixty-eighth Congress, House Report No. 1527.

[3] Journal, 658.

363. On January 24, 1925,[1] the House agreed to a resolution authorizing an investigation by a select committee of five Members to be appointed by the Speaker, of the National Disabled Soldiers' League (Inc.), its methods of solicitation of funds, sources of revenue, character and pay of officials, distribution of funds for the benefit of the veterans of the World Wax, uses of the United States mails, implication of indorsement by the Commissioner of Internal Revenue, and all other matters pertaining to the organization and conduct of said league. The committee was authorized to send for persons and papers, administer oaths, take testimony, and, by later resolution, to incur expenses not to exceed $1,000.

The Speaker appointed as members of this committee Messrs. Hamilton Fish, of New York; William D. Boies, of Iowa; Richard S. Aldrich, of Rhode Island; Eugene Black, of Texas; William P. Connery, of Massachusetts.

On March 3[2] Mr. Fish, from the select committee, submitted a report which was referred to the Committee of the Whole House.

The report was received and ordered printed.

364. On May 19, 1926[3] (legislative day of May 17), in the Senate, Mr. James A. Reed, of Missouri, moved the following resolution:

Resolved, That a special committee of five, consisting of three members selected from the majority political party, of whom one shall be a progressive Republican, and of two members from the minority political party, shall be forthwith appointed by the President of the Senate; and said eommittee is hereby authorized and instructed immediately to investigate what moneys, emoluments, rewards, or things of value, including agreements or understandings of support for appointment or election to office have been promised, contributed, made, or expended, or shall hereafter be promised, contributed, expended, or made by any person, firm, corporation, or committee, organization, or association to influence the nomination of any person as the candidate of any political party or organization for membership in the United States Senate, or to contribute to or promote the election of any person as a Member of the United States Senate at the general election to be held in November 1926. Said committee shall report the names of the persons, firms, or corporations, or committees, organizations, or associations that have made or shall hereafter make such promises, subscriptions, advancements, or payments and the amount by them severally contributed or promised as aforesaid, including the method of expenditure of said sums or the method of performance of said agreements, together with all facts in relation thereto.

Said committee is hereby empowered to sit and act at such time or times and at such place or places as it may deem necessary; to require, by subpena or otherwise, the attendance of witnesses, the production of books, papers, and documents, and to do such other acts as may be necessary in the matter of said investigation.

The chairman of the committee or any member thereof may administer oaths to witnesses. Every person who having been summoned as a witness by authority of said committee willfully makes default, or who, having appeared, refuses to answer any question pertinent to the investigation heretofore authorized, shall be held to the penalties provided by section 102 of the Revised Statutes of the United States.

Said committee shall promptly report to the Senate the facts by it ascertained.

The resolution[4] was agreed to and a committee appointed consisting of Mr. Reed, chairman; Mr. Charles L. McNary, of Oregon; Mr. Guy D. Goff, of West

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[1] Second session Sixty-eighth Congress, Record, p. 2437.

[2] House Report No. 1638.

[3] First session Sixth-ninth Congress, Record, p. 9677.

[4] This resolution was supplemented by S. Res. 227, 258, and 324 of the Sixty-ninth Congress.

Virginia; Mr. William A. King, of Utah; and Mr. Robert M. La Follette, jr., of Wisconsin.

The committee was continued in the succeeding Congress [1] by the following resolution:

Resolved, That a resolution of the United States Senate, agreed to on May 19, 1926, numbered Senate Resolution 195, of the Sixty-ninth Congress, first session, creating a special committee to investigate expenditures in senatorial primary and general elections, and all subsequent resolutions dealing with the said special committee and agreed to by the United States Senate during the Sixty-ninth Congress (to wit, S. Res. 227, S. Res. 258, and S. Res. 324), have continued in full force and operation since the dates of their respective enactment by the Senate, and do now, as then, express the will of this body.

And that the said special committee appointed pursuant to said Senate Resolution 195 of the Sixty-ninth Congress, first session, shall continue to execute the directions of the said several resolutions relating to the said committee until the Senate accepts or rejects the final report of the said special committee or otherwise orders.

The committee held numerous us hearings and from time to time submitted reports,[2] including reports on the election of Frank L. Smith in the Illinois primary election, with special reference to contributions by Samuel Insull; the election of William S. Vare in Pennsylvania primaries and elections, with particular attention to contributions by Thomas W. Cunningham; the senatorial elections in Arizona; the primary election in Illinois, reporting the contumacy of Robert E. Crow, Daniel T. Schuyler, Samuel Insull, and Thomas W. Cunningham, and the election of a Senator from New Jersey. These investigations were made the basis of various further inquiries by the Senate and gave rise to a number of questions eventually carried to the Supreme Court for final adjudication.[3]

365. On April 29, 1922,[4] the Senate agreed to a resolution requesting the Secretary of the Interior to transmit to the Senate copies of oil leases within the naval reserve, with related papers, and authorizing the Committee on Public Lands and Surveys to investigate the entire subject with reference to the rights and equities of the Government and the preservation of natural resources.

The authorization was further supplemented on June 5,[5] by a resolution conferring on the committee power to require the attendance of witnesses and the production of books and papers, with provision for the payment of the expenses of the investigation from the contingent fund.

On January 9, 1928,[6] the Senate by further resolution authorized the Committee on Public Lands and Surveys to continue the investigation with specific directions to inquire into designated phases of the subject. This investigation eventually led to the indictment [7] of Harry F. Sinclair and Robert W. Stewart.

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[1] First session Seventieth Congress, Record, p. 488.

[2] Second session Sixty-ninth Congress, Senate Report No. 1197, parts 1 to 5; First session Seventieth Congress, Senate Report No. 603, parts 1 and 2; Second session Seventieth Congress, Senate Report No. 1861.

[3] See sec. 347 in this volume.

[4] Second session Sixty-seventh Congress, Record, p. 6096.

[5] Record, p. 8140.

[6] First session Seventieth Congress, Record, p. 1185.

[7] See sections 336 and 340 of this volume.

366. On October 1, 1929,[1] the Senate passed a resolution[2] empowering the Committee on the Judiciary to inquire into the activities of lobbyists and authorizing the expenditure of $10,000 in such investigations.

Under the authority thus granted, Mr. T. H. Caraway, of Arkansas, Chairman of the subcommittee, submitted from time to time various reports[3] including reports relating to Senator Hiram Bingham, of Connecticut; Frederick L. Koch, an employee of the Tariff Commission; Joseph R. Grundy, president of the Pennsylvania Manufacturers Association; J. A. Arnold, of the Southern Tariff Association; the Hawaiian Sugar Planters Association; the National Council of American Importers & Traders; the Tennessee River Improvement Association, with regard to its interest in legislation relating to Muscle Shoals; John J. Raskob, a director of the Association against the Prohibition Amendment; Dr. Eugene R. Pickrell, formerly chief chemist in the Customs Service, and representing the General Dye Stuffs Corporation, and others.

367. On February 10, 1930,[4] the House agreed to this resolution:

Resolved, That a subcommittee of the Committee on Appropriations, specially designated by the committee to conduct hearings and examine estimates of appropriations for the eradication, control, and prevention of the spread of the Mediterranean fruit fly, is authorized to visit the State of Florida and other adjacent territory to obtain information and data in connection with the purposes of such estimates. As a necessary incident to the examination of such estimates of appropriations, the subcommittee is authorized, to the extent it may deem advisable, to investigate expenditures heretofore made and currently being made from Federal funds on account of such fruit fly. For the purposes of this resolution, the subcommittee is authorized to sit and act at such times and places in the District of Columbia and elsewhere as it may determine, to hold hearings, to require the attendance of witnesses, to compel the production of books, papers, and documents, to take testimony, to employ personal services, to have printing and binding done, and to make such expenditures as it deems necessary.

The committee held hearings in the District of Columbia and in Florida but made no formal report.

368. On May 22, 1930,[5] the House authorized the investigation of Communist propaganda in the United States with particular reference to such activities in educational institutions. Subsequently, provision[6] was made for payment of the expenses of the investigation from the contingent fund in amount not to exceed $25,000.

369. In 1928,[7] and again in 1930,[8] the House provided by resolution for the appointment of a special committee to investigate campaign expenditures of the various candidates for the House in both parties.

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[1] First session Seventy-first Congress, Record, p. 4115.

[2] Senate Res. No. 20; see sec. 7603 of this volume.

[3] Senate Report No. 43, parts 1 to 10.

[4] Second session Seventy-first Congress, Record, p. 3375.

[5] Second session Seventy-first Congress, Record, p. 9759 temporary.

[6] Record, p. 11099.

[7] First session Seventieth Congress, Record, p. 10688; Second session Seventieth Congress, Record, p. 896.

[8] Second session Seventy-first Congress, Record, p. 11600.

Chapter CLXXXVII.[1]

THE CONDUCT OF INVESTIGATIONS.

370. Instance wherein the House, upon request of a committee of investigation, limited the scope of its inquiry.

At the suggestion of a committee charged with an investigation its authority to inspect private and secret archives was canceled.

The report of a committee authorized to report "during the present session" is privileged.

On January 9, 1909,[2] the House agreed to the following resolution:

Resolved, That the Speaker is authorized to appoint a select committee of five members, whose duty it shall be to inquire and report to the House at its present session, as follows:

First. What appropriations were made at the first session of the Sixtieth Congress for the fiscal year 1909 that could be used to prevent frauds in and depredations upon the several branches of the public service, including the protection of public lands and their products from fraudulent entry or appropriation, and to apprehend and punish persons charged with violations of the laws of the United States; also what increase, if any, was made in any of such appropriations over the amounts appropriated for 1908.

Second. What branches of the public service, paid for in whole or in part out of the United States Treasury, are authorized or are in existence and supported by appropriations made by Congress, whose principal duties are to detect and prevent frauds, or to apprehend and bring to trial and punishment persons charged with violating the laws of the United States; whether such branches of the public service or any persons employed therein have been or are engaged in any duty not contemplated by the law or the appropriation establishing or providing for such service; the names of the persons employed, for any period, in each branch of such service during the current and last fiscal year, the rates of compensation and allowance paid or being paid to each of them, by whom they were appointed and on whose recommendation, and a statement of the specific duty performed, or engaged upon by each of such employees, each day since the beginning of the fiscal year 1908.

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[1] Supplementary to Chapter LV.

[2] Second session Sixtieth Congress, Record, p. 699; Journal, p. 137.

The committee, or any subcommittee thereof, is authorized to sit during the session of the House; to send for persons and papers, including private or secret archives; to administer oaths; and to employ such clerical, messenger, and stenographic assistance as they shall deem necessary; all expenses incurred hereunder shall be paid on the certificate of the chairman of the committee out of the contingent fund of the House.

Mr. Marlin E. Olmsted, of Pennsylvania, from the select committee so created, submitted on February 1,[1] a resolution enlarging the powers of the committee by authorizing an inquiry into what decrease as well as increase

If any was made in any of such appropriations over the amounts appropriated for nineteen hundred and eight.

authorized in the first paragraph of the original resolution, and eliminating the requirement that the committee ascertain and report on

the names of the persons employed, for any period, in each branch of such service during the current and last fiscal year; the rates of compensation and allowance paid or being paid to each of them, by whom they were appointed and on whose recommendation, and a statement of the specific duty performed or engaged upon by each of such employees each day since the beginning of the fiscal year nineteen hundred and eight.

The clause in the last paragraph:

Including private or secret archives.

was also eliminated.

The resolution was agreed to, and on March 3,[2] Mr. Olmsted submitted the final report of the committee with the request that it be printed in the Record without being read.

Mr. Edwin W. Higgins, of Connecticut, objected.

Mr. Olmsted submitted that under the authority of the resolution creating the committee it was authorized to report at any time and the report was privileged.

The Speaker[3] held that the report was privileged and as such could be read and would thereupon appear in the Record, but that unanimous consent was required for its insertion in the Record without reading.

371. By joint resolution a joint committee was created, empowered, and instructed to make an investigation.

The House by special order provided for election of House members of a joint select committee previously authorized by law.

The resignation of a member from a joint select committee created by law is made either to the House or to the committee and, while the House has no power either to accept or to refuse to accept such resignation, it may fill the vacancy so occasioned.

Instance wherein the House investigated delay in the reference and transmission of paper to a committee.

The report of a committee of investigation making no recommendations was laid on the table.

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[1] Record, p. 1685; Journal, p. 242.

[2] Record, p. 3795; Journal, p. 395.

[3] Joseph G. Cannon, of Illinois, Speaker.

Discussion of the procedure in the presentation and reference of reports from commissions created by law and from joint committees of the two Houses.

A statute provides for the printing and distribution of documents.

Discussion of the functions of the joint committee on printing.

A standing committee of the House, to which had been referred the report of a joint select committee of investigation, concluded it was not authorized to review the evidence or pass judgment on the findings so referred, and that the only duty which devolved upon it was to present to the House bills designed to carry into effect the recommendations of the committee of investigation.

On January 7, 1910,[1] the House transmitted to the Senate a joint resolution authorizing an investigation of the Interior Department and the Bureau of Forestry of the Department of Agriculture, which was later agreed to by the Senate and approved by the President January 19, 1920, in the following form:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That a joint committee of both Houses of Congress is hereby created, to be composed of six Members of the Senate, to be appointed by the President thereof, and six Members of the House of Representatives, to be elected by that body. Any vacancy occurring on the committee shall be filled in the same manner as the original appointment. The said committee is hereby empowered and directed to make a thorough and complete investigation of the administration, action, and conduct of the Department of the Interior and its several bureaus, officers, and employees, and of the Bureau of Forestry, in the Department of Agriculture, and its officers and employees, touching, relating to, or bearing upon the reclamation, conservation, management, and disposal of the lands of the United States, or any lands held in trust by the United States for any purpose, including all the resources and appurtenances of such lands, and said committee is authorized and empowered to make any further investigation touching said Interior Department, its bureaus, officers, and employees, and of said Bureau of Forestry, its officers, and employees, as it may deem desirable. Said committee or any subcommittee thereof is hereby empowered to sit and act during the session or recess of Congress, or of either House thereof; to require, by subpoena or otherwise, the attendance of witnesses and the production of books, documents, and papers; to take the testimony of witnesses under oath; to obtain documents, papers, and other information from the several departments of the Government, or any bureau thereof; to employ stenographers to take and make a record of all evidence taken and received by the committee, and to keep a record of its proceedings; to have such evidence, record, and other matter required by the committee printed and suitably bound; and to employ such assistance as may be deemed necessary. The chairman of the committee, or any member thereof, may administer oaths to witnesses. Subpoenas for witnesses shall be issued under the signature of the chairman of the committee or the chairman of any subcommittee thereof. And in case of disobedience to a subpoena this committee may invoke the aid of any court of the United States or of any of the Territories thereof or of the District of Columbia or the district of Alaska, within the jurisdiction of which any inquiry may be carried on by said committee in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this resolution. And any such court within the jurisdiction of which the inquiry under this resolution is being carried on may, in case of contumacy or refusal to obey a subpoena issued to any person under authority of this resolution, issue an order requiring such person to appear before said committee and produce books and papers if so ordered and give evidence touching the matter in question, and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend

[1] Second session Sixty-first Congress, Record, p. 383.

to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding except in prosecution for perjury committed in giving such testimony. In addition to being subject to punishment for contempt, as hereinbefore provided, every person who, having been summoned as a witness by authority of said committee, or any subcommittee thereof, Willfully makes default, or who, having appeared, refuses to answer any question pertinent to the investigation herein authorized, shall be deemed guilty of a misdemeanor and, upon conviction thereof, be punished by a fine of not more than one thousand dollars nor less than one hundred dollars, and imprisonment in a common jail for not more than one year nor less than one month.

Any official or ex-official of the Department of the Interior, or of the Bureau of Forestry, in the Department of Agriculture, whose official conduct is in question, may appear and be heard before the said joint committee or any subcommittee thereof, in person or by counsel.

All hearings by and before said joint committee or any subcommittee thereof shall be open to the public. The said joint committee shall conclude its investigation and report to this Congress all the evidence taken and received and their findings and conclusions thereon. The sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to pay the necessary expenses of said joint committee, the said sum to be disbursed by the Secretary of the Senate upon vouchers to be approved by the chairman of the committee.

On January 20,[1] the House agreed to the following resolution reported by the Committee on Rules:

Resolved, That immediately on the adoption of this resolution the House shall proceed by resolution to elect its members of the joint committee provided for by the joint resolution "Authorizing the investigation of the Interior Department and the Bureau of Forestry of the Department of Agriculture."

Thereupon, Mr. Frank D. Currier, of New Hampshire, "by direction of the Republican Caucus," offered the following which was agreed to:

Resolved, That the following Members be elected the House members of the joint committee provided for by the joint resolution authorizing an investigation of the Interior Department and the Bureau of Forestry of the Department of Agriculture: Mr. Samuel W. McCall, of Massachusetts; Mr. Marlin E. Olmsted, of Pennsylvania; Mr. Edwin Denby, of Michigan; Mr. Edward H. Madison, of Kansas; Mr. James T. Lloyd, of Missouri; and Mr. Ollie M. James, of Kentucky.

On the following day Mr. Lloyd tendered in writing:

Hon. JOSEPH G. CANNON,
Speaker of the House of Representatives.

DEAR SIR: I hereby request to be excused from service on the joint committee to investigate the Interior Department and the Bureau of Forestry in the Department of Agriculture.

JAMES T. LLOYD.

A question arising as to whether the House was authorized to accept the resignation, the Speaker said:

As to the right of the gentleman from Missouri, Mr. Lloyd, to resign, this is the situation: The gentleman was appointed under the joint resolution, which is a law, which provided that the House should select six members and the Senate six members of the joint committee or commission of investigation, the Vice-President appointing the Senate members and the House electing the members on the part of the House. The commission exists under law. The House of Representatives, in the opinion of the Chair, has no power in this instance to make a removal or refuse a resignation. In many respects resignation from this joint committee is like unto the resigna-

[1] Record, p. 837; Journal, p. 195.

tion by a Member of Congress. Ordinarily the resignation by a Member of Congress is to the House. It may be to the governor of the State. The governor of the State in such case notifies the House, or the Member notifies the House that he has sent his resignation to the governor.

Now, the House, under the law, has the power which it has exercised in appointing the members of the commission in question. In the event of a vacancy among the House members upon the commission the House, as the law provides, has the power to fill that vacancy.

After citing various precedents:

That is sufficient to show what the practice has been; but if it were an open question, the House having the power under the law to appoint this commission, while it has no power to accept a resignation and no power to refuse to accept such a resignation, in the opinion of the Chair the resignation may be to the House, which has the power to select a successor, or it may be to the commission.

The report [1] of the joint committee was submitted to the House on December 7.

On January 26, 1911,[2] Mr. Gilbert M. Hitchcock, of Nebraska, rising to a question of the privilege of the House, offered the following:

Whereas on December 7 the House received from the joint committee appointed to investigate the Department of Interior and the Forestry Bureau three reports, made under House joint resolution 103; and

Whereas there was unexplained delay, doubt, and mystery, and confusion in referring said reports to the Committee on Agriculture, and the said reference was not made until December 19; and

Whereas the said committee did not receive said reports in accordance with said order of reference until January 25; and

Whereas said reports during that period were neither upon the Speaker's desk nor in the hands of the Committee on Agriculture, to which they were referred, nor of any other committee: Now, therefore,

Resolved, That these irregular proceedings and this misleading and improper treatment of these reports, rendering them for six weeks unavailable and inaccessible, constitute a violation of the proper procedure of the House, and the Committee on Rules be, and it is hereby, directed to investigate and report to the House within one week the reasons for the delay and irregular treatment of these reports.

After debate Mr. Hitchcock offered the following in lieu thereof, which was agreed to by the House:

Resolved, That the Committee on Rules be, and it is hereby, directed to investigate and report to the House within one week all facts connected with the reference of the so-called Ballinger reports and any delay regarding the transmission of said reports to the committee to which referred.

During the investigation by the Committee on Rules, Mr. Asher C. Hinds, clerk at the Speaker's table, testified:

The first question which came up about that report was in what way it should be made, and the view was taken that that committee was in reality a commission established by law, and was not a committee, parliamentarially, and that the proper way to make the report would be for the vice chairman, Mr. McCall, on behalf of the House, to write a letter of transmittal to the Speaker, and send the report that way. A report so sent to the House is treated as we treat executive communications, that is the communications from the heads of departments of the Government and other communications to the House that the Speaker lays before the House through the

[1] Senate Document No. 719.

[2] Third session Sixty-first Congress, p. 1491.

basket, and the usual way of treating it is for the endorsement to be made in behalf of the Speaker on the back of it, showing what it is and also showing the reference. That endorsement was made in this case, and the reference also on the back of the letter of transmittal, and the document was put into the basket on the Clerk's desk or handed to the journal clerk. Mr. McCall was anxious that the House should know that the report had been brought in, so he asked unanimous consent to have that letter of transmittal read to the House; and that letter of transmittal was read to the House, as a matter of information, by unanimous consent.

You will find that in the Congressional Record of December 7. That was merely an outside performance; it had nothing to do with the reference. It was a privilege accorded Mr. McCall by the House, but not one to which he had a right under the rules.

But nothing was said by the Speaker about a reference, because a document of that kind would not be referred in open House, but would be referred through the basket.

As to the printing and distribution of documents, he explained:

Where a document is referred, the minute it is referred the rules and the law take charge of it as to printing, and the law provides for the printing of 1,682 copies, and provides how they shall be distributed;

And the fact is that I had no right, so far as official authority goes, to send word to hold the report. When I have referred the document and handed it to the Journal clerk it has gone beyond my jurisdiction, or rather the Speaker's jurisdiction, but for convenience I sometimes use discretion to keep the business moving in proper channels.

For instance, the rule is that everything that is referred through that basket shall be printed. Sometimes some department of the Government will send up a wooden box of manuscript that would cost thousands of dollars to print. There is no way of bringing that to the attention of the House, so I simply leave off the direction to print. Strictly, under the rules, the printing is required as an incident of the reference, but by leaving off the direction to print time is given for the committee to whom a document is referred to examine as to the necessity for printing. Of course all that is beyond the proper authority of my office; but that little discretion does no harm and saves some useless printing. It was in line with this habit of exercising some discretion, and in order to facilitate the printing in the way desired by the joint committee, that I sent word to hold the report. Of course, really when it has passed from me to the Journal clerk the Speaker's connection with it was through.

As to the method of presenting reports from commissions:

Reports from commissions have very generally been handled as I tell you. It has varied, however. Sometimes they have arisen on the floor and asked unanimous consent to bring them in, and they were in those cases referred on the floor to committees by unanimous consent; but that takes time, so when Members have come to me in such cases I have always advised them to present the report by a letter of transmission; that saves delay and all bother.

If it had been a joint committee of the two Houses, created by the action of the two Houses entirely, the proper procedure would be for its report to go to the calendar directly.

In response to an inquiry as to the method of referring reports from the Joint Committee on Printing:

The Joint Committee on Printing, so far as its joint functions are concerned, has seemed not to be a legislating committee. The Joint Committee on Printing makes us no reports. It is a very anomalous committee. I do not remember when anything of a legislative nature has ever been reported from that committee, as a joint committee, to the House. The two parts of that committee act as standing committees of their respective Houses, and whenever you have a report on the calendar from the Committee on Printing it is not from the joint committee, but it is from the House section of it. The Joint Committee on Printing has practically no functions except executive functions.

But this joint committee was established by statute, and its method of compelling testimony was the statutory method and not the constitutional method under the prerogative of the House.

The report [1] of the Committee on Rules found:

On December 7, Senator Nelson, chairman of the Ballinger Commission, introduced into the Senate a concurrent resolution calling for the printing of 30,000 copies.

The only delay seems to have been caused by the slow progress through the Senate and the House of Senator Nelson's concurrent resolution. The committee are unable to find from the testimony submitted any delay as the result of design upon the part of anyone.

The Committee on Agriculture, to which the report of the joint committee of the Senate and House was referred, reported [2] on February 2, holding:

Your committee does not conceive it to be its duty or within its province to review this evidence as if it were a court of appeals and pass judgment upon the finding of the joint committee. Your committee does believe that through the reference to it of this report it might properly assume jurisdiction and present to the House for its consideration bills designed to carry into effect the legislative recommendations of the joint committee.

The records of the Congress disclosed the fact, however, that bills are now pending precisely in line with these recommendations. Inasmuch, therefore, as measures designed to carry into effect the recommendations of the report of the joint committee have been already introduced in the respective Houses and are under consideration by the committees to which they were properly referred, it would seem futile and unnecessary for this committee to enter upon the field.

For these reasons it is the judgment of your Committee on Agriculture that it has no function to perform in relation to this report, and it therefore respectfully returns the same to the House with the recommendation that it be discharged from the further consideration thereof.

372. The term of a resolution creating and empowering a committee of investigation have not always been strictly construed.

A committee of investigation expressed the opinion that the appearance as lobbyists of former Senators and former Members of the House should be discouraged.

On February 28, 1911,[3] the select committee appointed to investigate certain Indian contracts submitted their report.

The resolution under which the committee was appointed directed the committee to investigate—

all circumstances connected with certain contracts now said to exist by and between J. F. McMurray, an attorney, of McAlester, Oklahoma, or any other person or persons, and the Choctaw and Chickasaw Tribes of Indians of Oklahoma, or any member or members thereof, or any other of the Five Civilized Tribes, the Osage Indians, or any members thereof, this to include bribery, fraud, or any undue influence that may have been exerted on behalf of the approval or procuring of the said contracts, or any of them.

The report thus construes the resolution:

Strictly construed the text of the resolution would have limited the committee to the investigation of existing contracts. But when the resolution was being considered in the House it was evidently contemplated that the committee was not to be so limited in its inquiry, but might inquire into any contracts. See Congressional Record of June 25, 1910, wherein the following colloquy, which occurred on the floor of the House immediately prior to the adoption of the resolution, is reported:

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[1] House Report No. 2102.

[2] House Report No. 2044.

[3] Third session Sixty-first Congress, Record, p. 3711; House Report No. 2273.

"Mr. STEPHENS of Texas. I desire to ask the chairman of the committee whether or not this resolution is broad enough to include all contracts between this man McMurray and these nations of Indians?

"Mr. TAWNEY. And any other contracts?

"Mr. STEPHENS of Texas. Will it go back 10 years?

"Mr. MANN. It will go back as long as the committee wants it to go back."

It was deemed necessary, therefore, in order to make an exhaustive and intelligent inquiry relative to existing contracts with McMurray, to ascertain his contractual relations with any of the Five Civilized Tribes prior to entering into the pending or existing contracts.

In the course of its report the committee express the following opinion on the activities of former Members of the Senate and House in seeking to affect legislation:

Furthermore, the committee is of the opinion that the appearance of former Senators and former Members of the House of Representatives in respect to matters where legislation is desired to be procured through their activities, as well as in matters requiring executive or departmental approval, should be discouraged.

373. The House has sometimes provided for the election of a select committee.

The motion to amend is not entertained while the motion to refer is pending.

A resolution providing for the election of a select committee previously authorized is privileged as affecting the organization of the House.

A motion may be withdrawn in the House, although an amendment to it may have been offered and may be pending.

The motion to refer, the previous question not being ordered, has precedence of the motion to amend.

The ordering of the previous question on a pending proposition precludes the motion to amend.

The previous question may be moved on both the motion to refer and on the pending proposition.

The House has by resolution authorized a committee of investigation to sit wherever it might deem necessary.

On May 9, 1911,[1] the House agreed to the resolution (H. Res. 157) providing for the election of a select committee to investigate and ascertain whether the American Sugar Refining Co. had violated the antitrust act.

On a subsequent day[2] Mr. Robert L. Henry, of Texas, offered, as privileged, the following:

Resolved, That the following Members shall constitute the select committee provided for in House resolution 157: Thomas W. Hardwick (chairman), Finis J. Garrett, William Sulzer, H. M. Jacoway, John E. Raker, George R. Malby, Joseph W. Fordney, E. H. Madison, and Asher C. Hinds.

After debate, Mr. Thomas U. Sisson, of Mississippi, moved to refer the resolution to the Committee on Rules.

Mr. Victor Murdock, of Kansas, then proposed to offer an amendment striking out a name and substituting another.

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[1] First session Sixty-second Congress, Record, p. 1143.

[2] Record, p. 1254; Journal p. 205.

The Speaker [1] held:

If the motion to refer should be voted down, then any gentleman on the floor in the present situation has a right to offer to end this original resolution by striking out any name and substituting another, or by striking out all of the names and substituting others. That is true until some gentleman moves the previous question and the previous question is ordered. The gentleman from Louisiana is recognized.

In the course of debate Mr. S. A. Roddenbery, of Georgia, inquired if the resolution was privileged.

The Speaker replied that it was privileged because affecting the organization of the House.

After further debate, Mr. James R. Mann, of Illinois, offered as an amendment to Mr. Sisson's motion a proposition to refer the resolution to a select committee of 15 members instead of to the Committee on Rules.

Mr. Sisson then proposed to withdraw his motion to refer, when Mr. N. E. Kendall, of Iowa, raised the point of order that a motion could not be withdrawn after an amendment had been offered and was pending.

The Speaker ruled that the mover of the resolution could withdraw it, no amendment having been adopted or decision made thereon, and that Mr. Sisson's motion was withdrawn.

Whereupon, Mr. Mann moved to refer the resolution to a select committee of 15 members.

Mr. Oscar W. Underwood, of Alabama, having moved the previous question, on the motion of Mr. Mann, Mr. Murdock inquired if a motion to strike out and insert was in order.

The Speaker replied that the demand for the previous question, if ordered, would preclude amendment.

Thereupon Mr. Mann made the point of order that the previous question could not be moved on the original resolution while a motion to refer was pending.

The Speaker held that it was in order to move the previous question on both the resolution and the motion to refer and entertained the motion for the previous question which was ordered, yeas 139; nays 80. The resolution was then agreed to.

Subsequently [2] the House further—

Resolved, That the special committee created 'under the provisions of House resolution No. 157 be authorized to sit, as a whole or by subcommittee, at such places as it may deem necessary.

374. The House by resolution elected a committee of investigation.

A Member appointed on a committee of investigation was, at his request, excused by the House from service on the committee.

Discussion of practices of the committees in ordering printing of hearings.

The House has denied to subcommittees the right granted to the committee as a whole to sit at such places as it might deem necessary.

The Department of Justice having instituted proceedings involving an investigation of subjects previously entrusted to a committee of investiga-

[1] Champ Clark, of Missouri, Speaker.

[2] Record, p. 2944; Journal, p. 310.

tion appointed by the House, the committee of its own initiative abandoned that phase of the investigation and confined its attention to other subjects committed to it by the House.

Form of special order providing for consideration of report of a committee of investigation.

On May 16, 1911,[1] the House by resolution elected the committee previously authorized under the resolution providing for an investigation of alleged violations of the antitrust act by the United States Steel Corporation.

On the following day[2] the Speaker laid before the House:

WASHINGTON, D. C., *May 17, 1911.*

Hon. CHAMP CLARK,

Speaker of the House of Representatives.

MY DEAR MR. SPEAKER: Not anticipating that any business would be transacted by the House yesterday beyond the debate upon the resolution providing for the approval of the constitutions of New Mexico and Arizona, I withdrew from the Hall to attend to other matters. During my absence the House paid me the compliment of a unanimous election to membership on the select committee provided for by House resolution 148, for the investigation of the affairs of the United States Steel Corporation and other corporations. That election, coming without solicitation or suggestion from me, I very much appreciate, but I find that the resolution includes, by name, the Pennsylvania Steel Co. and calls for an inquiry whether it has any relations of affiliations in violation of law with the so-called Steel Corporation.

The Pennsylvania Steel Co. is located in my district. I have no financial interest in it of any kind and have never represented it professionally or in any other way. I have, however, a great interest in its welfare because so many of my constituents are dependent upon it for support and some of its officers are my warm personal friends. I do not believe that it has any relations or affiliations in violation of law with the United States Steel Corporation or anybody else, but it will avoid any appearance of partiality if the finding to that effect be made by others than myself. I therefore beg to be excused from service upon the committee.

Very respectfully,

M. E. OLMSTED.

There being no objection when the question was put by the Speaker the resignation was accepted, and on June 2,[3] the House—

Resolved, That Augustus P. Gardner be, and is hereby, elected a member of the select committee provided for in House resolution 148 in place of Marlin E. Olmsted, resigned.

On June 9, 1911,[4] Mr. Augustus O. Stanley, of Kentucky, chairman of the select committee, asked unanimous consent for the consideration of the following:

Resolved, That there shall be printed 10,000 extra copies of the testimony taken in each of the hearings before the special committee appointed under House resolution 148, to investigate violations of the antitrust act of 1890, and other acts.

Mr. James R. Mann, of Illinois, reserving the right to object, said:

It does not require action on the part of the House at all to accomplish this; that the matter has always been in the hands of the Committee on Printing; and that under the law the committee would have authority to order a thousand copies of hearings printed on its own order; and under the law, within the limit of $200 at each time the hearing is printed, which would cover

[1] First session Sixty-second Congress, Record, p. 1253.

[2] Record, p. 1296; Journal, p. 214.

[3] Journal, p. 245; Record, p. 1683.

[4] Journal, p. Record, p. 1341.

more than 10,000 copies, they can get that number printed by getting a certificate from the clerk of the Committee on Printing. That leaves it so that the gentleman can have such number printed as he desires. If he prints 5,000 copies to-day and run short of the number necessary to meet the demand, he can order more printed to-morrow by getting an order from the Committee on Printing.

The special committee on pulp and paper printed a good many thousand copies of different hearings. We would order at one time 2,500 copies, or 3,000 or 4,000 copies, and, as the demand came in later, we would get another order. Of course, we had to go to the Committee on Printing, but there never was any hesitation in granting the order, and we had some control over the matter.

One time I took possession of some rooms over in the House Office Building which had been occupied by a special committee known as the Lilly investigation committee. I found in that room stacked up a great mass—tons, I should say—of hearings that had been ordered printed on the assumption that they would be used, which were still there, printed at great expense, and I ordered them thrown away or sold as waste paper, there being no other disposition to be made of them.

Thereupon Mr. Stanley withdrew the resolution.

Subsequently,[1] Mr. Stanley asked for the consideration of the following resolution:

Be it resolved, etc., That the special committee created under the provisions of the House resolution No. 148 be authorized to sit (as a whole or by subcommittee) at such places as it may deem necessary.

Mr. Mann said:

It has been called to my attention that various investigating committees are appointing small subcommittees where there is no occasion for it, to carry on investigations that ought to be carried on by the full committees, where all the minority members may attend and have notice.

After debate the resolution was modified and agreed to in the following form:

Be it resolved, etc., That the special committee created under the provisions of House resolution 148 be authorized to sit at such places as it may deem necessary.

Under the original resolution creating and empowering the select committee to conduct the investigation, the committee was particularly charged with the duty of determining whether the organization and operation of the United States Steel Corporation was in violation of the Sherman antitrust law. During the progress of the investigation, however, the Department of Justice instituted a proceeding in the Federal court seeking the dissolution of the corporation.

Thereupon, the select committee determined as follows:

The committee has had under careful consideration the objections made by the United States Steel Corporation, through its counsel, to the further prosecution of this investigation. The resolution under which this committee is proceeding directs the committee—

First. To inquire into and report as to whether the United States Steel Corporation is in its organization or operations acting in violation of the antitrust law.

Second. To inquire into and report violations of the interstate-commerce acts and amendments thereto, and to the acts relating to national-banking associations.

Third. To inquire into the restriction or destruction of competition by reason of the relations of the United States Steel Corporation and its officers with other companies.

Fourth. The excessive capitalization and bonding of corporations.

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[1] Journal, p. 313; Record, p. 3076.

Fifth. Combinations created by holding companies, interlocking directorates, and other devices.

Sixth. Combinations to depress the value of stocks and bonds for the purpose of acquiring them.

Seventh. Panics in the bond and stock markets.

And the committee is also directed to recommend such further legislation by Congress as in its opinion is desirable.

The objection made by the counsel for the Steel Corporation to the further continuance of the investigation was based upon the ground that the Government had filed a bill in the courts of New Jersey against the United States Steel Corporation, seeking its dissolution under the antitrust law. As to this objection, it is our unanimous opinion that the committee should continue the investigation as if no proceeding on the part of the United States Government were now pending against said corporation, but not for the purpose of determining the questions involved in the action brought by the Government against the United States Steel Corporation, and any inquiry into the subjects embraced in that action should be made for the purpose of enabling the committee to recommend such further legislation as in its opinion is desirable. Touching all other matters the committee will proceed as heretofore.

The report of the special committee was submitted by Mr. Stanley on August 2, 1912,[1] and was later debated under the following order agreed to on August 6.[2]

Resolved, That there be evening sessions of the House of Representatives on Thursday August 8, 1912, and Friday, August 9, 1912, beginning at 8 o'clock p. m. and continuing until 11 o'clock p. m. on each day, during which time it shall only be in order to discuss the report of the special committee appointed under House resolution 148 to investigate violations of the antitrust act of 1890, one half of the time to be controlled by the gentleman from Kentucky [Mr. Stanley] and the other half by the gentleman from Massachusetts [Mr. Gardner]; that on said days it shall be in order, when the business of the House is disposed of, to move to take a recess until 8 o'clock.

375. Instance wherein a committee of the House to which was referred a resolution providing for the creation of a select committee to make an investigation, itself conducted the investigation and reported to the House.

On June 6, 1911,[3] Mr. Robert L. Henry, of Texas, from the Committee on Rules, to which had been referred a resolution providing for the creation of a select committee to investigate the arrest and extradition of John J. McNamara, submitted the following report:[4]

The Committee on Rules has had under consideration House concurrent resolution 6, providing for the appointment of a committee on investigation and, report: That they held hearings, at which the proponent and all others desiring to be heard appeared and gave testimony. In the opinion of your committee it covered all the material facts that could be elicited by a select committee, and further investigation would throw no additional light on the transaction, and it is therefore unnecessary. The testimony is herewith submitted for the information of the House, with a view of determining whether or not further legislation is necessary. It is recommended that House concurrent resolution 6 do lie upon the table.

After brief debate, on motion of Mr. Henry, by unanimous consent, the testimony and the report were referred to the committee on the Judiciary.

The resolution was then laid on the table without debate or division.

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[1] Second session Sixty-second Congress, Record, p. 10078; House Report No. 1127.

[2] Record, p. 10304; Journal, p. 928.

[3] First session Sixty-second Congress, Record, p. 1717; Journal, p. 250.

[4] House report No. 46.

376. The House sometimes confers upon subcommittees the power to send for persons and papers.

A general investigation having been conducted by subcommittees, the several reports were made to the committee and appended to its general report.

Minority views may accompany the report of a subcommittee made to the committee.

A committee, under authority expressly conferred by the House, apportioned work of investigation among subcommittees.

Pursuant to authorization to "meet at such places as said committee deems advisable," subcommittees of a select committee held hearings in various States of the Union and in Europe.

On June 4, 1919,[1] the House agreed to the following resolution providing for the appointment of a select committee on expenditures in the War Department to investigate all contracts and expenditures by the War Department or under its direction during the World War:

Resolved, That the Speaker of the House of Representatives be, and he is hereby, directed to appoint from the membership of this House a select committee of 15 members, for the Sixty-sixth Congress, and which said committee is hereby authorized to fully investigate all contracts and expenditures made by the War Department, or under its directions, during the present war; and, in addition to the powers herein conferred, shall have the same powers and authority as are now conferred by the rules of this House upon the standing Committee on Expenditures in the War Department; said committee is hereby authorized to send for persons and papers, to administer oaths and affirmations, to take testimony, to sit during the sessions of the House and during any recess which may occur during its sessions, and may meet at such places as said committee deems advisable. Said committee is also hereby authorized and empowered to appoint such subcommittees as it may deem advisable, and such subcommittees, when so appointed, are hereby authorized to send for persons and papers, to administer oaths and take testimony, and to meet at such times and places as said committee shall from time to time direct.

Resolved further, That said select committee shall report to the House, in one or more reports, as it may deem advisable, the result of its investigations, with such recommendations as it may care to make.

Resolved further, That the Speaker of the House is hereby authorized to issue subpoenas to witnesses, upon the request of said committee or any subcommittee thereof, during any recess of Congress during the sessions.

Resolved further, That the Sergeant at Arms of the House be directed to serve all subpoenas and other process put into his hands by said committee or any subcommittee thereof.

Pursuant to this resolution, the Speaker appointed Messrs. William J. Graham, of Illinois; Edwin S. Johnson, of South Dakota; Charles F. Reavis, of Nebraska; Walter W. Magee, of New York; Roscoe C. McCulloch, of Ohio; Oscar E. Bland, of Indiana; Albert W. Jefferis, of Nebraska; Clarence MacGregor, of New York; Henry D. Flood, of Virginia; Finis J. Garrett, of Tennessee; Frank E. Doremus, of Michigan; Jerome F. Donovan, of New York; and Clarence F. Lea, of California, as members of the select committee.

Subsequently the following resolution providing for payment of the expenses of the investigation was agreed to by the House:

[1] First session Sixty-sixth Congress, Record, p. 640, Journal, p. 133.

Resolved, That the Select Committee on Expenditures in the War Department, appointed under the resolution of the House of Representatives adopted June 4, 1919, be, and is hereby, authorized and empowered to employ such stenographic, clerical, and legal assistance and such accountants, and to have such printing and binding done, as it may deem necessary.

All expenses that may be incurred by said committee, including the expenses of said committee or any subcommittee thereof when sitting outside of the District of Columbia, shall be paid out of the contingent fund of the House of Representatives on vouchers signed by the chairman of said select committee, or by the chairman of a subcommittee, where such expenses are incurred by such subcommittee.

Upon organization, the select committee apportioned the work of the investigation among five subcommittees: Subcommittee No. 1, on aviation; subcommittee No. 2, on camps; subcommittee No. 3, on foreign expenditures; subcommittee No. 4, on the Quartermaster's Department; and subcommittee No. 5, on ordnance, there being two majority Members and one minority Member on each subcommittee.

These subcommittees held hearings and made exhaustive investigations in various States and in Europe and from time to time submitted reports to the select committee, which were adopted as reports of the select committee and by it reported [1] to the House. Most of the reports were accompanied by minority views. Accompanying these reports were minority views signed by dissenting members of the subcommittees.

In addition to findings of fact, the committee reported legislative and administrative recommendations, including resolutions requesting the Secretary of War to place on sale surplus food products,[2] providing for sale and distribution of surplus motor vehicles,[3] requesting the Secretary of Wax to review settlement of certain claims arising out of war contracts,[4] and bills [5] prohibiting sale of Government property to certain persons, and directing transfer of certain claims to Court of claims.

377. A committee of investigation adopted rules for examination of witnesses and taking of testimony.

The House enlarged the powers of a select committee after it had been created.

On May 9, 1911,[6] the following resolution providing for an investigation of violations of the antitrust act of July 2, 1890, commonly known as the Sherman antitrust law, by a special committee to be elected by the House, was agreed to:

Resolved, That a committee of nine members, to be elected by the House, be, and is hereby, directed to make an investigation for the purpose of ascertaining whether or not there have been violations of the antitrust act of July 2, 1890, and the various acts supplementary thereto, by the American Sugar Refining Co., incorporated January 10, 1891, under the laws of the State of New Jersey, and the various corporations controlled thereby or holding stocks or bonds therein or whose stocks or bonds are held, in whole or in part, thereby, and all other persons or corporations engaged in manufacturing or refining sugar and their relations with each other, which said violations have not been prosecuted by the executive officers of the Government.

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[1] House reports Nos. 171, 463, 441, 616, 637, 816, 998, 1002, 1307, 1400, 1406, 1408, 1410.

[2] Record, p. 3356.

[3] Record, p. 8898.

[4] Record, p. 8362.

[5] Third session Sixty-sixth Congress, Record, p. 357.

[6] First session Sixty-second Congress, Journal, p. 198. Record, p. 1147.

Said committee is also directed to investigate the organization and operations of said American Sugar Refining Co., and its relations with other persons or corporations engaged in the business of manufacturing or refining sugar, and all other persons or corporations engaged in manufacturing or refining sugar and their relations with each other, and if in connection therewith violations of the aforesaid laws are disclosed, to report same to the House.

Said committee shall also inquire whether the organization and operations of the American Sugar Refining Co. and other persons or corporations having relations with it, and all other persons or corporations engaged in manufacturing or refining sugar and their relations with each other, have caused or had a tendency to cause any of the following results:

First. The restriction or destruction of competition among manufacturers or refiners of sugar.

Second. An increase in price of refined sugar to the consumer or decrease in the price of sugar cane or sugar beets to the producer thereof.

And said committee shall report to the House all the facts and circumstances disclosed by the investigation herein provided, with such recommendations as it may deem advisable.

And said committee as a whole, or any subcommittee thereof, is authorized to sit during sessions of the House and the recess of Congress, to employ clerical and other assistance, to compel the attendance of witnesses, to send for persons and papers, and to administer oaths to witnesses.

The Speaker shall have authority to sign, and the Clerk to attest, subpoenas during the recess of Congress.

Mr. Henry of Texas, from the Committee on Rules, submitted the following:

The Committee on Rules, to whom was referred House resolution 157, to investigate violations of the antitrust act of 1890 and other acts, have considered the same and beg leave to report with the recommendation that it do pass.

Later the House by separate resolutions, designated the committee so authorized;[1] provided for payment of expenses, not to exceed $25,000,[2] and empowered it to sit as a whole or as a subcommittee wherever deemed necessary.[3]

Upon organizing the committee announced the adoption of the following rules:[4]

RULE 1. That each witness appearing before the committee shall first be examined by the chairman, or by a member designated by him, without interruption until conclusion, and after the chairman or member has concluded, then any other member desiring shall be permitted to ask such questions as he may wish, and when he shall have concluded, then any other member, and so on, until the members of the committee have had opportunity for examination.

RULE 2. That if in the public proceedings of the committee any objection is made by any member of the committee, or by any witness or other person, with regard to the admissibility of testimony or any other matter or thing, it shall, in the first instance, be ruled upon by the chairman of the committee, and if any member of the committee desires to object to such ruling, then the question shall be submitted to the committee.

RULE 3. Counsel may attend witnesses summoned before this committee, but may not participate in the proceedings, either by way of examination or argument, except upon permission given by the committee, from time to time, as the occasion arises.

RULE 4. These rules shall apply to any subcommittee sitting for the purpose of taking testimony.

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[1] Record, p. 1296.

[2] Record, p. 1717.

[3] Record, p. 2945.

[4] Committee hearings, vol. 1, p. 3.

On February 17, 1912,[1] Mr. Thomas W. Hardwick, of Georgia, from the special committee presented the report of the committee which was ordered to be printed.

378. A committee having completed the investigation with which charged, suggested in its report thereupon the filing of a supplemental report showing the results of the investigation.

The House has by express authorization granted a select committee power to report at any time.

The resolution adopted by the House September 11, 1917,[2] authorizing the appointment of a committee to investigate the East St. Louis riots, provided that the committee so appointed should "have power to report at any time."

The report of the committee was presented on July 6, 1918,[3] and closed with the following statement:

> Your committee has not adjourned sine die for the reason that it is possible, at least, that a supplementary report may be made showing the beneficial results of the exposures brought about by the investigation and also by the vigorous prosecutions hereinbefore referred to.

No further report was submitted.

379. A committee of investigation expressed the opinion that an organization under investigation had violated the provisions of the corrupt practices act.

Upon the presentation of a privileged report embodying no recommendations, any Member offering a motion for its disposition is entitled to recognition for one hour's debate thereon.

A Member presenting a privileged report and Members submitting minority views are entitled to recognition to read in full the report or views respectively although no question may be pending.

The consideration of conference reports is in order at any time and may interrupt the presentation of a privileged report, but a privileged report so interrupted remains the unfinished business and is in order following the disposition of the conference report.

The report of a select committee of investigation was agreed to by the House, although it contained no resolution or recommendation.

On March 3, 1919,[4] Mr. Ben Johnson, of Kentucky, from the select committee appointed to investigate and report on the character, activities, and purposes of the National Security League, submitted a privileged report[5] which he read from the floor.

Among other conclusions the committee reported the National Security League had participated actively in political campaigns without complying with the provisions of the corrupt practices act requiring itemized statements of expenditures on the part of political committees.

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[1] House Report No. 331.

[2] First session Sixty-fifth Congress, Record, p. 6961; Journal, p. 352.

[3] Second session Sixty-fifth Congress, Record, p. 8826; House document No. 1231.

[4] Third session Sixty-fifth Congress, Record, p. 4921.

[5] House Report, No. 1173.

The report says:

Section 1 of the Federal act, generally known as the "corrupt practices act," approved June 25, 1910, is as follows:

"The term 'Political committee,' under the provisions of the act, shall include national committees of all political parties, the national congressional campaign committees of all political parties, and all committees, associations, or organizations which shall in two or more States influence the result, or attempt to influence the result of an election at which Representatives in Congress are to be elected."

Sections 5 and 6 of the act, as amended by an act approved August 19, 1911, require that such political committees as are defined in section 1 shall file with the Clerk of the House of Representatives, at Washington, D.C., certain itemized statements which shall be verified by oath.

In the judgment of your committee the National Security League has violated the provisions of that act, the penalty for which is a fine of not more than $1,000, or imprisonment not longer than one year, or both.

At the conclusion of the reading of the report Mr. Joseph Walsh, of Massachusetts, proposed to read the minority report, when Mr. J. Thomas Heflin, of Alabama, made the point of order that a Member submitting a minority report was not entitled to the floor.

The Speaker[1] held that a Member submitting minority views was entitled to the same privilege granted the chairman of the committee for the submission of the majority report, and recognized Mr. Walsh to read the minority views.

Mr. Edward E. Browne, of Wisconsin, rising to a parliamentary inquiry, asked how much time was permitted for discussion of the reports.

The Speaker replied that no recommendation was embodied in the report, and any member offering a motion for its disposition would be entitled to recognition for one hour in which to debate his motion.

Before the minority views could be presented, Mr. Henry D. Flood, of Virginia, called up the conference report on the diplomatic and consular bill.

Mr. James R. Mann, of Illinois, submitted as a parliamentary inquiry that while the presentation of a conference report was in order at any time and took precedence over the pending report of the select committee, the latter remained the unfinished business and was in order immediately following the disposition of the conference report.

The Speaker sustained Mr. Mann's contention, and after the disposition of the conference report again recognized Mr. Walsh, who read the minority views.[2]

Thereupon Mr. Browne moved the adoption of the majority report. The motion was agreed to without debate or division.

380. The two Houses, by concurrent resolution, constituted a joint select committee of investigation, with power to send for persons and papers and sit during the recess of Congress.

By concurrent resolution the two Houses fixed the time within which a committee of investigation should complete the investigation and file its report thereon.

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[1] Champ Clark, of Missouri, Speaker.

[2] Record, p. 5035; Journal, p. 289.

On May 31, 1921,[1] the Senate sent to the House the following resolution in which the House concurred without amendment:

Resolved by the Senate (*the House of Representatives concurring*), That a joint commission is hereby created, to be known as the joint commission of agricultural inquiry, which shall consist of five Senators, three of whom shall be members of the majority party and two of whom shall be members of the minority party, to be appointed by the President of the Senate; and five Representatives, three of whom shall be members of the majority party and two of whom shall be members of the minority party, to be appointed by the Speaker.

Said commission shall investigate and report to the Congress within 90 days after the passage of this resolution upon the following subjects:

1. The causes of the present condition of agriculture.

2. The cause of the difference between the prices of agricultural products paid to the producer and the ultimate cost to the consumer.

3. The comparative condition of industries other than agriculture.

4. The relation of prices of commodities other than agricultural products to such products.

5. The banking and financial resources and credits of the country, especially as affecting agricultural credits.

6. The marketing and transportation facilities of the country.

The commission shall include in its report recommendations for legislation which in its opinion will tend to remedy existing conditions and shall specifically report upon the limitations of the powers of Congress in enacting relief legislation.

The commission shall elect its chairman, and vacancies occurring in the membership of the commission shall be filled in the same manner as the original appointments.

The commission or any subcommittee of its members is authorized to sit during the session or recesses of Congress in the District of Columbia or elsewhere, to send for persons and papers, to administer oaths, to summon and compel the attendance of witnesses, and to employ such personal services and incur such expenses as may be necessary to carry out the purposes of this resolution; such expenditure shall be paid from the contingent funds of the Senate and House of Representatives in equal proportions, upon vouchers authorized by the committee and signed by the chairman thereof.

On August 4,[2] the Senate concurred in the following resolution transmitted by the House:

Resolved by the House of Representatives (*the Senate concurring*), That the time for the completion of the investigation by the Joint Commission of Agricultural Inquiry, created by Senate concurrent resolution No. 4, of the present session, and the filing of the report to Congress therein directed to be made, be, and the same is hereby, extended to a date not later than the first Monday in January, 1922.

Subsequently[3] the two Houses concurred in the following:

Resolved by the House of Representatives (*the Senate concurring*), That the time for the completion of the investigation by the Joint Commission of Agricultural Inquiry, created by a Senate concurrent resolution (S. Con. Res. 4) of the first session of the Sixty-seventh Congress, and the filing of the report to Congress therein directed to be made, be, and the same is hereby, extended to a date not later than the 15th of April, 1922.

381. A committee of investigation was granted leave to file report with the Clerk of the House after adjournment of the Congress in which it was appointed.

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[1] First session Sixty-seventh Congress, Record, p. 1899; House Report No. 408.

[2] Record, p. 4644.

[3] Second session Sixty-seventh Congress. pp 311, 344.

On March 24, 1924,[1] the House agreed to a resolution providing for an investigation of the United States Army Air Service, the Naval Bureau of Aeronautics, and the mail air service by a special committee of nine, to be appointed by the Speaker.

The committee, consisting of Messrs. Florian Lampert, of Wisconsin; Albert H. Vestal, of Indiana; Randolph Perkins, of New Jersey; Charles L. Faust, of Missouri; Frank R. Reid, of Illinois; Clarence F. Lea, of California; Anning S. Prall, of New York; Patrick B. O'Sullivan, of Connecticut; William N. Rogers, of New Hampshire, was appointed by the Speaker March 24, and was subsequently authorized by resolution to employ legal and clerical assistance and incur expenses not exceeding $25,000.

On March 3, 1925,[2] Mr. Perkins said:

Mr. Speaker, I ask unanimous consent that the select committee appointed by the Speaker under House resolution 192, Sixty-eighth Congress, first session, have the right to file its report with the Clerk on or before the second Monday in December, with the strict understanding that no further expense of any kind will be incurred by the committee.

There was no objection, and the committee prepared and filed its report[3] with the Clerk of the House after the adjournment of the Sixty-eighth Congress.

382. Instance wherein time for filing report of a select committee was extended beyond life of the Congress in which appointed.

Form of resolution authorizing an investigation by select committee of the House.

On March 4, 1924,[4] the House agreed to the following resolution:

Resolved, That the Speaker of the House of Representatives be, and he is hereby, directed to appoint from the membership of the House a select committee of seven Members, for the Sixty-eighth Congress, and which said committee is hereby authorized and directed to inquire into the operations, policies, and affairs of the United States Shipping Board and the United States Shipping Board Emergency Fleet Corporation, or any agency, branch, or subsidiary of either; said inquiry shall include an investigation of contracts, leases, sales, settlements, accounts, expenditures, receipts, assets, liabilities, properties, and any and all transactions, affairs, policies, and plans of the United States Shipping Board and the United States Shipping Board Emergency Fleet Corporation and any other corporations, firms, individuals, or agencies in any way associated with or controlled or regulated by the said Shipping Board or Emergency Fleet Corporation from the date of the passage of the several acts creating the same, together with an inquiry into such other pertinent matters as may aid the committee in determining and recommending future policies with respect to the Shipping Board and Emergency Fleet Corporation and the properties and agencies under their control.

Resolved further, That said committee is also hereby authorized and empowered to appoint such subcommittees as it may deem advisable, and the said committee or any subcommittee thereof is hereby authorized to sit during the sessions of the House or during any recess of the House, and to hold its sessions in such places as the committee may determine; to require by subpoenas, or otherwise the attendance of witnesses, the production of books, papers, and documents, to administer oaths and affirmations, and to take testimony.

Resolved further, That the Speaker is hereby authorized to issue subpoenas to witnesses upon the request of the committee or any subcommittee thereof at any time, including any recess of

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[1] First session Sixty-eighth Congress, Record, p. 4817.

[2] Second session Sixty-eighth Congress, Journal, p. 389. Record, p. 5466.

[3] House Report No. 1653.

[4] First session Sixty-eighth Congress, Record, p. 3553.

Congress; and the Sergeant at Arms is hereby empowered and directed to serve all subpoenas and other processes put into his hands by said committee or any subcommittee thereof.

Resolved further, That said select committee shall have the right at any time to report to the House in one or more reports the results of its inquiries with such recommendations as it may deem advisable.

Pursuant to this resolution, the Speaker appointed as members of the select committee Messrs. Wallace H. White, jr., of Maine, Chairman; Henry Allen Cooper, of Wisconsin; Frederick R. Lehlbach, of New Jersey; Walter F. Lineberger, of California; Edwin L. Davis, of Tennessee; William B. Bankhead, of Alabama ; and Tom Connally, of Texas.

The powers of the committee were further supplemented in the House March 18: [1]

Resolved, That the select committee, appointed under the provisions of House Resolution 186, adopted March 4, 1924, to make inquiry into the affairs of the United States Shipping Board, The United States, Shipping Board Emergency Fleet Corporation, or any agency, branch, or subsidiary of either, is hereby authorized to employ such stenographic, legal, and clerical assistance, including accountants and statisticians, as it may deem necessary, and is further authorized to have such printing and binding done as it may require.

Resolved further, That all expenses incurred by aid committee under the provisions of House Resolution 186, including the expenses of such committee or any subcommittee thereof when sitting outside of the District of Columbia shall be paid out of the contingent fund of the House of Representatives on vouchers, ordered by said committee, signed by the chairman of said select committee, or by the chairman of a subcommittee where such expenses are incurred by such subcommittee, and approved by the Committee on Accounts, evidenced by the signature of the chairman thereof.

On January 28, 1925,[2] Mr. White made the following request:

Mr. Speaker, I ask unanimous consent that the select committee appointed by the Speaker of the House under authority of House Resolution 186, Sixty-eighth Congress, first session, shall have the right to file the report of its inquiries, with such recommendations as it may deem advisable, with the Clerk of the House on or before the Second Monday of December next, and that the same right shall be accorded to any member or members of said committee, it being expressly understood that this request and consent thereto shall not extend the power and authority of said committee or of any member thereof in any other respect beyond the adjournment of the present Congress. This request is made by the direction of the committee designated by the Speaker to inquire into the Shipping Board and Emergency Fleet Corporation and its activities. The committee has conducted most exhaustive inquiries, but it is very much delayed in the printing of the record. This request contemplates that this committee shall have absolutely no authority beyond the 4th of March other than to write and file the report.

There was no objection, and the report of the select committee was filed with the Clerk of the House during vacation following the adjournment of the Sixty-eighth Congress.

383. A committee requested and was granted time in which to file a report beyond that specified in the authorizing resolution.

On February 28, 1924,[3] the Senate agreed to a resolution authorizing an investigation by the Committee on the District of Columbia as to housing condi-

[1] Journal, p. 348.

[2] Second session Sixty-eighth Congress, Journal, p. 171; Record, p. 2605.

[3] First session Sixty-eighth Congress, Record. p. 3240.

tions and combinations controlling rents and prices in-the District of Columbia, in order to determine the advisability of extending the District of Columbia rent act approved October 2, 1919.

This resolution provided that final report should be made by the committee of its investigations, with recommendations, not later than March 31, 1924.

On March 31, 1924, Mr. Heisler L. Ball, of Delaware, said:

Mr. President, under the resolution (S. Res. 158) authorizing the Committee on the District of Columbia to make an investigation of rental conditions in Washington, the committee was to file report on the 31st day of March, which is to-day. I ask for an extension of one week in which to submit the report. The investigation itself is completed, but the report is not yet ready to be presented to the Senate.

There was no objection, and the report of the committee was submitted May 12.[1]

384. Instance wherein the Senate increased the limit of expenditure originally provided for a select committee.

A select committee reported a resolution authorizing continuance of its investigation which was not acted on by the Senate.

On March 2, 1923,[2] the Senate, by the following resolution, authorized an investigation of the Veterans' Bureau:

Whereas complaints are being made against alleged delay by the Veterans' Bureau in the adjustment of claims for relief of invalid and disabled veterans of the World War under the various acts of Congress; and

Whereas it is claimed that there has been great and needless delay in the construction of hospitals and in providing proper hospitalization for the relief of disabled veterans, as a result of which much unnecessary suffering exists; and

Whereas it is claimed that an unnecessarily large proportion of the appropriations made by Congress for the relief of the veterans is being improperly consumed in overhead expense, duplication of duties, excessive rent of properties and quarters, and in the employment of an unnecessarily large number of agents, doctors, inspectors, instructors, and other persons; and

Whereas it has been charged that certain sales of surplus property belonging to the Government and under the supervision of the United States Veterans' Bureau were made improperly: Therefore be it

Resolved, That a committee consisting of three Senators, Members of the Sixty-eighth Congress, to be appointed by the President of the Senate, is authorized and directed to investigate the leases and contracts executed by the United States Veterans' Bureau or the Treasury Department for vocational schools and hospitals and for the purchase, rental, and sales of real estate and supplies used or to be used directly or indirectly by the Veterans' Bureau for the benefit of the veterans of the World War and the matters and conditions in the premises set forth and to report their findings, together with recommendations for the improvement of such conditions, to the next regular session of Congress. Such committee is authorized to sit during any recess of Congress and send for persons and papers, to administer oaths to witnesses, and to incur necessary expenses for clerical and other services not exceeding $20,000, which shall be paid out of the contingent fund of the Senate.

The limitation on expenditures was subsequently[3] increased to $26,500

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[1] Senate Report No. 530.

[2] Fourth session Sixty-seventh Congress, Record, p. 5102.

[3] First session Sixty-eighth Congress, Record, p. 773.

The committee appointed under the resolution, consisting of Messrs. David A. Reed, David I. Walsh, and Tasker L. Oddie, submitted preliminary reports[1] No. 1, No. 2, and No. 3 on January 8, 1924, February 7, and June 6, respectively. A resolution to continue the committee until the conclusion of the Sixty-eighth Congress, placed on the calendar, January 31, 1925, was not acted upon by the Senate.

385. A witness having declined to answer a pertinent question before a committee charged with an investigation, the House directed the Speaker to certify that fact to the United States district attorney.

The House sometimes enlarges the powers of a committee of investigation.

The report of a committee of investigation, as such, is without privilege.

On April 25, 1912,[2] Mr. Robert L. Henry, of Texas, from the Committee on Rules, presented as privileged a resolution enlarging the powers of the Committee on Banking and Currency in its conduct of an investigation of banking and currency conditions of the United States, previously authorized[3] and including the following:

Fifth. Said committee as a whole or by subcommittee is authorized to sit during the sessions of the House and during the recess of Congress. Its hearings shall be open to the public. The committee as a whole or by subcommittee is authorized to hold its meetings both during the sessions of Congress and throughout the recesses and adjournment thereof and in such cities and places in the United States as it may from time to time designate; to employ counsel, experts, accountants, bookkeepers, clerical and other assistants; may summon and compel the attendance of witnesses; may send for persons and papers; and administer oaths to witnesses. The Comptroller of the Currency, the Secretary of the Treasury, and the Commissioner of the Bureau of Corporations, and their respective assistants and subordinates, are hereby respectively directed to comply with all directions of the committee for assistance in its labors, to place at the service of the committee all the data and records of their respective departments, to procure for the committee from time to time such information as is subject to their control or inspection, and to allow the use of their assistants for the making of such investigations with respect to corporations under their respective jurisdictions as the committee or any subcommittee may from time to time request.

Subsequently[4] Mr. Arsene P. Pujo, of Louisiana, being recognized by the Speaker to submit a privileged motion said:

Mr. Speaker, as chairman of the Committee on Banking and Currency and acting under its instructions by unanimous vote, I present as privileged the contumacy of Mr. George G. Henry, of New York, who declined as a witness to answer certain questions propounded by counsel for the committee pertinent to the inquiry being had under House resolutions 429 and 504. I submit the report[5] of the committee, with the record of the proceedings had and the questions declined to be answered as a part thereof. I now move pro forma, as the statute does not require the approval of the House, but preferring to have its action thereon, that the question of the contumacy of the witness, George G. Henry, be certified by the Speaker to the United States district attorney, under the seal of the House, so that the said officer shall bring the matter before the grand jury of the District of Columbia for such action as may be authorized by sections 101, 102, 103, and 104 of the Revised Statutes of the United States.

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[1] Senate Report No. 103.

[2] Second session Sixty-second Congress, Record, p. 5336; Journal, p. 604.

[3] Record p. 2418.

[4] Third session Sixty-second Congress, Record, p. 1296

[5] House Report No. 1285.

The motion was agreed to.

On February 28, 1913,[1] Mr. Pujo submitted the report of the committee as privileged, when Mr. James R. Mann, of Illinois, made the point of order that it was not privileged.

The Speaker[2] sustained the point of order and the report was delivered to the clerk.

386. A person summoned as a witness before a select committee of the Senate declined to testify on the ground that the authorization under which the examining committee purported to act had expired.

Form of resolution authorizing continuance of an investigation beyond the expiration of the Congress in which instituted.

The authority of its committee to pursue an investigation having been challenged, the Senate passed a further resolution confirming the authority previously sought to be conferred.

On April 29, 1922[3] (legislative day of April 20), the Senate agreed to the following resolution providing for an investigation by the Committee on Public Lands and Surveys of leases upon naval oil reserves:

Resolved, That the Secretary of the Interior is directed to send to the Senate:

(a) Copies of all oil leases made by the Department of the Interior within naval oil reserve numbered one, and, separately, naval oil reserve numbered two, both in the State of California, and naval oil reserve numbered three in the State of Wyoming, showing as to each the claim upon which the lease was based or issued; the name of the lessee; the date of the lease; the area of the leased property; the amount of the rent, royalty, bonus, and all other compensation paid and to be paid to the United States.

(b) All Executive orders and other papers in the files of the Department of the Interior and its bureaus, or copies thereof if the originals are not in the files, authorizing or regulating such leases, including correspondence or memoranda embodying or concerning all agreements, instructions, and requests by the President or the Navy Department as to the making of such leases and the terms thereof.

(c) All correspondence, papers, and files showing and concerning the applications for such leases and the action of the Department of the Interior and its bureaus thereon and upon all the several claims upon which such leases were based or issued, all in said naval reserves.

(d) And all contracts for drilling wells on naval oil reserves, date and terms of same, reasons therefor, and the number and date of the drilling of wells on private lands adjacent to oil reserves.

Resolved further, That the Committee on Public Lands and Surveys be authorized to investigate this entire subject of leases upon naval oil reserves, with particular reference to the protection of the rights and equities of the Government of the United States and the preservation of its natural resources, and to report its findings and recommendations to the Senate.

Thereafter, on June 5[4] (legislative day of April 20), this resolution was supplemented by the following resolution authorizing activities of the committee essential to the investigation and providing for payment of expenses:

Resolved, That S. Res. 282 is hereby amended by adding, at the end of said resolution, the following:

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[1] Journal, p. 108; Record, p. 4355.

[2] Champ Clark, of Missouri, Speaker.

[3] Second session Sixty-seventh Congress, Record, p. 6097.

[4] Record, p. 8140.

"That the said committee is hereby authorized to sit and perform its duties at such times and places as it deems necessary or proper and to require the attendance of witnesses by subpoenas or otherwise; to require the production of books, papers, and documents; and to employ counsel, experts, and other assistants, and stenographers, at a cost not exceeding $1.25 per printed page. The chairman of the committee, or any member thereof, may administer oaths to witnesses and sign subpoenas for witnesses; and every person duly summoned before said committee, or any subcommittee thereof, who refuses or fails to obey the process of said committee or appears and refuses to answer questions pertinent to said investigation shall be punished as prescribed by law. The expenses of said investigation shall be paid from the contingent fund of the Senate on vouchers of the committee or subcommittee, signed by the chairman and approved by the Committee to Audit and Control the Contingent Expenses of the Senate."

For the purpose of authorizing continuance of this investigation beyond the expiration of the Sixty-seventh Congress, the Senate, on February 5, 1923 [1] agreed to the following:

Resolved, That Senate Resolution 282, agreed to April 21, 1922, and Senate Resolution 292, agreed to May 15, 1922, authorizing and directing the Committee on Public Lands and Surveys to investigate the entire subject to leases upon naval oil reserves, with particular reference to the protection of the rights and equities of the Government of the United States and the preservation of its natural resources, and to report its findings and recommendations to the Senate, and providing that the expenses of such investigation be paid from the contingent fund of the Senate, be, and the same are, continued in full force and effect until the end of the Sixty-eighth Congress.

The committee or any subcommittee thereof is authorized to sit during the sessions or the recesses of the Senate, and after the expiration of the present Congress until the assembling of the Sixty-eighth Congress, and until otherwise ordered by the Senate.

Subsequent to the adjournment of the Sixty-seventh Congress, a witness appearing before the committee, Albert B. Fall, declined to testify, giving as his reason for so refusing:

I decline to answer the question for the following reasons and on the following grounds:

The committee is conducting an investigation under Senate Resolution 282, agreed to April 21, 1922, in the Sixty-seventh Congress, and Senate Resolution 294, agreed to May 15, 1922, in the same Congress, and further by virtue of Senate Resolution 434, agreed to by the Senate on February 5, 1923, during the same Congress, and I do not consider that, acting under those resolutions, or under the last-named resolution, which authorizes the committee to sit after the expiration of the Sixty-seventh Congress "until the assembling of the Sixty-eighth Congress, and until otherwise ordered by the Senate," this committee has any authority to conduct the investigation now attempted to be conducted by the addressing of this question to me.

I decline to answer on the further ground that on January 7, 1924, Senator Caraway introduced in the Senate of the United States, in this Congress, Senate Joint Resolution 54, attempting to deal with the lease of the Mammouth Oil Co.; that that resolution was referred to this committee and in due course the Senate discharged this committee as of January 24, 1924, and the Senate thereafter, on January 31, 1924, agreed to that resolution and completed its consideration thereof, the resolution being so amended as to deal, in the Senate, in a plenary way, with the leases upon naval oil reserves which were before this committee under Senate Resolution 282 and Senate Resolution 294; and that this committee has not further authority to deal with Senate Joint Resolution 54, since it has been discharged by the Senate, and the Senate itself has finally acted upon the resolution.

[1] Fourth session Sixty-seventh Congress, Record, p. 3048.

For the purpose of confirming the authority of the committee thus questioned, the Senate on February 7, 1924,[1] agreed to the following resolution:

Resolved, That the Secretary of the Interior is directed to send to the Senate:

(a) Copies of all oil leases made by the Department of the Interior within naval oil reserve numbered 1, and, separately, naval oil reserve numbered 2, both in the State of California, and naval oil reserve numbered 3, in the State of Wyoming, showing as to each the claim upon which the lease was based or issued; the name of the lessee; the date of the lease; the area of the leased property; the amount of the rent, royalty, bonus, and all other compensation paid and to be paid to the United States.

(b) All Executive orders and other papers in the files of the Department of the Interior and its bureaus, or copies thereof, if the originals are not in the files, authorizing or regulating such leases, including correspondence or memoranda embodying or concerning all agreements, instructions, and requests by the President or the Navy Department as to the making of such leases and the terms thereof.

(c) All correspondence, papers, and files showing and concerning the applications for such leases and the action of the Department of the Interior and its bureaus thereon and upon all the several claims upon which such leases were based or issued, all in said naval reserves.

(d) And all contracts for drilling wells on naval oil reserves, date and terms of same, reasons therefor, and the number and date of the drilling of wells on private lands adjacent to oil reserves.

Resolved further, That the Committee on Public Lands and Surveys be authorized to investigate this entire subject of leases upon naval oil reserves, with particular reference to the protection of the rights and equities of the Government of the United States and the preservation of its natural resources, and to ascertain what, if any, other or additional legislation may be advisable, and to report its findings and recommendations to the Senate.

Resolved further, That the said committee is hereby authorized to sit and perform its duties at such times and places as it deems necessary or proper and to require the attendance of witnesses by subpoenas or otherwise; to require the production of books, papers, and documents; and to employ counsel, experts, and other assistants, and stenographers, at a cost not exceeding 25 cents per hundred words, to report such hearings. The chairman of the committee, or any member thereof, may administer oaths to witnesses and sign subpoenas for witnesses; and every person duly summoned before said committee or any subcommittee thereof, who refuses or fails to obey the process of said committee or appears and refuses to answer questions pertinent to said investigation shall be punished as prescribed by law. The expenses of said investigation shall be paid from the contingent fund of the Senate on vouchers of the committee or subcommittee, signed by the chairman and approved by the Committee to Audit and Control the Contingent Expenses of the Senate.

The report of the majority of the committee signed by Messrs. Ladd, Norbeck, Jones, Adams, Kendrick, Dill, Walsh, and Pittman, was submitted on June 6, 1924,[2] by Mr. Walsh of Montana, accompanied by minority views signed by Messrs. Spencer, Smoot, Stanfield, Cameron, and Bursum.

On June 6, 1924, and again on June 7, in the Senate Mr. Walsh of Montana moved the adoption of the report but consideration of the motion was not reached.

Supplemental minority views were filed January 15, 1925, and debated in the Senate on March 17 and March 18.[3]

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[1] First session Sixty-eighth Congress, Record, p. 1972.

[2] Senate Report No. 794.

[3] Special session of the Senate, Sixty-ninth Congress, Record, p. 322.

387. Witnesses having declined to testify, hearings were discontinued.

On January 17, 1924,[1] the Senate agreed to the following resolution:

Resolved, That a special committee of five shall be forthwith appointed by the President pro tempore of the Senate, and said committee is hereby authorized and directed immediately to investigate and report to the Senate whether there is any organized effort being made to control public opinion and the action of Congress upon legislative matters through propaganda or by the use of money, by advertising, or by the control of publicity, and especially to inquire what, if any, such methods are being employed to control the action of Congress upon revenue measures, and whether or not the profiteers of the war are now contributing to defeat the soldiers' adjusted compensation bill by money or influence, and what, if any, such influences are being employed, either by American citizens or the representatives of foreign governments or foreign institutions, to control or affect the foreign or domestic policies of the United States.

Said committee is authorized to send for or subpoena persons, books, and papers, to administer oaths, and to employ a stenographer at a cost not exceeding 25 cents per 100 words to report such hearings, and that said committee shall report the evidence and its conclusion to the Senate as early as is reasonably possible.

The proposed investigation had particular reference to a competitive prize offered, final award of which was contingent upon acceptance by the Senate.

The special committee consisting of Messrs. George H. Moses, of New Hampshire; Henrik Shipstead, of Minnesota; Frank L. Green, of Vermont; James A. Reed, of Missouri; and T. H. Caraway, of Arkansas, subpoenaed as witnesses Edward Bok and Esther Lape. Both witnesses declining to answer questions propounded by members of the committee, the hearings were discontinued and no report was formulated.

388. Form of resolution providing for expenses of a select committee of investigation.

On May 4, 1911,[2] the House agreed to the following resolution authorizing the election of a special committee to investigate violations of the antitrust act of 1890:

Resolved, That a committee of nine Members, to be elected by the House, be, and is hereby directed to make an investigation for the purpose of ascertaining whether there have occurred violations by the United States Steel Corporation, or other corporations or persons as hereinafter set out, of the antitrust act of July second, eighteen hundred and ninety, and the acts supplementary thereto, the various interstate-commerce acts, and the acts relative to the national banking associations, which violations have not been prosecuted by the executive officers of the Government; and if any such violations are disclosed, said committee is directed to report the facts and circumstances to the House.

Said committee is also directed to investigate the United States Steel Corporation, its organization and operation, and if in connection therewith violations of law as aforesaid are disclosed, to report the same.

Said committee shall inquire whether said Steel Corporation has any relations or affiliations in violation of law with the Pennsylvania Steel Company, the Cambria Steel Company, the Lackawanna Steel Company, or any other iron or steel company.

Also whether said Steel Corporation, through the persons owning its stock, its officers or agents, has or has had relations with the Pennsylvania Railroad Company, or any other railroad company, or any coal companies, nationalbanking companies, trust companies, insurance companies, or other corporate organizations or companies, or with the stockholders, directors, or

[1] First session Sixty-eighth Congress, Record, p. 1086.

[2] First session Sixty-second Congress Journal, p. 179. Record, p. 918.

other officers or agents of said companies, or with any person or persons, which have caused or have a tendency to cause any of the results following:

First. The restriction or destruction of competition in production, sale, or transportation.

Second. Excessive capitalization and bonding of corporations.

Third. Combinations created by ownership or control by one corporation, or the stockholders or bond holders thereof, of the stock or bonds of other corporations, or combinations between the officers or agents of one corporation and the officers or agents of other corporations by duplication of directors or other means and devices.

Fourth. Speculations in stocks and bonds by agreement among officers and agents of corporations to depress the value of the stocks and bonds of other corporations for the purpose of acquiring or controlling same.

Fifth. Profits through such speculation to officers or agents of such corporations to the detriment of the stockholders and the public.

Sixth. Panics in the bond, stock, and money markets.

Said committee shall in its report recommend such further legislation by Congress as in its opinion is desirable.

Said committee, as a whole or by subcommittee, is authorized to sit during sessions of the House and the recess of Congress, to employ clerical and other assistance, to compel the attendance of witnesses, to send for persons and papers, and to administer oaths to witnesses.

The Speaker shall have authority to sign and the Clerk to attest subpoenas during the recess of Congress.

Pursuant to this resolution the House on May 17, 1911, resolved, that the following Members shall constitute the committee provided for in House resolution 148: Augustus O. Stanley (chairman), Charles L. Bartlett, Jack Beall, Martin W. Littleton, Daniel J. McGillicuddy, Marlin E. Olmsted, H. Olin Young, J. A. Sterling, H. G. Danforth.

These resolutions were subsequently supplemented by the passage of the following:

Resolved, That all expenses that may be incurred by the committee appointed under the resolution of the House of Representatives adopted May 16, 1911, to make an investigation for the purpose of ascertaining whether there have occurred violations by the United States Steel Corporation or other corporations or persons of the antitrust act of July 2, 1890, and the acts supplementary thereto, the various interstate commerce acts and the acts relative to the national banking associations to an amount not exceeding $25,000, shall be paid out of the contingent fund of the House of Representatives on vouchers ordered by said committee, signed by the chairman thereof, and approved by the Committee on Accounts, evidenced by the signature of the chairman thereof.

On August 2, 1912,[1] Mr. Augustus O. Stanley, of Kentucky, from the special committee, presented the report of the committee on its investigation of the United States Steel Corporation, with recommendations for remedial legislation.

389. The House in providing for the expenses of a committee of investigation has limited both the amount and purpose of its expenditures.

On June 12, 1911,[2] Mr. John C. Floyd, of Arkansas, from the Committee on Accounts, presented, as privileged, the following resolution:

Resolved, That all expenses that may be incurred by the committee appointed under the resolution of the House of Representatives adopted June 6, 1911, to make an investigation and an inquiry into the operations and methods of the departments of assessment and collection of taxes of the Dis-

[1] House Report No. 1127.

[2] First session Sixty-second Congress, Record, p. 1925; Journal, p. 265.

trict of Columbia and such other departments of the District of Columbia as may be determined by them, as well as the organization, capitalization, bonded and other indebtedness, management and conduct of any and all of the public-utility corporations doing business in the said District, to an amount not exceeding $5,000, shall be paid out of the contingent fund of the House of Representatives on vouchers ordered by said committee, signed by the chairman thereof, and approved by the Committee on Accounts, evidenced by the signature of the chairman thereof: *Provided*, That no expenses incurred by members of the said committee appointed under the said resolution for the purpose herein mentioned, in going outside of the District of Columbia, or incurred outside the said District, shall be payable out of the fund designated herein.

A committee amendment striking out the proviso was disagreed to, yeas 43, nays 52.

The resolution was then agreed to.

390. Expenditures by various select and joint committees of investigation, as reported by the Clerk of the House.

On September 5, 1919,[1] the Clerk of the House submitted the following statement of expenses incurred by committees of investigation from 1909 to 1919:

Expenditures incurred by certain committees of investigation.

Investigations of the United States Steel Corporation	$4,643.91
Investigation of the American Sugar Refining Co	7,556.83
Investigations of alleged violations of the antitrust act and other acts	37,408.89
Investigation by the Committee on Banking and Currency of the so-called money trust	61,277.12
Investigation of the "Taylor system"	4,287.00
Investigation of the Manufacturers' Association	4,119.56
Investigation of the shipping industry	15,284.00
Investigation of the affairs of the District of Columbia	51,191.03
Investigation of the charges by F. T. Lawson ("Leak")	22,883.76
Investigation of the expenditures in the Interior Department	13,503.16
Investigation of the expenditures in the Post Office Department	10,639.96
Investigation of the expenditures in the Department of Commerce and Labor	6,175.34
Investigation of the expenditures in the Department of Agriculture	5,461.95
Investigation of the expenditures in the Treasury Department	3,682.78
Investigation of the expenditures in the Department of Justice	3,834.48
Investigation of the expenditures in the Department of War	3,665.13
Investigation of the expenditures in the Navy Department	3,074.60
Investigation of expenditures in the State Department	2,969.20
Investigation of expenditures on public buildings	2,135.90
Investigation of the Forestry Service (Ballinger-Pinchot)	25,000.00

391. Annual Reports[2] of the Clerk of the House report the following expenditures by committees of investigation from 1919 to 1925:

Expenditures of committees, regular and special, under authority of House resolutions during the Sixty-sixth and Sixty-seventh Congresses to January 12, 1922.

Committee on Expenditures in the War Department and five subcommittees, total expenditures, June 11, 1919, to July 1, 1921	$157,109.91
Committee to Investigate Shipping Board Operations, total expenditures from August 2, 1919, to July 1, 1921	43,969.04

[1] Hearings on first deficiency appropriation bill, 1920, p. 876.

[2] Annual Reports of the Clerk of the House of Representatives, 1919–1924.

Expenditures of committees, regular and special, under authority of House resolutions during the Sixty-sixth and Sixty-seventh Congresses to January 12, 1922.—Continued

Committee on Immigration and Naturalization, total expenditures from November 17, 1919, to July 1, 1921	$10,047.13
Committee on Ways and Means, total expenditures from June 2, 1919, to January 12, 1923	14,809.96
Committee on Military Affairs, investigation of camp sites, total expenditures from September 8, 1919, to July 1, 1921	2,500.00
Committee on Education, investigation of Federal Board for Vocational Education March 27, 1920, to July 1, 1921	1,143.94
Committee on Expenditures in the Treasury Department, total expenditures from August 1, 1919, to July 1, 1921	991.50
Committee on Expenditures in the Navy Department, total expenditures from August 1, 1919, to July 1, 1921	150.00
Joint Committee to Investigate Naval Bases on the Pacific Coast, total expenditures from June 4, 1920, to July 1, 1921 (one-half)	8,492.42
Committee to investigate the Escape of Grover Bergdoll, total expenditures from April 18, 1921, to January 12, 1922	6,441.85
Joint Committee of Agricultural Inquiry, total expenditures from June 7, 1921, to January 12, 1922 (one-half)	10,913.21
Joint Commission on Reorganization of the Executive Departments, total expenditures from July 1, 1921, to January 12, 1922 (one-half)	3,802.73
Joint Committee to investigate the efficiency of commissioned and enlisted forces of the Army and Navy, total expenditures, from November 1, 1921, to January 12, 1922 (one-half)	33.33

392. The following summary of expenses incurred by standing and select committees in carrying out investigations authorized by the House in the Sixty-sixth, Sixty-seventh, and Sixty-eighth Congresses is reported by the Clerk of the House: [1]

Expenditures of committees, regular and special, under authority of House resolutions during the Sixty-sixth, Sixty-seventh, and Sixty-eighth Congresses.

Committee on Expenditures in the War Department and five subcommittees, total expenditures, June 11, 1919, to July 1, 1921	$157,109.91
Committee to Investigate Shipping Board Operations, total expenditures from August 2, 1919, to July 1, 1921	43,969.04
Committee on Immigration and Naturalization, total expenditures from November 17, 1919, to July 1, 1921	10,047.13
Committee on Ways and Mean, total expenditures from June 2, 1919, to June 30, 1924	17,083.87
Committee on Military Affairs, investigation of camp sites, total expenditures from September 8, 1919, to July 1, 1921	2,500.00
Committee on Education, investigation of Federal Board for Vocational Education, March 27, 1920, to July 1, 1921	1,143.94
Committee on Expenditures in the Treasury Department, total expenditures from August 1, 1919, to July 1, 1921	991.50
Committee on Expenditures in the Navy Department, total expenditures from August 1, 1919, to July 1, 1921	150.00
Joint Committee to Investigate Naval Bases on the Pacific Coast, total expenditures from June 4, 1920, to July 1, 1921 (one-half)	8,492.42
Committee to Investigate the Escape of Grover Cleveland Bergdoll, total expenditures from April 18, 1921, to June 30, 1923	5,816.85

[1] Annual Report of the Clerk of the House of Representatives, 1925.

Expenditures of committees, regular and special, under authority of House resolutions during the Sixty-sixth, Sixty-seventh, and Sixty-eighth Congresses.—Continued

Joint Committee of Agricultural Inquiry, total expenditures from June 7, 1911, to June 30, 1924 (one-half)	$21,440.92
Joint Commission on Reorganization of the Executive Departments, total expenditures from July 1, 1921, to June 30, 1924 (one-half)	16,948.16
Joint Committee to Investigate the Efficiency of Commissioned and Enlisted Forces of the Army and Navy, total expenditures from November 1, 1921, to January 12, 1922 (one-half)	333.33
Joint Committee to Investigate Membership of State Banks and Trust Companies of the Agricultural Sections in the Federal Reserve System (five eighths)	5,650.17
Select Committee to Investigate the Air Service, Sixty-eighth Congress	24,995.63
Select Committee to Investigate the United States Shipping Board and Emergency Fleet Corporation, Sixty-eighth Congress, to July 1, 1925	24,102.71
Select Committee to Investigate Alleged Charges Against Two Members, Sixty-eighth Congress	3,089.93
Select Committee to Investigate Alleged Duplication of Bonds, Sixty-eighth Congress	9,627.03
Select Committee to Investigate the National Disabled Soldiers' League, Sixty-eighth Congress	999.30
Committee on World War Veterans Investigation of Hospitals, Sixty-eighth Congress	6,912.02
Committee on the Judiciary:.	
Charges against Judge English (Missouri)	3,193.37
Charges against Judge Baker (West Virginia)	2,043.06
Investigation of Federal prisons	68.90

393. The rules provide for the rate of compensation of witnesses summoned to appear before the House or its committees.

Rule XXXVI provides:

> The rule for paying witnesses subpoenaed to appear before the House or either of its committees shall be as follows: For each day a witness shall attend, the sum of six dollars; for each mile he shall travel in coming to or going from the place of examination, the sum of seven cents each way; but nothing shall be paid for traveling when the witness has been summoned at the place of trial.

This is the form adopted in 1930. It was taken from the old Rule 138, which was dated from May 31, 1872,[1] and is practically the same except that the rule of compensation was then $4. On February 27, 1880,[2] the daily compensation was changed from $4 to $2 to conform to the rate then paid witnesses in the United States courts,[3] and remained at the rate until increased, February 25, 1930,[4] to $6 with an increase in mileage from 5 cents each mile to 7 cents.

The compensation of a witness residing in the District of Columbia was before the adoption of this rule fixed by statute at a sum not exceeding $2 a day.[5]

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[1] Second session Forty-second Congress, Cong. Globe, p. 4090.

[2] Second session Forty-sixth Congress, Record, p. 1206.

[3] On February 2, 1804 (first session Eighth Congress, Journal, p. 564; Annals, p. 966), the House by resolution provided that witnesses summoned before any committee during that session should be paid out of the contingent fund at the rate of $2.50 a day and 12½ cents mileage; and for every messenger sent after witnesses, $3 for every 20 miles.

[4] Second session Seventy-first Congress, Record, p. 4406 tem.

[5] 19 Stat. L., p. 41.

Chapter CLXXXVIII.[1]

INVESTIGATIONS OF CONDUCT OF MEMBERS.

394. A resolution creating a select committee to investigate charges involving Members of the House was referred to a standing committee with instructions to conduct the investigation.

A resolution providing for an investigation of charges that Members of the House and Senate had profited in the stock market by the use of official information was held to involve a question of privilege.

A question of privilege takes precedence of business in order on Calendar Wednesday.

The mover of a proposition is entitled to prior recognition for allowable motions relating thereto.

A committee under instructions by the House to make an investigation and report within a specified time requested and received an extension of time.

Witnesses are summoned in pursuance of and by virtue of the authority conferred on a committee to send for persons and papers.

Instance wherein a committee of investigation after being authorized to send for persons and papers was further empowered to require witnesses to testify.

A committee of the House empowered and instructed to make an investigation was by resolution of the House authorized to employ counsel and accountants.

Reports on investigations when submitted to the House are read by unanimous consent only and are not necessarily acted upon by the House.

Charges against Members of the House and Senate being unsubstantiated, the resolution and report thereon were laid on the table.

On January 3, 1917,[2] Mr. William R. Wood, of Indiana, presented, as a question of privilege, the following preamble and resolution:

[1] Supplementary to Chapter LVI.

[2] Second session Sixty-fourth Congress; Journal, p. 84; Record, p. 801.

Whereas Thomas W. Lawson, of Boston, gave to the public a statement which appears in the daily newspapers under date of December 28 and 29, 1916, in which he says, amongst other things, that "If it was actually believed in Washington there was to be a real investigation of last week's leak, there would not be a quorum in either the Senate or House next Monday and a shifting of bank accounts similar to those in the old sugar-investigation days"; and in another statement which appears in the daily press of December 31, 1916, he says, "The good old Capitol has been wallowing in Wall Street leak grafts for 40 years, wallowing hale and hearty"; and

Whereas the statements of the aforesaid Thomas W. Lawson, and each of them, affect the dignity of this House and the integrity of its proceedings and the honesty of its Members;

Resolved, That the Speaker appoint a select committee of five Members of the House and that such committee be instructed to inquire into the charges made by the aforesaid Thomas W. Lawson, and for such purpose it shall have power to send for persons and papers and enforce their appearance before said committee, and to administer oaths, and shall have the right to make report at any time.

Mr. Finis J. Garrett, of Tennessee, raised a question of order against the resolution; first, that it was offered on Calendar Wednesday and nothing was in order on that day except a call of committees; and, second, that it did not present a question of privilege.

The Speaker ruled:

In this particular case Mr. Lawson charges by plainest implication that at least a majority of both the House and the Senate have been engaged in illegal and disgraceful speculation growing out of information they had no business to get in the first place and which, if they did get, they had no moral right to act upon. The Chair thinks this charge by Mr. Lawson is in derogation of the dignity of the House and therefore rules that this resolution is privileged.

and held that as such it was in order on Calendar Wednesday.

Thereupon Mr. Robert L. Henry, of Texas, asked for recognition to offer a motion to refer the resolution.

Mr. James R. Mann, of Illinois, made the point of order that Mr. Wood, as the introducer of the resolution, was entitled to the floor.

The Speaker sustained the point of order and recognized Mr. Wood, who moved to refer the resolution to the Committee on Rules, with instructions to report within 10 days.

The motion was agreed to by the House and the resolution was referred to the Committee on Rules.

On January 12,[1] Mr. Henry, from that committee, reported the resolution back to the House with the recommendation that it lie upon the table.

After extended debate the resolution was, on motion of Mr. Henry, by unanimous consent, recommitted to the Committee on Rules, with instructions to report within five days. Other resolutions of similar tenor were likewise referred to the same committee.

On January 13,[2] Mr. Henry submitted, by unanimous consent, the following resolutions, which were agreed to:

Resolved, That in the performance of the duties imposed upon it by reference to it of House resolution 420, the Committee on Rules shall have the power to send for persons and papers and to administer oaths and to employ such stenographic and clerical assistance as may be necessary. The expenses incurred hereunder shall be paid out of the contingent fund of the House of Repre-

[1] Journal, p. 115; Record, p. 1273.

[2] Journal, p. 121, Record, p. 1334.

sentatives on vouchers ordered by this committee and signed by the chairman thereof and approved by the Committee on Accounts, evidenced by the signature of the chairman thereof.

Resolved, That in the consideration of House resolutions Nos. 420 and 429, committed to the Committee on Rules, said committee be, and it is hereby, authorized and empowered to require witnesses to answer all questions propounded by said committee or a member thereof, touching the subject matter of said resolutions, and to require any witness called before it to testify fully as to any information in his possession, whether in the nature of hearsay testimony or otherwise, relative to the matters set forth in said resolutions. And said committee is specifically directed to require one Thomas W. Lawson to name any Member of Congress or other person alleged by him in his testimony before said committee on January 8 and 9, 1917, to have given him any information relating to the subject matter of said resolutions or either of them.

On January 17,[1] on motion of Mr. Edward W. Pou, of North Carolina, by unanimous consent, the time within which the committee was instructed to report was extended 30 days.

Whereupon Mr. Pou offered the following resolution, which was agreed to by the House:

Resolved, That in the consideration of House resolutions 420, 429, and 446, referred to the Committee on Rules, said committee be and is authorized and empowered to employ counsel to aid in conducting the investigations which it has been directed by the House to make, and also to employ such expert accountants familiar with stock-exchange transactions as may be found necessary in conducting said investigation.

The Committee on Rules or any subcommittee thereof is authorized in the consideration of said resolution to sit during the sessions of the House in Washington or elsewhere.

The expenses incident to the employment of counsel and accountants and those of the committee or subcommittee when sitting outside of Washington shall be paid out of the contingent fund of the House on vouchers signed by the chairman or acting chairman of said committee.

On February 13,[2] Mr. Pou, by direction of the Committee on Rules, asked unanimous consent that 10 additional days be granted in which to complete consideration of the resolution.

The request was acceded to, and on February 27[3] Mr. Henry submitted the unanimous report[4] of the committee.

The report was called up on March 3,[5] and Mr. Mann demanded the reading of the report in full.

Mr. Garrett called attention to the fact that reports on investigations are statements of fact merely, and under the rules of the House may be read by unanimous consent only.

Mr. Mann agreed:

We do not adopt the report. I think the gentleman from Tennessee is right about it.

The report discussed at length the circumstances under which advance notice of the President's message was disseminated, found no evidence to sustain any of charges made in that connection, and closed with the recommendation that the resolution lie on the table.

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[1] Journal, p. 135; Record, p. 1549.

[2] Journal, p. 223; Record, p. 3240.

[3] Record, p. 4439.

[4] House Report No. 1580.

[5] Journal, p. 328; Record, p. 4048.

In presenting the report Mr. Henry said:

Mr. Speaker, this is a unanimous report from the committee. After taking testimony and investigating every source of information that came to this committee, we have concluded that there is nothing to cast suspicion upon any Member of this House or of the Senate or upon any official of this Government. This committee desires to exonerate and does exonerate the Congress of the United States from the innuendo, suggestions, and charges that were made, and we are glad to report that we found nothing even suggesting that there should be criticism of the Members of Congress or of any Cabinet officer or any official of the Government. The report sets these things out at length. The report, speaking for itself, covers all of these points, and I believe there is nothing else that I can say or that I should say to the House, but we ask this body to adopt the report, and then the formal motions to lay these resolutions on the table will be made.

After brief debate the report was adopted, and the resolution was laid on the table.

395. The presence of unprivileged matter destroys the privilege of a resolution otherwise privileged.

A resolution providing for the investigation of a question of privilege loses its privileged character if including an appropriation.

A question of the privilege of the House takes precedence over the consideration of a proposition privileged by special order.

A committee of investigation in its report criticized a Member who had imputed corrupt motives to other Members of the House.

Instance wherein the House adopted the report of a committee of investigation.

On September 24, 1917,[1] Mr. Joseph W. Fordney, of Michigan, offered as privileged the following:

Whereas the Congressional Record of September 21, 1917, pages 7305 and 7306, contained a statement by the Hon. Thomas J. Heflin, Member of Congress from Alabama, commenting upon the contents of a telegram sent from Washington to Germany by Count von Bernstorff, the representative of the German Government, in which he (Von Bernstorff) asked permission "to pay out $50,000, as on former occasions to influence Congress," Mr. Heflin used the following language:

"I do not know what Members of Congress, if any, have been influenced by this mysterious German organization. If I were permitted to express my opinion, I could name 13 or 14 men in the two bodies who, in may judgment, have acted in a suspicious manner. If Members have acted in a suspicious manner, by the introduction of resolutions or bills or by speeches in the Congress or out of it, that leads to the conviction that they are not loyal to this Government in the hour of its peril, they ought to be investigated and, if found guilty, they ought to be expelled from the House and from the Senate of the United States."

And

Whereas the Washington Post and other newspapers of September 22, 1917, reported the following interview with or statement furnished by Congressman Heflin concerning the said telegram of Count von Bernstorff, to wit:

"I have heard a story that there is a gambling room in Washington where pro-German and peace-at-any-price Members of Congress get their pay by being extraordinarily lucky at cards. * * * I demand that this matter be investigated and that the guilty Members be expelled from Congress in disgrace. I believe some of this money has reached some Members of Congress. I know I could name 13 or 14 Members of the House and the Senate who have acted in a very suspicious fashion."

[1] First session Sixty-fifth Congress, Record, p. 7367.

And

Whereas in the Washington Post of September 22, 1917, Hon. William Schley Howard, a Member of Congress from Georgia, is reported to have said upon the subject of said telegram that he could point to men in this House who, "I believe, received money. Their actions certainly indicate it and they are certainly more prosperous now than they have ever been."

Therefore be it

Resolved, That the Speaker of the House of Representatives appoint a select committee of seven Members of the House, with instructions to inquire into the charges made in the statement of the said Hon. Thomas J. Heflin, Member of Congress from Alabama, as inserted by him in the Congressional Record of September 21, 1917, pages 7305 and 7306, respecting the said telegram of Count von Bernstorff, and also to inquire into the statements of said Heflin which appears in the Washington Post of September 22, 1917, and also the statment of said Howard in said paper and of said date, and all other statements, matters, or things pertaining to such telegram of said Von Bernstorff and comments of Members of Congress thereon. Said committee shall have the power to enforce attendance of persons in Washington or elsewhere, to administer oaths to such persons, and to require the production of such books and papers as may be pertinent to the inquiry. Said committee shall report to the House within 20 days the results of its inquiry and its recommendations, if any, as to appropriate action to be taken by the House against any person or persons involved in this inquiry. To pay the expenses of said committee the sum of $10,000, or so much thereof as may be necessary, is hereby ordered to be paid out of the contingent fund of the House, on vouchers approved by the Committee on Accounts.

Mr. Finis J. Garrett, of Tennessee, made the point of order that the resolution was not privileged for the reason that it carried an appropriation.

The Speaker[1] sustained the point of order, and referred the resolution to the Committee on Rules.

On October 4,[2] Mr. Hubert D. Stephens, of Mississippi, offered a resolution providing for an investigation of the same subject.

Mr. John N. Garner, of Texas, made the point of order that consideration of the resolution was precluded by a special order adopted on the preceding day providing:

That immediately upon the adoption of this resolution the House shall proceed to the consideration under the general rules of the House of H. R. 6361, entitled "A bill to extend protection to the civil rights of members of the Military and Naval Establishments of the United States engaged in the present war," and it shall be considered from day to day until disposed of, subject to consideration of conference reports.

The Speaker held that questions of privilege take precedence over all other questions with the exception of the motion to adjourn, and their consideration can not be circumscribed by orders providing for the consideration of other propositions, and recognized Mr. Stephens to present his resolution.

The resolution was agreed to, and Mr. Henry A. Barnhart, of Indiana, chairman of the committee, appointed in pursuance thereof, submitted a report[3] thereon October 6.

The report finds:

On the above statements to Mr. Heflin, taken in connection with the letter from the Secretary of State's office, your committee is of the opinion that there is no justification for and no evidence

[1] Champ Clark, of Missouri, Speaker.

[2] Record, p. 7786; Journal, p. 400.

[3] Record, p. 7906; House Report No. 201.

upon which to base a further investigation of the question of the corrupt receipts of money by Members of Congress.

The committee then express the opinion:

While your committee makes no recommendation in the premises, we beg to state it as our opinion that in so far as Mr. Heflin's charges impute or might fairly be construed as imputing dishonest or corrupt motives to any Member of Congress, notwithstanding the fact that he now denies any intention of conveying any such imputation, his conduct in that respect is subject to criticism.

After the reading of the report, Mr. Barnhart, by direction of the select committee, moved the previous question on the adoption of the report.

The previous question was ordered, and the question recurring on the report, it was agreed to without division.

396. The lobby investigation in the Sixty-third Congress.

A Member who had been defamed in his reputation as a Representative by a newspaper article presented the case as one of privilege and the House ordered an investigation.

Form of resolutions of the House creating, empowering, and instructing the select committee which investigated charges that Members have been improperly influenced in their official capacity.

In directing an investigation of charges against certain of its Members the House provided that all meetings of the committee for the purpose of taking testimony or hearing arguments should be open to the public.

On July 2, 1913,[1] Mr. Swagar Sherley, of Kentucky, submitted, as a question of privilege, the following resolution:

Whereas it appears that on the 29th day of June, 1913, there was published in the World, a newspaper of the city of New York, the following statement, viz:

"7. That among the men whom the lobbyists of this association (meaning thereby the National Association of Manufacturers) had no difficulty in reaching and influencing for business, political, or sympathetic reasons during recent years were: President Taft, Senator Lodge, the late Vice President Sherman, ex-Senator Foraker, Senator Nelson, ex-Senator Hemenway, ex-Speaker Cannon, ex-Congressman Dwight, Republican "whip" of the House from 1909 to 1911; former Congressman James E. Tawney, of Minnesota; former Congressman J. Adam Bede, of Minnesota; Senator Isaac Stephenson, of Wisconsin; former Senator Aldrich, of Rhode Island; Senator Townsend, of Michigan; Senator Gallinger, of New Hampshire; Congressman Webb, of North Carolina; former Congressman J. Sloat Fassett, of New York; former Congressman W. B. McKinley, of Illinois; former Congressman Vreeland, of New York; former Congressman Dalzell, of Pennsylvania; former Senator N. B. Scott, of West Virgina; former Congressman W. S. Bennet, of New York; former Postmaster General James A. Gary, of Baltimore; the late Congressman George A. Southwick, of New York; Congressman W. M. Calder, of New York; Congressman James F. Burke, of Pennsylvania; former Congressman W. H. Ryan, of New York; former Congressman W. M. Wilson, of Illinois; former Congressman Denby, of Michigan; former Congressman Edward H. Henshaw, of Nebraska; former Congressman Jesse Overstreet, of Indiana; former Congressman J. G. Beale, of Pennsylvania; former Congressman W. A. Calderhead, of Kansas; former Congressman Diekema, of Michigan; former Congressman M. A. Driscoll, of New York; former Congressman G. J. Foster, of Vermont; former Congressman P. M. Fowler, of New Jersey; Congressman Swager Sherley, of Kentucky; former Congressman J. A. Sterling, of Illinois; former Congressman J. P. Swasey, of Maine; former Congressman Charles E. Littlefield, of Maine; Gov. W. T. Haines, of Maine; Ambassador Myron T. Herrick, of Ohio; Ambassador

[1] First session Sixty-third Congress, Record, p. 2297.

Curtis Guild, of Massachusetts; Congressman Richard Bartholdt, of Missouri; the late Congressman Sidney Mudd, of Maryland; and Congressman George W. Fairchild, of the thirty-fourth New York district"; and

Whereas said statement reflects upon the official character and conduct of Representative Swager Sherley, a Member of this House, who has requested an investigation by this body, in accordance with the rules and practices of the House, of the matters so alleged concerning him:

Resolved, That the Speaker appoint a select committee of seven Members of the House, and that such committee be instructed to inquire into the matters so alleged concerning the said Representative, and more especially whether, during this or any previous Congress of which the said Representative was a Member, the lobbyists of the said National Association of Manufacturers, or the said association itself, through any officer, agent, or member thereof, did, in fact, reach or influence, whether for business, political, or sympathetic reasons, or otherwise, the said Representative in and about the discharge of his official duties; and if so, when, by whom, and in what manner. And for such purposes the said committee shall have power to send for persons and papers and administer oaths, and shall have the right to report at any time. The expenses of said inquiry shall be paid out of the contingent fund of the House, upon vouchers approved by the chairman of said committee, to be immediately available.

Mr. James Hay, of Virginia, having made a point of order that the resolution was not privileged, the Speaker ruled:

It undoubtedly is a privileged resolution. The precedents make it a question of privilege, and the Chair entertains the resolution as a privileged resolution.

On motion of Mr. Robert L. Henry, of Texas, after debate, the resolution was referred to the Committee on Rules, which on the following day[1] submitted[2] as a substitute therefor:

Whereas there have appeared in recent issues of various newspapers published in the United States divers statements and charges as to the existence and activity of a lobby organized by and on behalf of an organization known as the National Association of Manufacturers for the purpose of improperly influencing legislation by Congress, the official conduct of certain of its members and employees, the appointment and selection of committees of the House and for other purposes designed to affect the integrity of the proceedings of the House of Representatives and its Members: Therefore be it

Resolved, That the Speaker appoint a select committee of seven Members of the House and that such committee be instructed to inquire into and report upon all the matters so alleged concerning said Representatives, and more especially whether during this or any previous Congress the lobbyists of the said National Association of Manufacturers, or the said association through any officer, agent, or member thereof, did, in fact reach or influence, whether for business, political, or sympathetic reasons or otherwise, the said Representatives or any one of them or any other Representative or any officer or employee of this or any former House of Representatives in or about the discharge of their official duties, and if so, when, by whom, and in what manner.

Said committee shall also inquire whether money has been used or improper influence exerted by said National Association of Manufacturers or other person, persons, association, or organization or any agent thereof to accomplish the nomination or election or secure the defeat for nomination or election of any candidate for the House of Representatives, and said committee shall likewise inquire whether Members of the House of Representatives have been employed by any of said associations or have knowingly aided said associations or any of them for the accomplishment of any improper purpose whatever.

Said committee is also directed to inquire whether improper influence has been exerted by said association or by any other association, corporation, or person to secure or prevent the appointment or selection of any Representative to any committee of the House in this or any other Congress.

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[1] Record, p. 2315.

[2] House Report No. 33; Journal, p. 204.

Said committee shall also inquire whether the said National Association of Manufacturers or any other organization or corporation or association or person does now maintain or has heretofore maintained a lobby for the purpose of influencing legislation by Congress and ascertain and report to what extent and in what manner, if at all, legislation has been improperly effected or prevented by reason of the existence of such lobby, if it be found to exist now or to have existed heretofore.

Said committee, or any subcommittee thereof, may sit in the city of Washington or elsewhere to conduct its investigations during the sessions of the House or recess of Congress. All meetings of said committee or any subcommittee, for the taking of testimony or hearing of argument, shall be open to the public. It shall have power to employ such legal or clerical assistance as may be deemed necessary, to send for persons and papers and administer oaths, and shall have the right to report at any time.

The Speaker shall have authority to sign and the clerk attest subpoenas during the recess of Congress. The expenses of said inquiry shall be paid out of the contingent fund of the House upon voucher, approved by the select committee signed by the chairman thereof, and by the Committee on Accounts, signed by the chairman thereof.

The substitute was agreed to by the House, and the Speaker immediately appointed the committee, which presented its report [1] on December 9.[2]

397. The lobby investigation in the Sixty-third Congress, continued.

Definition by a committee of the House of the term "lobby."

Differentiation by a committee of the House between admissible and inadmissible methods of persons and organizations in appealing to Members of Congress.

Discussion by a committee of the House as to propriety of the employment of former Members of Congress to advocate or oppose measures under consideration by the House.

Discussion as to the propriety of employees of the House accepting employment by agencies interested in pending legislation.

A Committee of the House took the view that the acceptance by a Member of loans from individuals or associations organized for the purpose of opposing certain classes of legislation was incompatible with his duty as a Representative.

Instance wherein a Member delegated to another not in the service of the House the use of his frank and the occupancy of a room in the Capitol.

In the outset the report gives the following definition of the word "lobby":

The resolution does not define for us the word "lobby," and distinguished and eminent authorities entertain wide differences of opinion as to its correct definition. The word at one period carried with it a certain idea of acts, sinister and corrupt, and the first impression now made upon the mind of the average man when this word is used in connection with legislative bodies is probably in line with this conception. That it was not so intended to be understood in this resolution, however, appears to be certain, because the second part of paragraph 4 requires the committee to ascertain and report "to what extent and in what manner, if at all, legislation has been improperly effected or prevented by reason of the existence of such lobby, if it be found to exist now or to have existed heretofore." Had it been intended that your committee should consider the word "lobby" as used in the resolution to have the meaning above set forth, there would have been no necessity or occasion for the insertion of the word "improperly" in the subsequent clause.

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[1] Second session Sixty-third Congress, House Report No. 113.

[2] Record, p. 565, Journal, p. 32.

Your committee has therefore in the taking of testimony treated and does, for the purposes of this report, treat the word "lobby" as used in the resolution as having the broad meaning of a person or body of persons seeking to influence legislation by Congress in any manner whatsoever, and under this definition it finds that the National Association of Manufacturers, the National Council for Industrial Defense, the National Tariff Commission Association, the American Federation of Labor, the local associations of intoxicating liquor dealers, and the local loan sharks and pawnbrokers have maintained, and some of them do now maintain, lobbies for the purpose of influencing legislation by Congress.

Applying this definition the report reaches the conclusion:

From the testimony adduced before your committee, the conclusion must be inevitable that in so far as Mr. Mulhall's duties in Washington and about the Capitol are concerned he was employed and used by these organizations very largely and primarily for personal lobbying. They believed him to be a man of extended acquaintance among Representatives, Senators, and other public men, and believed that this acquaintance could be capitalized and utilized in influencing individual Members in their official acts, and so affect the general course of legislation; and it was for this purpose that he was employed and retained.

The committee expresses its disapproval of such activities in the following language:

We think it is offensive and outrageous that these associations should have their paid hirelings about this Capitol buttonholing Members of Congress, striving to induce them to remain away from the Chamber when a vote was being taken. We think they went beyond the limits of legitimate effort and that they deserve the severest censure as well as a pointed invitation and suggestion that they completely reform their methods or else remain away in the future. We have striven to make clear our opinion as to the right of persons and organizations to argue and appeal to Representatives and Senators. We would not place one of these upon an unapproachable pedestal and bid the world regard him with awe and in silence. That is not the true theory of representative government; but the Congressman himself is entitled, and what is vastly more important, the public whom he represents is entitled to have him act free from the annoyances and efforts such as clearly were incident to these activities of Mulhall and Emery, whose conduct met the unreserved approval and enthusiastic acclamation of the officials of their respective organizations.

But finds no grounds for considering it effective:

There was no evidence presented to your committee which would indicate that under the rule as to improper influence set forth this tariff commission legislation was improperly effected by the lobby which worked in its behalf. At the same time the committee questions the propriety of one who has been a Member of Congress and attained a personal and political influence capitalizing that influence in pressing legislative propositions upon Congress for hire by personal contact and personal efforts with Members, as was done in this case, and we confess to a feeling of regret that upon any question, whatever its merits, the lobbyist for it should be able to say, as Mr. Watson said in this case (p. 2571), "I had various Members of Congress coming to report to me about how their delegations stood."

The report then takes up in their order the several charges under consideration.

As to whether improper influence was exerted in attempting to influence the appointment of Members to committees of the House:

In the Mulhall article it was asserted that at the request of Mr. Emery and Mr. Mulhall three active members of the House Judiciary Committee were removed through the influence of Hon. James E. Watson; that one of these was Mr. George A. Pearre, late a Representative from the State of Maryland, the names of the others not being given; that in the place of the three men removed "three very subservient members" were appointed.

Doubtless the removal or failure to reappoint Mr. Pearre was gratifying to the N. A. M., because of the antagonism of views between them, and it is not beyond the range of possibility that the matter was by some of its representatives discussed with the Speaker, or others known to be close to him, but there is no evidence of any improper influence sought to be exerted upon him and no reason to assume that his act was other than upon his own initiative and responsibility.

As to the use of money or improper influence in securing the election or defeat of candidates for the House:

That the N. A. M. did participate actively and energetically in a number of these campaigns is, however, clearly established. Since about the year 1903 it has participated to a greater or less extent in political activities, giving encouragement and support to those who have strongly advocated the views for which it stood, rendering financial assistance to their campaigns at times, and opposing those who, by vigorous advocacy of the measures they have antagonized, have rendered themselves politically obnoxious to the association.

The report gives in detail the findings of the committee as to definite sums contributed by various organizations on specified occasions in the interest of favored candidates or in opposition to candidates considered antagonistic to their interests, and says:

It has not been possible for your committee to ascertain the aggregate amount which these organizations have expended in the effort to effect nominations and elections of Members of the House of Representatives, but we find that money has been by them expended for that purpose.

On another phase of the same inquiry:

Passing from the simple question of the use of money to that of whether "improper influence was exerted," this being the second part of paragraph 2, your committee has to report that it looks with greatest suspicion upon the act of sending Mulhall abroad in the country furnished with funds to organize temporary and speedily dissolving associations for use in elections, as was done again and again, and the secretiveness practiced induces in the common intelligence of men a surmise that there was not that scrupulousness which is attendant upon cleanly political practice.

The committee however find:

As to the employment of Members for improper purposes:

Inquiry was made of all the representatives of the several organizations that have been referred to herein as to the employment of Members of the House of Representatives and no evidence has been adduced of any such employment by them or by any other person or association.

As to the employment of House employees, the committee find that certain minor employees were employed for routine work the character of which would not necessarily reflect upon their motives, but hold:

Your committee does not believe that employees of the House should be permitted to accept outside employment, even of the character given McMichael in this instance. It tends to excite suspicion in the public mind, and may lead to dangerous and improper activities. This action meets the strong disapproval of your committee. It was a violation of all the proprieties, and all persons connected with it deserve the severest censure.

It also appeared that other employees had been the recipients of tips and gratuities on various occasions, of which the committee says:

For these services liberal gratuities or "tips" were given them from time to time, and these were accepted. Your committee can not conceive that these men in their position and circumstances could have been considered as able to aid or effect in any way the course of legislation, and does not believe that they were employed as agents, but we think the acts of those men who were here as professional lobbyists, in constantly bestowing gratuities upon these employees, was

reprehensible in the extreme and generally we feel that there is impropriety in the tipping of even the menial employees of the House.

The report then discusses individually each Member named in the newspaper article which had given rise to the investigation, and finds that with one exception no evidence was adduced to show that any of them were in any wise improperly influenced by lobbyists either in voting or otherwise.

As to the one exception the report says:

Representative James T. McDermott, of Illinois, is also listed in the summary among those whom the N. A. M. had no difficulty in reaching and influencing for business, political, or sympathetic reasons, and mentioned in the personal narrative of Mulhall.

Mr. McDermott has denied in his testimony very vigorously that the relations between Mulhall and himself ever became close and of an especially friendly character. We think, however, that they did. While we are of opinion that Mulhall has exaggerated largely the intimacy existing between them, we are, at the same time, of opinion that Mr. McDermott has unduly minimized it.

As to loans made:

Evidence in the record as to this is too voluminous and convincing to admit of any other conclusion. We think, too, that the weight of the testimony is that Mr. McDermott did obtain occasional sums of money from Mulhall, in the way of small loans, when they were together, but the testimony convinces us that these were personal acts of Mulhall, and we do not believe that he let McDermott have this money with a view of corrupting him.

That Mr. McDermott may have borrowed some moneys from the N. A. M., we think not improbable, but we do not believe there was any understanding that he was to regularly receive a portion or that there was any corrupt motive in the act. Probably it was an act of impropriety for Mr. McDermott to solicit and accept loans from this salary, knowing its source.

Your committee is of opinion that the most serious question of propriety affecting Mr. McDermott is not in connection with the N. A. M. or the other matters above related, but grows out of his acts and dealings with the Liquor Dealers' Association of the District of Columbia and with George Horning, one of the pawnbrokers, to which allusion has been made.

He further testifies as to procuring loans for McDermott from Horning and Heidenheimer, and also to procuring loans for himself from these men and McDermott aiding him in settling them or, rather, securing the return of his pledges without the payment, in one instance, of the principal, and in another, the interest, and relates other circumstances to show the alleged close relations of Mr. McDermott with the pawnbrokers and his influence with them.

In September, 1912, at the instance and suggestion of Mr. Hugh F. Harvey, secretary of this central body, there was loaned to Representative McDermott out of its treasury the sum of $500.

We can not say that Mr. McDermott's vote was influenced by this transaction. We have no doubt he would have voted against the Jones-Works bill had it not occurred, but we do not believe that the loan would have been made to him had he not been a Member of Congress, nor do we believe it would have been made had he been favorable to the Jones-Works bill.

As to the use of a room in the Capitol:

The fact of the use of a room in the Capitol by Mr. Mulhall has been referred to heretofore. In the article he claims that this was procured for him by Mr. McDermott. We think this is true or, at least, if he did not procure it for him, he did, having control over it, knowingly permit him to use it. The facts relative to this room, concerning which so much has been said, are that during the Sixty-second Congress two small adjoining rooms in the basement of the Capitol, Nos. 27 and 29, respectively, were allotted to the Committee on Expenditures in the Department of Commerce and Labor, of which Mr. Rothermel, of Pennsylvania, was chairman and Mr. McDermott was ranking member. They were not used for committee purposes, however, but were turned into storage rooms by the chairman, who seldom visited them and who gave Mr. McDermott the right to use them also, and through Mr. McDermott, Mulhall was furnished a key and given the use of the room and did use it for a few hours each day, having a stenographer come there and take

the dictation of his correspondence relative to his association work. His use of the room was limited to a few weeks during the summer.

As to the use of the Member's frank:

As for the use of McDermott's frank, we do not find from the evidence that he authorized its use to an extent, or that it was used by or for Mulhall to an extent, that might properly be classed as abuse thereof. Some books and documents were mailed under it to officials of the association by Mulhall, but it is not in evidence that its use was so delegated by him as to be a violation of the law relative to the franking privilege.

The report concludes:

Your committee can go no further than ascertain and report to the House the facts as it finds them. The Members of the House know Mr. McDermott, know his ideals and his characteristics as the public generally does not and in the nature of things can not know them. His training and associations have not given him the ethical perceptions and standards relative to public office that usually characterize public men.

We can not say that he has been corrupted in his votes, but some things which a private citizen may do with impunity must be avoided by one in official station, and we should feel that we had shirked a duty which we owe to the House and the country did we not say that we are driven, much to our regret, to the conclusion that he has been guilty of acts of grave impropriety, unbecoming the dignity of the distinguished position he occupies.

Separate views were filed by Mr. William J. MacDonald, of Michigan, concurring in the conclusions reached by the committee but expressing the opinion that the situation was of graver import than that indicated in the majority report.

The report was read in full, and Mr. MacDonald offered resolutions—

Directing the House to determine whether certain officers and agents of the National Association of Manufacturers have not been guilty of practices rendering them liable to punishment for contempt.

Directing the House to determine whether, under the report of the Select Committee on Lobby Investigations, Representative James Thomas McDermott has not been shown to be guilty of disgraceful and dishonorable misconduct and venality rendering him unworthy of a seat in the House, and justly liable to expulsion from the same.

Mr. Garrett made the point of order that the motions were not privileged.

The Speaker [1] overruled the point of order, and Mr. Garrett submitted the following:

Resolved, That the report of the select committee appointed under House resolution No. 198, and the findings and testimony, be referred to the Committee on the Judiciary, with directions to report to the House at the earliest practical date what action, if any, should be taken by the House thereon.

The resolution prevailed, yeas 133, nays 34, and the report of the special committee was referred to the Committee on the Judiciary which submitted its report [2] thereon April 24, 1914.

398. The lobby investigation in the Sixty-third Congress, continued.

Discussion by a committee of the power of the House to expel or otherwise punish its Members for disorderly behavior.

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[1] Champ Clark, of Missouri, Speaker.

[2] Second session Sixty-third Congress, House Report No. 570, Record, p. 7199; Journal, p. 481.

Discussion of the power of the House to punish persons other than Members for offenses affecting the dignity, orderly procedure, or integrity of the House.

A committee which had been empowered to investigate specific charges against certain Members recommended general legislation dealing with such offenses.

A committee of investigation appointed by the House, having declared a Member guilty of conduct of grave impropriety and warranting censure, the Member resigned and the House discontinued the proceeding.

The report of the Committee on the Judiciary considers:

First, The power of the House to punish its Members.

Second, The power of the House to punish persons other than Members.

On the first proposition the committee decide:

That it is within the power of the House to punish its Members for disorderly behavior and by a two-thirds vote expel a Member.

The two methods of punishment of a Member under the practices of the House are by expulsion and by censure.

In the judgment of your committee the power of the House to expel or otherwise punish a Member is full and plenary and may be enforced by summary proceedings. It is discretionary in character, and upon a resolution for expulsion or censure of a Member for misconduct each individual Member is at liberty to act on his sound discretion and vote according to the dictates of his own judgment and conscience. This extraordinary discretionary power is vested by the Constitution in the collective membership of the respective Houses of Congress, restricted by no limitation except in case of expulsion the requirement of the concurrence of a two-thirds vote.

In the judgment of your committee, the power of the House to expel or punish by censure a Member for misconduct occurring before his election or in a preceding or former Congress is sustained by the practice of the House, sanctioned by reason and sound policy and in extreme cases is absolutely essential to enable the House to exclude from its deliberations and councils notoriously corrupt men, who have unexpectedly and suddenly dishonored themselves and betrayed the public by acts and conduct rendering them unworthy of the high position of honor and trust reposed in them.

This opinion is supplemented:

But in considering this question and in arriving at the conclusions we have reached, we would not have you unmindful of the fact that we have been dealing with the question merely as one of power, and it should not be confused with the question of policy also involved. As a matter of sound policy, this extraordinary prerogative of the House, in our judgment, should be exercised only in extreme cases and always with great caution and after due circumspection, and should be invoked with greater caution where the acts of misconduct complained of had become public previous to and were generally known at the time of the Member's election. To exercise such power in that instance the House might abuse its high prerogative, and in our opinion might exceed the just limitations of its constitutional authority by seeking to substitute its own standards and ideals for the standards and ideals of the constituency of the Member who had deliberately chosen him to be their Representative. The effect of such a policy would tend not to preserve but to undermine and destroy representative government.

As to the second question, the committee holds:

The principle is well settled that each House of Congress has power to punish for contempt of its authority persons other than Members. The power to punish its Members, it must be observed, is derived from express provision of the Constitution. The power to punish persons other than Members for offenses committed/against either House of Congress is not found in any express

provision of the Constitution, but is an implied power inherent in legislative bodies as in courts originating from necessity and used as a means of self-protection and self-preservation, the exercise of which has long been sanctioned by custom and usage under American and English jurisprudence. Such a power is necessarily an undefined power, more or less arbitrary in its nature, and must be invoked and exercised in such summary way as may be deemed best to meet the exigencies of the situation arising in each particular case.

The report further says, however:

Your committee is not prepared to say that on account of the failure of Congress to exercise a power or by reason of the limited number of precedents bearing upon the particular question, that no case could arise wherein the assertion of such power would be necessary in order to protect the House or the dignity and honor of its membership, but in searching the precedents we have failed to find a single case in which either House of Congress ever attempted to punish persons other than Members for contempts committed in a previous Congress. The only case we have been able to find in which Congress undertook to punish a person other than a Member by an affirmative resolution of censure is in the case of President Andrew Jackson. If it should be contended that the adoption of the resolution of censure in that case is a precedent for such action, the contention is at once answered by subsequent action on the expunging resolution which was later adopted by the Senate in the same case. There can be no question that Congress has a right to inquire into the conduct of persons in their relation to its affairs in previous Congresses for the purpose of gathering information which may be used as a basis for remedial legislation or in dealing with its own Members. The right of either House of Congress to punish for contempts of its authority or for interfering with its proceedings is no longer questioned, but it has been held that the punishment in each particular case ceases with the termination of the Congress that imposed it.

From the reasoning and conclusions reached by the Supreme Court in the case of Anderson *v.* Dunn, it is manifest that the power of a legislative body to punish or censure persons other than Members rests upon an entirely different principle from its power to deal with its own Members, and begins with the opening of each Congress and terminates with its adjournment. The exercise of such power by either House, it would seem by clearest inference, therefore, is limited and restricted to acts or practices in contempt of its immediate authority, or, if committed against the authority of the House, in a previous Congress, and complaint thereof is made and inquiry into such acts and conduct is instituted by the House in a subsequent Congress, the acts and conduct complained of must be repeated in defiance of its own authority before punishment can properly be imposed therefor.

The committee accordingly concludes:

We have found no precedents to sustain the contention that this House has power to punish persons other than Members for acts committed during the Sixty-second Congress which may have constituted contempts of the authority of the then existing House, but which in no way relate to the affairs of the present House or its Members, and we therefore conclude that grave doubt exists as to its authority to do so.

As to the facts, the committee agrees:

The facts set forth in the report of the select committee and the conclusions and findings of the select committee are abundantly sustained by the testimony.

Applying the principles of law herein enunciated, and observing the rules of sound policy, which we conclude ought to govern the House in dealing with a Member for improper conduct, we fail to find in the record that satisfactory character of evidence which in our judgment would warrant or justify the expulsion of Representative James T. McDermott. At the same time we do not exonerate him and cannot and have no disposition to exculpate him from the imputations and consequences resulting from his own improper acts as disclosed by the testimony embodied in the hearings.

The adoption by the House of the following resolution is therefore recommended:

Resolved, That Representative James T. McDermott, while a Member of a former Congress, in his associations with M. M. Mulhall, a lobbyist of the National Association of Manufacturers, and in accepting loans of large sums of money from George D. Horning, a pawnbroker, and from Hugh F. Harvey, a member of the Retail Liquor Dealers' Association, both then vitally interested in legislation pending before such former Congress, was guilty of acts of impropriety incompatible with that high sense of honor and decorum which should characterize the conduct of a Member of this House, and that the House strongly condemns such conduct of the said James T. McDermott, and declares that he was thereby guilty of acts of grave impropriety unbecoming the distinguished position he held.

In addition to these findings and recommendations, the Committee deems itself authorized to further recommend:

Your committee reports that the testimony taken by the select committee as aforesaid, is voluminous, covering more than 2,900 printed pages and deals not only with the lobby activities of the National Association of Manufacturers and the National Council for Industrial Defense, but with the operations of the American Federation of Labor, the Liquor Dealers' Association of the District of Columbia, the local pawn brokers' association, and other organizations and associations which, by different methods, some proper and some improper, have heretofore attempted by varying means to influence individual Members of Congress and to control or defeat legislation that vitally affected the interests of their respective organizations.

We therefore feel that the most substantial service we can render the House or the country in submitting this report is not in recommending action by the House touching the conduct of its own Members or of particular individuals or associations who have become involved in charges disclosed by the testimony found in the hearings of the select committee, but in recommending the enactment of substantive legislation to prevent the recurrence of similar abuses in the future. With this end in view, by the direction of the Committee on the Judiciary a bill prepared by the subcommittee, the purpose of which is to regulate lobbying before either House of Congress, has been introduced in the House by the chairman of the subcommittee, Mr. Floyd, and has been referred to the Committee on the Judiciary, and is now before the committee for consideration. It is expected that at an early date your committee will be able to perfect and report to the House for its favorable consideration the proposed legislation, the necessity for which is made manifest by the disclosures of improper and disreputable practices brought to light in the investigations and hearings of the select committee. We submit as a part of this report, for the information of the House, the bill which has been introduced as aforesaid.

The committee then submit in full a proposed bill embodying such legislation.

Mr. John M. Nelson, of Wisconsin, and Mr. George S. Graham, of Pennsylvania, submit minority views concurring in the findings of the majority, but holding Mr. McDermott's conduct to be so inconsistent with his public duty as to warrant his expulsion by the House.

Mr. Louis Fitz Henry, of Illinois, in separate views, also concurs in the findings of the majority but dissents from its conclusion that the House is without power to censure the conduct of those shown to have been engaged in disreputable practices against the honor, dignity, and integrity of the House.

The report was referred to the Calendar of the House, but before it could be considered Mr. McDermott arose in his place, and after addressing the House presented his resignation therefrom.[1]

[1] Second session Sixty-third Congress, Record, p. 12431; Journal, p. 789.

399. The investigation of charges against Burton K. Wheeler, a Senator from Montana.

A Senator having been indicted by a grand jury, asked and obtained an investigation by a committee of the Senate.

Form of resolution providing for investigation of charges against a Senator.

Application of the statute prohibiting Members of Congress from serving in causes to which the United States is party.

Discussion of the latitude of inquiries conducted by the Senate under the right to determine the qualifications of its Members.

A Senator having been indicted in the United States district court, the Senate, prior to the trial, investigated the charges and exonerated him.

On April 9, 1924,[1] in the Senate, Mr. Burton K. Wheeler, of Montana, said:

Mr. President and Members of the Senate, I have risen to a question of personal privilege because of an article appearing in the morning papers. I appreciate that I am a new Member in this body, that I am a stranger to most of you, so for that reason I trust you will pardon me for giving you just a brief statement as to my career before I came to the Senate.

I have never at any time or on any occasion appeared before the Department of the Interior in behalf of Mr. Campbell or appeared in any other department of the Government of the United States. I defy those people to produce one scintilla of evidence that I ever appeared for them as attorney before any department of the Government of the United States. The contract which I entered into with Mr. Campbell expressly provided that I should not appear in any of the departments here in Washington. I expressly told him that, and I told former Representative Stout the same thing.

Let me say to you Senators here to-day that you are the judges of the qualifications of the Members of this body. I should be delighted to have this body appoint any committee, any Members of the United States Senate, to investigate these charges that have been filed against me, and I venture the assertion that after you have done it you will see a report that there is not a scintilla of evidence casting the slightest reflection upon my honesty or upon my integrity.

Thereupon Mr. Thomas J. Walsh, of Montana, submitted a resolution, which was agreed to, as follows:

Resolved, That a committee consisting of five members of the Senate be appointed by the President pro tempore to investigate and report to the Senate the facts in relation to the charges made in a certain indictment returned against Senator Burton K. Wheeler in the United States District Court for the State of Montana.

The Senate also agreed to this resolution:

Resolved, That in pursuance of Senate Resolution No. 206, providing for the appointment of a committee to investigate charges made in an indictment against Senator Burton K. Wheeler, said committee or any member thereof be, and hereby is, authorized during the Sixty-eighth Congress to send for persons, books, and papers, to administer oaths, and to employ stenographic assistance at a cost not to exceed 25 cents per hundred words, to report such hearings as may be had in connection therewith, the expenses thereof to be paid out of the contingent fund of the Senate; and that the committee, or any subcommittee thereof, may sit during the sessions or recesses of the Senate.

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[1] First session Sixty-eighth Congress, Record, p. 5946.

The President pro tempore [1] appointed as the committee Messrs. William E. Borah, of Idaho, as chairman, George P. McLean, of Connecticut, Thomas Sterling, of South Dakota, Claude A. Swanson, of Virginia, and T. H. Caraway, of Arkansas.

On May 14 [2] Mr. Borah presented the report of the committee, which declared:

In conclusion, the committee wholly exonerates Senator Burton K. Wheeler from any and all violation of section 1782 of the Revised Statutes of the United States, and find that he neither received or accepted, or agreed to receive or accept, any compensation whatever, directly or indirectly, for any services rendered, or to be rendered, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States was a party, or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever.

The committee further states that in its opinion Senator Wheeler was careful to have it known and understood from the beginning that his services as an attorney for Gordon Campbell, or his interests, were to be confined exclusively to matters, of litigation in the State courts of Montana, and that he observed at all times not only the letter but the spirit of the law.

The report quotes section 1782 of the Revised Statutes, alleged to have been violated, which reads:

No Senator, Representative, or Delegate, after his election and during his continuance in office, and no head of a department or other officer or clerk in the employ of the Government, shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered, or to be rendered, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever. Every person offending against this section shall be deemed guilty of a misdemeanor, and shall be imprisoned not more than two years and fined not more than $10,000, and shall, moreover, by conviction therefor be rendered forever thereafter incapable of holding any office of honor trust, or profit under the Government of the United States.

The committee construe this section as follows.

Under this statute an agreement to receive compensation for services rendered, or to be rendered, before any department, court-martial, bureau, officer, or any civil, military, or naval commission is made an offense; the receiving of compensation in violation of the statute, whether pursuant to a previous agreement or not, is also made an offense. In other words, if a party agrees to receive compensation for such services he is guilty under the statute; or if he receives compensation without any previous agreement he is also guilty of an offense.

However, the committee further hold:

This statute in no way prohibits or interferes with a Member of Congress from appearing before any department, court-martial, bureau, officer, or any civil, military, or naval commission, provided he does so free from any agreement to receive compensation or without receiving compensation therefor. The sole question which your committee was authorized to investigate, therefore, was, Did Senator Wheeler agree to receive compensation, directly or indirectly, for services rendered, or to be rendered; or did he receive compensation for services rendered, or to be rendered, relative to his appearance or services before any department, court-martial, bureau, officer, or any civil, military, or naval commission?

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[1] Albert B. Cummins, of Iowa, President pro tempore.

[2] Senate Report No. 537.

The committee then report the following finding of facts:

Your committee finds:

First. That during the months of January and February, 1923, after his election to the Senate, Senator Wheeler entered the employ of Gordon Campbell as his attorney, the said contract of employment including the firm of lawyers under the name of Wheeler & Baldwin.

Second. That, according to the terms of employment by which he entered the service of Campbell as his attorney, the said firm of Wheeler & Baldwin was to receive a retainer's fee of $10,000 per annum; that $2,000 thereof was paid January 9, 1923, and $2,000 thereof on February 16, 1923, and that the balance is still unpaid.

Third. That it was fully understood and agreed between all parties to said contract of employment that the services of Senator Wheeler and his firm related alone to the litigation then pending, or to be brought, in the State courts of Montana, said Campbell being at that time interested in a number of lawsuits, some 19 or 20 at least in number.

Fourth. That said Burton K. Wheeler did not at any time agree to receive compensation for services before any department, court-martial, bureau, officer, or any civil, military, or naval commission at Washington, and did not at any time receive compensation for such services before any department, court-martial, bureau, officer, or any civil, military, or naval commission.

Fifth. That, on the other hand, the sole contract of employment which he had with Campbell related to matters of ligation in the State courts of Montana; that Senator Wheeler did not at any time appear for said Campbell or his companies before any of the departments in Washington under agreement to receive compensation, and did not at any time receive compensation for any appearance or services rendered before said Government departments.

On May 19,[1] Mr. Sterling read minority views which thus propose to define the scope of the investigation:

The language of the resolution is broad enough to include an inquiry not only as to whether there was probable cause upon which the Federal grand jury for the district of Montana might properly return an indictment against Senator Wheeler but also whether Senator Wheeler was in fact guilty of the charges laid in the indictment.

The view here expressed is limited to the first of these propositions, namely, as to whether the indictment was justified by the evidence before the grand jury. The second proposition, as to whether Senator Wheeler is in fact guilty of the crime, is not, in my opinion, a proper subject of inquiry by the committee, that being solely a matter for determination by the court in which the indictment is pending.

In support of the latter contention, Mr. Sterling said:

A grand jury is one of our time-honored institutions, and has special recognition in our Federal Constitution. Neither the Senate nor the President has any power to control the action of grand juries or in any way to overturn indictments returned by grand juries. When a valid indictment has been found, the party indicted must be put upon trial, unless the district attorney concludes, and the court concurs, that for some legitimate reason the indictment should be withdrawn. The legislative branch of the Government nor either House of Congress should attempt to exercise the power to determine in advance of such trial, whether the defendant is in fact guilty, and its right or power so to determine is seriously questioned. Such determination not only encroaches upon the legal functions of the court but is likely so to prejudice public sentiment at the proper place of trial as to make it difficult and perhaps impossible for either the Government or the defendant to obtain a fair and impartial jury. Furthermore, when a committee of the Senate calls before it, in open session, all the witnesses of the prosecution and examines them before trial, the defendant Senator is accorded an advantage to which no other defendant is entitled under the law, an advantage to which he, merely because he is a Senator, is not entitled.

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[1] Record, p. 8861.

On this point Mr. Borah said in reply:

The committee was not authorized to find whether there was probable cause for the returning of an indictment. The committee was not authorized to delay action until the courts of Montana should have acted. The committee was specifically directed to find the facts and report them to the Senate touching the subject covered by the indictment. Indeed, Mr. President, if we had desired to encroach upon the authority of the court or if we had in any way ever sought to interfere with judicial proceedings, we would have accomplished that more perfectly and completely by following the course suggested by the Senator from South Dakota than in any other way.

I would not have sat upon a committee which was authorized to inquire as to whether a grand jury had probable cause for its action. That, in my judgment, is wholly beyond any authority which the Senate could confer upon any committee. That does not concern us at all as we sit here. But whether the facts which are the basis of that charge are sufficient to justify us in saying that the junior Senator from Montana shall or shall not hold his seat in the Senate is a matter the jurisdiction of which is given to this body and to this body alone. Even if a jury in Montana should proceed to the trial of Senator Wheeler and convict him, this body would still have devolving upon it the duty of determining whether or not Senator Wheeler should retain his seat in this body. If a jury in Montana should proceed to acquit him, this body would still have devolved upon it the duty of determining whether or not he should sit as a Senator in this body. But to send a committee of the Senate out to inquire whether or not a grand jury had probable cause for performing its function is a duty which no one who understands the obligations and duties of the Senate would ever think of conferring upon a special committee coming from this body.

Mr. Sterling also differed with the committee as to the statute involved:

At the outset of the committee's proceedings, the chairman indicated that "it might be well to read into the record the statute under which this charge is made." He then read into the record section 1782 of the Revised Statutes. It did not occur to the chairman, nor I think to the other members of the committee at the time, that section 1782 was repealed by the act of Congress of March 4, 1909, and by the same act, section 113 of the Criminal Code was enacted. Section 113 differs materially from the old statute and is considerably enlarged so as to include Senators from the time of their election and either before or after they have actually qualified. Section 113 is hereinafter set forth.

Section 113 of the Criminal Code, thus cited, reads in part as follows:

SEC. 113. Whoever, being elected or appointed a Senator, Member of, or Delegate to Congress or a resident commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, * * * directly or indirectly receive or agree to receive any compensation whatever for any services rendered or to be rendered to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, before any department, * * * shall be fined not more than $10,000 and imprisoned not more than two years; and shall, moreover, thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States.

The presentation of evidence before the committee is thus criticized in the minority views:

In the presentation of evidence before the committee, the customary order was reversed and eight witnesses were heard who, supposedly, had been summoned at the instance of Senator Wheeler with the view of refuting the charges laid in the indictment and of proving that Senator Wheeler was not guilty thereof. This was not in accord with my conception of the proper function of the committee, as above stated, but tended to extend the inquiry far beyond any legitimate scope.

Indeed, from my viewpoint, the hearing might very properly have been entirely exparte, to determine alone the question of probable cause. It may be granted, however, the course of procedure which was followed was perhaps justified by the emphatic assertions made by Senator Wheeler in his remarks on the floor of the Senate, that the indictment in Montana was the result of a "frame up" by his political enemies and that there was not "one scintilla of truth in the things with which" he was charged.

None of the witnesses thus called at the instance of Senator Wheeler had appeared before the grand jury, and obviously their testimony can serve no useful purpose in determining the question of probable cause. In the testimony of these witnesses, there is an utter lack of evidence in any manner substantiating the statement of Senator Wheeler that improper motives actuated the Government officers who either made the investigation or presented the evidence to the grand jury which returned the indictment. In other words, the charge of "frame up" failed entirely of proof. It may be stated further that several other witnesses were brought from Montana, at the instance of Senator Wheeler, but as none of them were called to testify, it is fair to assume that they had no information bearing upon the question.

With this view, Mr. Borah took issue as follows:

The Senator from South Dakota has referred to the fact that some seven or eight witnesses were subpoenaed, as he supposes, at the suggestion of Senator Wheeler, and that we began at the wrong end of the controversy. Instead of inquiring whether or not the grand jury was justified or had probable cause for its action, he complains that we proceeded at once to inquire as to the facts. Now, as a matter of fact, the first thing which the chairman did after he was appointed was to send a telegram to the presiding judge of the court in Montana asking for the minutes of the grand jury proceedings, the names of the witnesses, and the documentary evidence which had gone before the grand jury. Some of the witnesses were suggested by Senator Wheeler, some of their names came from other sources, and from the reply to the telegram to which I have referred, and the names of some of the witnesses subpoenaed came from those with whose views the Senator from South Dakota is more in sympathy, from those who were interested in securing all the evidence possible against Senator Wheeler.

As chairman of the committee, I subpoenaed every witness, except one, to whom I will refer in a moment, and called for every piece of documentary evidence that was suggested by friend of foe of Senator Wheeler or that was suggested by the Senator from South Dakota. No evidence has been left out of the hearings, and anyone who intimates that there was any partiality anywhere in the proceedings did not follow the proceedings of the committee with any degree of fairness.

The minority views discuss in detail evidence, both oral and documentary, adduced before the committee, and conclude:

From the foregoing testimony of Rhea and Glosser, together with the documentary evidence, it would seem clear that the grand jury at Great Falls was justified in returning the indictment against Senator Wheeler; and from the view which has heretofore been expressed in this statement as to the proper functions of the committee, it is unnecessary to discuss the testimony of the other witnesses further than to say that this testimony is all contradicted, if not refuted by, the documentary evidence herein referred to. The testimony of Senator Wheeler himself consists largely of a categorical denial of the charges made in the indictment and a denial of the statements of witnesses, qualified in some important instances by the statement that to the best of his recollection certain statements had not been made or certain things had not occurred.

Senator Wheeler, having been charged by a Federal grand jury with the violation of a Federal statute, should be remitted to the proper forum where he will have full opportunity to explain, deny, or refute the charges made against him and where the Government likewise, through its counsel, will be accorded the right to present its case in a lawful and orderly way. That forum is the Federal District Court for the State of Montana; and before a jury duly impaneled and sworn to try the case according to the law and the evidence.

On May 23,[1] Mr. Borah offered the following resolution:

Resolved, That the report submitted by the chairman of the special committee appointed to investigate the charges against Senator Burton K. Wheeler be adopted and approved and the special committee be discharged.

As a substitute for this resolution, Mr. Sterling proposed the following:

Resolved, That it is the sense of the Senate that no action be taken upon the majority and minority reports presented to the Senate in the matter of the investigation of the charges made in the indictment returned against Senator Burton K. Wheeler in the United States District Court for the State of Montana, and that pending the trial on such charges no question shall be made or raised as to the qualifications of Senator Wheeler or as to his right to a seat in the Senate on account of such charges.

The substitute being rejected after lengthy debate by a vote of yeas 5, nays 58, Mr. Selden P. Spencer, of Missouri, offered this substitute, which was disagreed to, yeas 8, nays 56:

Resolved, The Senate, having before it the majority and minority reports of its special committee empowered "to investigate and report to the Senate the facts in relation to the charges made in a certain indictment returned against Senator Burton K. Wheeler in the United States District Court for the State of Montana", and bearing in mind that the duty of the Senate in the matter has to do only with the "qualifications of its own Members" and its right to punish or expel a Member, declares that no reason has been presented to the Senate which questions the right of the junior Senator from Montana to membership in the Senate, and discharges its committee from further consideration of the matter.

The resolution adopting and approving the report of the committee was then adopted, yeas 56, nays 5.

400. A Member having introduced a resolution authorizing an investigation of charges made by himself and proven by the investigation to be unfounded, the committee of investigation reported conclusions censuring the Member, and the House by resolution adopted the report and approved the conclusions.

Discussion as to wherein a resolution authorizing an investigation was deficient.

In appointing committees of investigation it is obviously necessary to disregard the former usage that the proposer of the committee should be its chairman.

A committee of investigation permitted persons affected by the investigation to consult counsel and adopted rules for asking questions of persons under examination before the committee.

Discussion of the extent of the House's power to compel testimony and the production of books and papers.

Discussion of the use of the subpoena duces tecum in procuring books and papers from a private person.

Conclusion reached by a committee of investigation condemning the formulation and prosecution of groundless charges against a Member of the House.

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[1] Senate Journal, p. 383; Record, p. 9256.

Report of a committee holding in contempt of the House a Member who had permitted the dissemination of letters in his name reflecting upon the honor and integrity of Members of the House.

A motion for the previous question takes precedence of the motion to postpone.

On March 6, 1908,[1] Mr. John Dalzell, of Pennsylvania, from the Committee on Rules, submitted the following preamble and resolution which were agreed to by the House:

Whereas, Mr. George L. Lilley, a Representative from the State of Connecticut, on his responsibility as a Member of this House, before the Committee on Rules, has, among other things, stated in substance that the Electric Boat Company of New Jersey and their predecessors, the Holland Boat Company, have been engaged in efforts to exert corrupting influence on certain Members of Congress in their legislative capacities, and have in fact exerted such corrupting influence: Therefore be it

Resolved, That a committee of five Members be appointed to investigate the charges made by said George L. Lilley of corrupt practices on the part of said company and of Members of Congress with respect to legislation, and that said committee shall have authority to send for persons and papers and to take testimony in Washington, District of Columbia, or elsewhere, either before the full committee or any subcommittee thereof. Said committee shall report as speedily as possible with such recommendation, if any, as to the committee shall seem meet.

The preamble and resolution were reported in lieu of the following resolution previously introduced by Mr. George L. Lilley, of Connecticut, and referred to that committee:

Resolved, That a special committee of five Members of the House be appointed by the Speaker to investigate the conduct of the Electric Boat Company of New Jersey and their predecessors, the Holland Boat Company, respecting the methods employed by said companies in connection with past and proposed legislation before Congress: *Provided,* That said committee may employ a stenographer and one clerk, and is hereby authorized and empowered to send for persons and papers, to compel the attendance of witnesses, and to administer oaths, and that the expenses incurred hereunder shall be paid out of the contingent fund of the House on vouchers approved by the chairman of said committee: *Provided further,* That said committee shall report their findings to this House at such time as said investigation may have been concluded.

The report[2] of the select committee so authorized differentiates between the purport of the two resolutions as follows:

The resolution indorsed by Mr. Lilley to be referred to the Committee on Rules makes no reference to Members of Congress or to any one but the Electric Boat Company. It does not charge the company with corruption or misconduct. It asks for an investigation of the conduct of the company respecting the methods employed by it in connection with past or proposed legislation, but it does not even suggest the nature of the legislation the author had in mind or what conduct or methods are to be examined. It was therefore not a privileged resolution under the rules of the House, and could not be called up by its author in case the committee to which it was referred did not report it. On its face the resolution disclosed no grounds for its report or even consideration by a committee.

And further:

It is very clear that had a committee been appointed under the resolution introduced by Mr Lilley, it would have been powerless. No witness could have been compelled to answer a single

[1] First session Sixtieth Congress, Record, p. 2972.

[2] House Report No. 1727.

question or produce a paper, save by his own voluntary act. The resolution charged nothing, but proposed merely the appointment of a special committee "to investigate the conduct of the Electric Boat Company of New Jersey and their predecessor, the Holland Boat Company, respecting the methods employed by said companies in connection with past or proposed legislation before Congress." There was not even an allegation that there had been any conduct, and certainly none that it had been improper, and there was no reference whatever to the conduct of Members of the House with regard to legislation. Such an investigation would therefore have been entirely outside of and beyond the jurisdiction of the House itself, and, of course, beyond that of any committee of the House.

Again, in summing up the case, the committee reported as the first of its conclusions:

First. That House resolution 255, introduced by Mr. Lilley, was an impotent resolution, and no evidence could have been compelled thereunder, and that this investigation required the adoption of House resolution 288 of the Committee on Rules, under which the inquiry has proceeded.

The disregard in modern practice of the earlier custom of appointing the proposer of a committee of investigation as its chairman is illustrated by the following excerpt from the report:

MR. LILLEY'S EXPECTATION THAT HE WOULD BE CHAIRMAN AND HAVE CHARGE OF THE INVESTIGATION EXPLAINS IN PART HIS ATTITUDE

Mr. Lilley's singular attitude toward the investigation which his charges had instituted, his somewhat incoherent and irrelevant statements to the committee, and his unwillingness to give to the committee those facts on which his charges were based and which they thought he ought to be quick to impart, puzzled the committee more at the time than they would have done had the committee known what the evidence subsequently disclosed, that Mr. Lilley expected, when he introduced his resolution, to be made chairman of the investigating committee with power to employ counsel and conduct the proceedings, and thus be relieved of the necessity of either disavowing or making good his charges against his colleagues. The appointment of this committee, however, relieved Mr. Lilley of all responsibility for the conduct of the investigation, and simply left to him the duty of communicating to the committee the information on which he based the charges made by him on his responsibility as a Member of the House.

The report discloses that the committee permitted parties affected by the investigation to consult counsel at all public hearings, and otherwise provided for the orderly conduct of the investigation as follows:

When the committee met on March 12, this resolution, which had been adopted in executive session, was read for the information and guidance of Mr. Lilley and all other persons interested:

"Resolved, That Hon. George L. Lilley, the Electric Boat Company, and such other parties affected by the investigation as may desire to do so, may be accompanied by and consult with counsel in all public hearings of the committee; and that in view of these circumstances and in accordance with the well-established precedents of both Houses of Congress for insuring the orderly conduct of such investigation, the examination of all witnesses shall be conducted by a member of the committee to be designated for that purpose from time to time by the chairman; and that such questions or course of examination as parties interested, or their counsel, may desire shall be submitted in writing to the committee."

The report thus discusses the power of the House to compel testimony and the production of books and papers:

The power of a select committee of one House of Congress to compel the testimony of witnesses and the production of books and papers can not, of course, rise higher than the authority

of the House itself, and that power must be found in the Constitution, either in express terms or by necessary implication.

The right to exercise the power in question and to punish for contempt is limited to very few cases. Each House, acting separately, is by the Constitution expressly authorized to be the judge of the elections, returns, and qualifications of its own Members, to compel their attendance, in such manner and under such penalties as it may provide, to determine the rules of its proceedings, punish its Members for disorderly behavior, and, by a two-thirds vote, to expel a Member.

In the course of the investigation, Mr. Lilley demanded that a subpoena duces tecum be issued to certain witnesses. In compliance with his request such subpoenas were made out in blank and delivered to him to be filled out as he thought best to accomplish the desired purpose.

One of them, served upon Isaac L. Rice, president of the Electric Boat Company, read as follows:

The said Isaac L. Rice to bring with him all books of accounts, showing payments made to attorneys and employees for work performed or to be performed at Washington or in any Congressional district of the United States. Also all vouchers covering expenses of that character. Also all checks, check books, check stubs, showing all such checks issued for such employment. Also all vouchers and memoranda showing payments to Elihu B. Frost for expenses of every kind and character at Washington or elsewhere in promoting the interests of legislative enactments of appropriation and for the procurement of contracts. All books, records, vouchers, checks or check stubs, drafts, or other evidences of any money contributed by Isaac L. Rice personally to the campaign fund of any political party in the United States. Also certified list of all stockholders of the Electric Boat Company at the present time. Also certified list of all stockholders of the Holland Torpedo Boat Company, as well as those who have ever at any time owned or held stock of either of those companies.

In response to this subpoena Mr. Rice appeared with the books and papers described in the subpoena, but submitted by counsel that neither the committee nor the House had authority to investigate purely private books and papers in the absence of positive evidence that they contained anything relating to the conduct of Members.

The committee held:

It must be conceded that in any event the subpoena is altogether too broad. The evidence shows that the company operates several manufacturing plants and has several hundred employees. The demand to produce the books and documents showing payments to them "for work performed, or to be performed, in Washington or in any Congressional district of the United States" would include the services of attorneys in the trial of litigation and of mechanics engaged in boat building anywhere in the United States, all of which is clearly beyond the scope of this inquiry, and equally beyond the power of the House itself.

In other particulars the subpoena is too broad. What has this House or this committee to do with "the procurement of contracts" unless in some way the conduct of Members in regard to legislation is involved? It is true that a new subpoena might be issued or this one, limited in scope so as to call only for books, check stubs, vouchers, etc., showing payments to campaign funds for the election or defeat of Members of Congress, conditioned upon their agreement to vote for certain legislation, but all through the most thorough and exhaustive examination each and every one of the officers, agents, and attorneys of the company have sworn that there are no such books and papers to be produced because there were no such payments.

The question is whether, in the face of such positive and uncontradicted testimony, and in the absence of any specific charge pertaining to any particular year, or any particular Congress, or any particular Congressional district, or any particular campaign fund of any particular party, but merely upon indefinite and general charges shown to have been based entirely upon rumor, the

committee is authorized to examine books, papers, and accounts relating to the private affairs of this private corporation merely for the purpose of determining whether or not in their testimony the officers have lied. If they have told the truth, there is nothing in their books and papers into which this committee or the House itself has authority to inquire.

The requirement of the books and papers seems to have been desired chiefly to prove payments to campaign funds. Prior to the passage of the act of 1907 there was no Federal law making such contributions illegal. That act makes it an offense to contribute to political funds for the election or defeat of Congressmen, and makes it an offense punishable, not by the House, but through the instrumentality of the proper court. It is conceivable, however, that in a proper case where there was a specific allegation that such contribution had affected the conduct of a Member of the House, testimony as to such contribution by a corporation might properly be demanded by the House, not for the punishment of the corporation, but as a basis of proper action against the Member. In this case there is no allegation that any Member has been corrupted, and there is positive evidence that no contribution whatever has been made, and that there are no books showing any payment of any character having a tendency to affect legislation.

Furthermore, the subpoena, like the charges of Mr. Lilley, has no relation to any particular date or dates, but covers all time from the incorporation of the company to the present moment. There is no allegation anywhere that any candidate for a seat in the present House was either elected or defeated by the use of campaign funds contributed by this corporation. It may well be asked, What jurisdiction has this present House to inquire into allegations against Members of any preceding House?

Many authorities might be cited in addition to those herein mentioned, but they are sufficient to convince us that under all the facts of this case if we were to persist in our demands and positive refusals to comply being made the House should certify the fact to the district attorney of the District of Columbia under the law, the courts would not sustain an indictment against the officers of these corporations for failure to produce their books and papers.

Among the conclusions reached by the committee were the following:

That Representative Loud was made the object of anonymous charges that were without any foundation in fact.

That Mr. Lilley violated his obligation as a Member of this House in formulating and urging before this committee the groundless charges against Representative Loud.

That Mr. Lilley violated his obligations as a Member of this House in permitting his clerk to send out letters in Mr. Lilley's name reflecting upon the honor and integrity of Members of this House.

That Mr. Lilley acted in contempt of this House in not disavowing openly upon the floor of the House the letter to Goff, published over his signature, reflecting upon the honor and integrity of Members of this House.

That no Member of this House has been induced by the officers of the Electric Boat Company or any one else to act in his official capacity from corrupt or improper motives.

The report of the committee was submitted on May 20, 1908,[1] and Mr. Sereno E. Payne, of New York, immediately offered the following:

Resolved, That the report of the select committee appointed under House resolution 288 to investigate charges made by George L. Lilley, a Representative of the State of Connecticut, is hereby approved, and the conclusions of said committee are hereby adopted as the conclusions of the House of Representatives of the Congress of the United States, and that the said committee be discharged from further consideration of said charges.

After debate, Mr. Payne moved the previous question, when Mr. Herbert Parsons, of New York, demanded recognition to move to postpone consideration of the resolution until the first Monday in December.

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[1] Record, p. 6602; Journal, p. 949.

The Speaker[1] held that under the rule[2] the motion for the previous question took precedence of the motion to postpone.

The previous question was ordered and the resolution was then agreed to, yeas 159, nays 82.

401. Provisions of the statute relative to solicitation of contributions for political purposes do not apply to such solicitations by one Member of Congress from another.

A committee to which a resolution had been committed, having submitted a report making no recommendations thereon and proposing another resolution neither germane to nor recommended as a substitute for the original resolution, was permitted to withdraw it and file an amended report recommending the proposed resolution as a substitute.

A committee to which a resolution providing for an investigation was referred, itself conducted the investigation and reported, in lieu of the resolution, its findings on the subject.

On September 18, 1913,[3] Mr. James R. Mann, of Illinois, presented, as privileged, the following:

Whereas the act to codify, revise, and amend the penal laws of the United States, approved March 4, 1909, provides in section 118 that no Senator or Representative * * * shall directly or indirectly solicit or receive, or be in any manner concerned in soliciting or receiving any assessment, subscription, or contribution for any political purpose whatever * * * from any person receiving any salary or compensation from moneys derived from the Treasury of the United States; and

Whereas it is provided in section 119 of said act that no person shall in any room or building occupied in the discharge of official duties by any officer or employee of the United States mentioned in the preceding section * * * solicit, in any manner whatever, or receive any contribution of money or other thing of value for any political purpose whatever; and

Whereas it is alleged that the Democratic national congressional committee, composed in chief part of Members of this House, has directed to be sent, and it is alleged there has been sent, to the Democratic Members of this House, a letter stating that an assessment has been levied upon the Democratic Members of this House soliciting contributions from such Members for political purposes, and it is alleged that said letter has been signed by a Member of this House and delivered to other Members of this House in the Capitol Building and in the House Office Building, which letter is alleged to read as follows:

"SEPTEMBER 15, 1913.

"At a meeting of the Democratic national congressional committee, August 28, 1913, the following resolution presented by Senator Thomas, of Colorado, was unanimously adopted:

"'*Resolved,* That an assessment of $100 be made on each Democratic Member of the House of Representatives and the United States Senate, to be paid to the chairman of the congressional committee as follows: $25 at once; $25 on or before January 1, 1914; balance on or before July 1, 1914.'

"The committee is in debt to the extent of nearly $4,000 and has no money in the treasury. The object of the foregoing resolution is to secure funds with which to pay the debts of the committee and begin the work of the approaching campaign.

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[1] Joseph G. Cannon, of Illinois, Speaker.

[2] Section 4 of Rule XVI.

[3] First session Sixty-third Congress, Record, p. 5132.

"Checks should be made payable to Hon. William G. Sharp, treasurer, and handed to——, member of the committee from your State, who will make return thereof to the treasurer. The entire amount may be paid at once or in installments provided by the resolution.

"Trusting that you will favor the committee with an earlv payment, I beg to remain,

"Very sincerely, yours,

"FRANK E. DOREMUS, *Chairman."*

And whereas section 122 of said act provided that whoever shall violate any provision of section 118 or section 119 shall be fined not more than $5,000 or imprisoned not more than three years, or both: Therefore

Resolved, etc., That a committee of seven Members shall be appointed by the Speaker to investigate and report to this House whether any Members of this House have been guilty of violating any of the provisions of the Criminal Code by soliciting or receiving or by being in any manner concerned in soliciting or receiving any assessment, subscription, or contribution for any political purpose whatever from any person receiving any salary or compensation from moneys derived from the Treasury of the United States, and particularly from Members of this House, to the end that it may be ascertained whether the Members of this House, constituting in part the lawmaking branch of the Government are above the law.

On motion of Mr. Charles R. Crisp, of Georgia, the resolution was referred to the Committee on Election of President, Vice President, and Representatives in Congress, which submitted the following report [1] thereon:

Your committee is firmly of opinion that congressional committees or members thereof may lawfully solicit and receive contributions for political purposes from Senators and Representatives in Congress; that such solicitation or receipt of contributions from Senators or Representatives may be lawfully made and had in offices assigned Senators and Representatives, and therefore recommends the adoption of the following resolution:

"Resolved, That it is no violation of section 118 of the Criminal Code of the United States for a Senator or Member of the House to solicit or receive assessments or contributions for political purposes from other Senators or Members of the House.

"Resolved, That it is no violation of section 119 of the Criminal Code of the United States for a Senator or Member of the House to solicit contributions for political purposes from other Senators or Members of the House by letters written in his office in the Senate or House Office Building."

Mr. Mann made the point of order that the report was not in fact a report on the resolution referred to the committee, as it made no recommendations either favorable or adverse thereon, and that while it included a recommendation for the passage of another resolution appended at the end of the report, it was not germane to the resolution originally referred to the committee and was not reported as a substitute therefor.

The Speaker [2] sustained the point of order, and Mr. William W. Rucker, of Missouri, from the Committee, by unanimous consent, withdrew the report and filed an amended report [3] which presented the following conclusions:

If a Member of Congress cannot receive campaign contributions from another Member, then members of the same political belief will be prohibited from organizing and supporting a committee of their own members for the purpose of promoting their own reelection or the success of their political party. This would give the statute an effect bordering on absurdity. It is inconceivable that Congress intended any such effect. No reason in morals can be assigned in support of such intention; no demand by the public can be pleaded as its justification; no question of public policy can be urged in its behalf.

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[1] House Report no. 655.

[2] Champ Clark, of Missouri, Speaker.

[3] House Report No. 677.

We conclude that this is a case where the letter of the law must yield to reason and the intendment of Congress, and that therefore sections 118 and 119 of the Criminal Code should not be construed to prohibit one Senator or Member of Congress from soliciting campaign contributions from another Senator or Member of Congress or from making such solicitation in the office furnished such Senator or Member of Congress in a Government building.

Section 119 of the Criminal Code was also taken from "An act to regulate and improve the civil service of the United States," approved January 1, 1883.

If the foregoing conclusion is correct, of course it follows by the same reasoning that section 119 does not prohibit a Member of Congress from mailing requests from his office in the House Office Building to other Members of Congress for campaign contributions.

The committee, after a full consideration of the facts and of the sections of the Criminal Code referred to in the resolution (H. Res. 256), is firmly of opinion that congressional committees or members thereof may lawfully solicit and receive contributions for political purposes from Senators and Representatives in Congress; that such solicitation or receipt of contributions from Senators and Representatives may be lawfully made and had in offices assigned Senators and Representatives in Government buildings; that the appointment by the Speaker of a committee of seven Members of the House to investigate and report upon the matters contained in and referred to in the resolution (H. Res. 256) is wholly useless and unnecessary because they are fully covered by this report.

In accordance with this finding the committee recommended the adoption of the following as a substitute for the original resolution:

In accordance with the facts herein reported and the conclusions herein expressed, your committee reports back to the House the resolution with recommendations that the House adopt, as a substitute therefor, the following resolutions:

"Resolved, That it is no violation of section 118 of the Criminal Code of the United States for a Senator or Member of the House to solicit or receive assessments or contributions for political purposes from other Senators or Members of the House.

"Resolved, That it is no violation of section 119 of the Criminal Code of the United States for a Senator or Member of the House to solicit contributions for political purposes, from other Senators or Members of the House, by letters written in his office in the Senate or House Office Buildings."

The report was called up on the following day [1] and after extended debate, the resolution recommended as a substitute was agreed to, yeas 178, nays 80. The resolution as amended was then agreed to without division.[2]

402. The investigation of charges against John W. Langley, of Kentucky, and Frederick N. Zihlman, of Maryland.

Two unnamed Members having been implicated in a report by a Federal grand jury, the House directed the Attorney General to transmit the names of the Members implicated and the nature of the charges against them.

Instance wherein an executive officer declined to transmit information requested by the House.

A member of the Cabinet declining on his own responsibility to transmit data requested by the House was criticized for failure to communicate such refusal through the President as incompatible with public interest.

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[1] Second session Sixty-third Congress, Record, p. 8678.

[2] Journal, p. 575; Record, p. 8830.

The House, when advised by the Attorney General that certain charges against Members were under investigation by the Department of Justice, did not insist on its request for information relative thereto.

On March 6, 1924,[1] the House agreed to the following resolution:

Whereas a grand jury of the District Court of the United States for the Northern District of Illinois, southern division, impaneled at the February term, 1924, has reported to that court that certain evidence has been submitted to them involving the payment of money to two Members of Congress:

Resolved, That the Attorney General be directed to transmit to the House of Representatives the names of the two Members of Congress and the nature of the charges made against them.

On March 8,[2] the Speaker laid before the House a communication from the Attorney General declining to comply with this request of the House, as follows:

MARCH 6, 1924.

THE SPEAKER OF THE HOUSE OF REPRESENTATIVES.

SIR: Resolution No. 211 of the House of Representatives of the United States passed March 6, 1924, directing me to transmit the names of the two Members of Congress mentioned in the report of the grand jury of the District Court of the United States for the Northern District of Illinois, eastern division, and the nature of the charges made against such Members of Congress can not be complied with by me for the reasons—

First, I am unwilling to make public the name of any man against whom any criminal charge has been made until the evidence in my possession convinces me that there is reasonable ground to believe that the person is guilty as charged and until proper legal steps shall have been taken to protect the public interests.

Second. To transmit to you the nature of the charges made against any persons under investigation in the Department of Justice is incompatible with the public interest and will tend to defeat the ends of justice.

If, however, the House of Representatives of the United States, acting within its constitutional power (under Article I) to punish its Members for disorderly behavior or to expel such Member, requests that all the evidence now in the possession of anyone connected with the Department of Justice shall be turned over to the House of Representatives to enable it to determine what action should be taken by the House in reference to the conduct of any of its Members, I will direct all such evidence, statements, and information obtainable to be immediately turned over to you or to such committee as may be designated by the House and will await the complete investigation of the facts of the House before continuing the investigation now being made by the Department of Justice. To have two tribunals attempting to act upon the same facts and to hear the same witnesses at the same time will result in confusion and embarrassment and will defeat the ends of justice.

Until I am requested by a resolution of the House of Representatives to submit these matters to the jurisdiction of the House the investigation now being conducted of the matters referred to in said resolution will continue in accordance with the usual rules of the department.

Respectfully,

H. M. DAUGHERTY, *Attorney General.*

On motion of Mr. Nicholas Longworth, of Ohio, this communication was referred to the Committee on the Judiciary which submitted its report thereon March 10,[3] with the following conclusions:

Under the reply of the Attorney General there is but one of two courses open to the House of Representatives:

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[1] First session Sixty-eighth Congress, Record, p. 3736.

[2] Record, p. 3803.

[3] House Report No. 282.

(a) The House take full charge of the investigation and evidence of the alleged charges and relieve the Department of Justice from any further responsibility.

(b) Allow the Department of Justice to continue the investigation now being made.

While there is a difference of opinion among the membership of your committee as to the correctness of the position of the Attorney General that the ends of justice would be imperiled by giving to the House the names of the Members of the House and the charges against them as requested by the House, and while it is a high duty which the House owes to itself and to the country at large to purge itself at the quickest possible moment, of all those, if any there be, unworthy to sit in that body, your committee is unwilling to recommend to the House that it permit itself to be placed in the position of being responsible for the suspension of proceedings by the Attorney General in connection with this matter.

The committee accordingly recommend:

Your committee, therefore, recommends to the House that no further action be taken for the present by the House to procure from the Attorney General the information heretofore requested of the Attorney General by the House and submits the following resolution:

Resolved, That the House take no further action for the present to procure from the Attorney General the information heretofore requested of the Attorney General by the House under House Resolution 211.

In the meantime Mr. John W. Langley, of Kentucky, and Mr. Frederick N. Zihlman, of Maryland, mentioned in the public press as the two Members referred to, rose severally to questions of personal privilege in the House and emphatically denied any guilt.

On March 11, Mr. George S. Graham, of Pennsylvania, from the Committee on the Judiciary, called up the resolution recommended by the committee, when Mr. Fred H. Dominick, of South Carolina, offered a substitute declaring the reply of the Attorney General not responsive to the request of the House and directing him to transmit to the House the names of the two Members and the nature of the charges against them.

During the debate on the proposed substitute Mr. John N. Garner, of Texas, expressed criticism of the action of the Attorney General in refusing the information on his own responsibility instead of following custom in permitting the President to advise the House that compliance with its request was incompatible with public interest.

Pending action on the substitute, Mr. Graham offered the following amendment, which was agreed to, yeas 178, nays 162:

Resolved, That in view of its extreme importance to the House, the Attorney General be, and is hereby, requested to proceed at once and give preference and precedence to this investigation and report the results to this House.

Mr. Dominick's substitute was then rejected, yeas 152, nays 184, and the resolution recommended by the committee as amended was passed by a vote of yeas 222, nays 108.

403. The case of John W. Langley and Frederick N. Zihlman, continued.

A proposition to investigate charges against Members was presented as a question of privilege.

A decision by the House to procure from the Attorney General certain information is not such disposition as to preclude a proposition to secure the same information through one of its own committees.

A resolution relating to the privilege of the House takes precedence over a conference report.

A Member having been indicted by a grand jury, a committee of the House assumed that until final disposition of his case he would take no part in any business of the House or its committees.

A committee which had been empowered to investigate charges of corruption against Members recommended that action by the House be delayed pending trial in the courts.

Immediately upon the passage of the resolution recommended by the committee, Mr. Finis J. Garrett, of Tennessee, offered the following resolution which the Speaker held to be privileged: [1]

Whereas a grand jury of the District Court of the United States for the Northern District of Illinois, southern division, impaneled at the February term, 1924, has reported to that court that certain evidence has been submitted to them involving the payment of money to two Members of Congress;

Whereas the honor and dignity of the Congress require that the facts be immediately ascertained, to the end that such action as is essential for the Congress itself to take may be promptly taken: Therefore be it

Resolved, That a select committee of five Members of the House shall be appointed by the Speaker thereof whose duty it shall be to proceed forthwith to make an investigation of such allegation and ascertain—

(a) Whether said "two Members of Congress" so charged are Members of the House of Representatives; and

(b) If so, to make such further investigation as may be essential to establish the truth or falsity of said allegation.

Said committee shall have power to send for persons and papers and administer oaths and shall be permitted to sit during the sessions of the House and any recess thereof and at such place or places as may be necessary to discharge the duties herein imposed.

Resolved further, That the Speaker is hereby authorized to issue subpoenas to witnesses upon the request of the committee or any subcommittee thereof at any time, including any recess of the Congress; and the Sergeant at Arms is hereby empowered and directed to serve all subpoenas and other processes put into his hands by said committee or any subcommittee thereof.

Resolved further, That said committee shall report to the House as promptly as possible the results of its inquiries together with such recommendations as it may deem advisable.

A point of order by Mr. Louis C. Cramton, of Michigan, that the resolution related to subject matter already disposed of by the House was overruled by the Speaker.

The Speaker also held the resolution of highest privilege and subject to consideration notwithstanding a proposal by Mr. Cramton to call up the conference report on the Interior Department appropriation bill.

On the following day this resolution was agreed to, and the Speaker appointed as members of the committee so authorized, Mr. Burton, Mr. Purnell, Mr. Michener, Mr. Wingo, and Mr. Moore of Virginia.

On May 15 Mr. Burton, from this committee, submitted a report,[2] Stating that the committee had—

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[1] Record, p. 3995.

[2] House Report No. 759.

formally ascertained that the Members referred to were Representatives Frederick N. Zihlman, of Maryland, and John W. Langley, of Kentucky.

As to Mr. Langley, the committee say:

It was agreed by the committee that, in view of the indictment and probable immediate trial in the District of Columbia of Representative Langley, the committee would first consider the Zihlman case. Since then Representative Langley has been indicted, tried, convicted, and sentenced in the Federal court for the eastern district of Kentucky. It is understood that he has initiated appellate proceedings, and therefore it would seem proper that further action by the committee in respect to him be deferred for the present, it being assumed that, until the final disposition of the case, he will take no part whatever in any of the business of the House or its committees.

As to Mr. Zihlman, the committee say:

The evidence is conflicting and sharply contradictory, and the question of the credibility of individual witnesses has frequently arisen. Taken as a whole, in the opinion of the committee, the evidence does not establish the truth of the charge against Representative Zihlman, and, accordingly, the committee recommends that, so far as he is concerned, no further action is required or should be taken by the House.

The report, which was referred to the House Calendar, was not acted on by the House.[1]

[1] Mr. Zihlman was subsequently acquitted. Both Mr. Langley and Mr. Zihlman were reelected, and Mr. Zihlman took his seat in the Sixty-ninth Congress.

Chapter CLXXXIX.[1]

INQUIRIES OF THE EXECUTIVE.

404. A resolution of inquiry when reported either favorably or unfavorably is privileged for immediate consideration.

A privileged resolution is reported from the floor and not by filing with the clerk.

A privileged resolution of inquiry, on which the question of consideration has been raised and decided adversely, is placed on the calendar although under section 2 of Rule XIII it is not otherwise eligible for reference to the calendar.

A Member may demand the question of consideration; although the Member in charge may demand the floor for debate.

On January 8, 1910,[2] Mr. James R. Mann, of Illinois, from the Committee on Interstate and Foreign Commerce, reported adversely a privileged resolution requesting certain information from the Secretary of Agriculture, with the recommendation that it lie on the table.

Mr. Halvor Steenerson, of Minnesota, made the point of order that under the rule the report should be referred at his request to the calendar as an adverse report.

The Speaker[3] held that the rule applied to nonprivileged reports only, and as the pending report was privileged it did not come within the rule and was not eligible for reference to the calendar except as unfinished business. The Speaker further ruled that privileged reports were made from the floor and not by filing with the clerk.

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[1] Supplementary to Chapter LVII.

[2] Second session Sixty-first Congress, Record, p. 412.

[3] Joseph G. Cannon, of Illinois, Speaker.

Mr. Marlin E. Olmsted, of Pennsylvania, proposed to raise the question of consideration, and the Speaker said:

Consideration on the merits not having begun, the question of consideration may be raised, and if the House, on the question of consideration, declines to consider it, it must be somewhere. It can not remain with the committee, because the committee has reported it. If the House should decline to consider it, then, it seems to the Chair, it would go to the calendar.

Mr. John J. Fitzgerald, of New York, raised the point of order that he did not have the floor.

The Speaker, however, recognized Mr. Olmsted to raise the question of consideration, and the question being put was decided in the negative.

Thereupon the Speaker referred the resolution to the calendar.

405. The motion to discharge a committee from further consideration of a resolution of inquiry is not privileged after its report to the House.

The time of delivery of reports to the clerk fixes the time at which such reports are made and a motion to discharge a committee comes too late after a report has been filed regardless of whether it has been printed.

On May 27, 1926,[1] Mr. George S. Graham, of Pennsylvania, from the Committee on the Judiciary, submitted the report of that committee on the resolution (H. Res. 225) directing the Secretary of the Treasury to furnish certain information.

Immediately thereafter Mr. Fiorello H. LaGuardia, of New York, moved to discharge the Committee on the Judiciary from the further consideration of the resolution.

Mr. Graham made the point of order that, the committee having reported, it was too late to move its discharge.

Mr. LaGuardia took the position that the report had not yet been printed as required by paragraph 2 of Rule XVIII and until so printed it was not on the calendar and the motion to discharge the committee from its further consideration was in order.

The Speaker[2] ruled:

The Chair thinks it would be a highly technical ruling to hold that this bill, which has been reported, is still in the committee.

It is going to be printed. The sole question, as it appears to the Chair, is that the gentle from New York moves to discharge the committee from the consideration of this resolution, and that presupposes that the resolution is still in the custody of the committee, which is not the fact, for it has been reported.

The Chair sustains the point of order.

406. Only resolutions of inquiry addressed to the heads of executive departments are privileged.

The term "Heads of Executive Departments" refers exclusively to members of the President's Cabinet.

A resolution of inquiry addressed to the Federal Reserve Board is not privileged.

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[1] First session Sixty-ninth Congress, Record, p. 10211.

[2] Nicholas Longworth, of Ohio, Speaker.

On February 18, 1929,[1] Mr. Loring M. Black, jr., of New York, moved to discharge the Committee on Banking and Currency from the further consideration of the resolution of inquiry (H. Res. 313) requesting certain information of the Federal Reserve Board, and referred to that committee on February 9.

Mr. Bertrand H. Snell, of New York, made the point of order that the resolution was not privileged because not addressed to the head of an executive department.

The Speaker[2] held:

The question presented is, Is the motion of the gentleman from New York to discharge the Committee on Banking and Currency from consideration of a resolution addressed to the Federal Reserve Board in compliance with clause 5 of Rule XXII privileged as addressed to the head of a department?

The Chair thinks there is no question whatever about the rule. There are a number of precedents. The first one that the Chair recalls is found in Volume III, section 1863, of Hinds' Precedents.

Then in Hinds' Precedents, volume 5, section 7283, occurs the following sentence:

"The words 'heads of departments' is construed to mean the members of the President's Cabinet as is evident from the fact that in 1886 the House did not agree to a proposition to add such offices as the Commissioners of Patents, Internal Revenue, Pensions, etc."

The rule with regard to the privilege of the House floor is also very clear. It provides that among those entitled to the privilege of the House floor are heads of departments, and this has been repeatedly held to refer only to members of the Cabinet.

Under the circumstances, the rule being so absolutely clear and the precedents undeviating, the Chair sustains the point of order made by the gentleman from New York.

407. A resolution of inquiry retains its privilege after reference to the calendar.

On June 21, 1919,[3] Mr. Leonidas C. Dyer, of Missouri, proposed to call up from the calendar a resolution of inquiry directed to the Secretary of War.

Mr. John N. Garner, of Texas, raised the point of order that such resolutions ceased to be privileged when referred to the calendar.

The Speaker[4] ruled that reference to the calendar did not affect the privilege of the resolution, and recognized Mr. Dyer to call up the resolution.

408. On January 4, 1923,[5] Mr. Gilbert N. Haugen, of Iowa, from the Committee on Agriculture, reported as privileged a resolution of inquiry addressed to the President and asking for facts concerning the United States Sugar Equalization Board, which was referred to the House Calendar.

On the following day,[6] the resolution was called up as privileged by Mr. Haugen, and after brief debate was agreed to by the House.

409. A privileged resolution of inquiry is in order on days on which it is in order to move to suspend the rules, and takes precedence of a call of the Unanimous Consent Calendar.

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[1] Second session Seventieth Congress, Record, p. 3667.

[2] Nicholas Longworth, of Ohio, Speaker.

[3] First session Sixty-sixth Congress, Record, p. 1508.

[4] Frederick H. Gillett, of Massachusetts, Speaker.

[5] Fourth session Sixty-seventh Congress, Record, p. 1272.

[6] Record, p. 1308.

While the motion to discharge a committee is not debatable, the motion to discharge a committee and pass a measure before them is subject to debate if undivided.

On March 15, 1920,[1] the Speaker pro tempore, Mr. Joseph Walsh, of Massachusetts, had directed the Clerk to call the Calendar for Unanimous Consent, when Mr. Thomas W. Harrison, of Virginia, moved to discharge the Committee on Interstate and Foreign Commerce from the further consideration of a privileged resolution of inquiry relative to the distribution and consumption of print paper, and pass the resolution.

Mr. Warren Gard, of Ohio, rose to a parliamentary inquiry and asked if the motion was in order on the day set apart for the consideration of bills on the Unanimous Consent Calendar.

The Speaker pro tempore ruled that the motion was privileged.

Mr. Harrison then demanded recognition to debate the motion and the Speaker pro tempore held that the motion was debatable and recognized him for one hour.

410. A resolution of inquiry, though adversely reported, is privileged if on the calendar.

An inquiry for "complete information" when only partial information was available, held not to constitute a request for an investigation, and to be privileged under the rule.

On April 21, 1910,[2] Mr. Thomas D. Nicholls, of Pennsylvania, called up from the Calendar, to which it had been referred through error after being adversely reported, the following:

Resolved, That the Attorney-General of the United States be requested, if not incompatible with the public interest, to furnish the House of Representatives with complete information regarding the arrest, indictment, trial, and conviction in the cases of Antonio I. Villarrel, R. Flores Magon, and Liberado Rivera, now in prison at Florence, Ariz., convicted of violating the neutrality laws, as between the United States and Mexico; also as to whether any other charges against the prisoners are pending, or whether they will regain their freedom at the end of the present term of imprisonment, and when such term in each case will expire.

Mr. Sereno E. Payne, of New York, made the point of order that—

It asks what is not in the hands of the Attorney-General, namely, a complete report with reference to the indictment, the trial, and the arrest. The Attorney-General only has memoranda; and a complete report of the trial would need an investigation. Our report also states that the gentleman was asked by the chairman of the committee to go with him and get what was in the hands of the Attorney-General, and it was ascertained that he did not want what was in the hands of the Attorney-General, but that he wanted an investigation which would disclose all those facts—the complete report of the trial. And we therefore, under those circumstances, regarded it as not a privileged resolution because it asked an investigation.

The Speaker[3] overruled the point of order and said:

The Attorney-General may or may not have that information, but it seems to the Chair that the House is entitled to call for that information; and if he does not have it, he can so respond. Again, also as to whether any other charges against the prisoners are pending, that is a question

[1] Second session Sixty-sixth Congress, Record, p. 4338.

[2] Second session Sixty-first Congress, Record, p. 5135.

[3] Joseph G. Cannon, of Illinois, Speaker.

of fact. It is true the Attorney-General may not have the information, but he may have, and that is as susceptible of an answer according to the facts as it would be if he did not have the knowledge.

411. The rule authorizing reference to the Calendar of Adverse Reports, on request, does not apply to privileged resolutions of inquiry.

Clause 2 of Rule XIII applies to nonprivileged reports only.

A resolution of inquiry adversely reported to the House and undisposed of becomes unfinished business and may be called up at the will of the House.

The Member presenting a committee report from the floor is entitled to prior recognition.

On January 8, 1910,[1] Mr. James R. Mann, of Illinois, from the Committee on Interstate and Foreign Commerce, presented the adverse report of that committee on a resolution of inquiry authorizing the Secretary of Agriculture to inform the House if Executive orders had been issued suspending the operations of the pure food and drugs act, with the recommendation that the resolution lie on the table.

Thereupon, Mr. Halvor Steenerson, of Minnesota, the author of the resolution, requested that the report be referred to the calendar under clause 2 of Rule XIII.

The Speaker[2] held: said:

The gentleman, the Chair presumes, relies—and the Chair proceeds without objection from the gentleman from Illinois—on Rule XIII, clause 2, which as is follows:

"All reports of committees, except as provided in clause 61 of Rule XI"—

That refers to privileged reports, and this is a privileged report—

"together with the views of the minority, shall be delivered to the Clerk for printing and reference to the proper calendar under the direction of the Speaker."

Then, on the next page:

"Provided, That bills reported adversely shall be laid on the table, unless the committee reporting a bill, at the time, or any Member within three days thereafter, shall request its reference to the calendar to which it shall be referred, as provided in clause 1 of this rule."

Now, this rule applies to nonprivileged matter; but under another rule this is a privileged report, and the Chair thinks it does not come within the rule just read, being privileged.

The report now being made on a privileged resolution, whether it was made in time or not, the matter is before the House, and may not be sent to the calendar under the rule relating to adverse reports or reports not privileged.

But in privileged matters there is a distinction, the Chair will state, between Rule XIII and Rule XI. The rule that the gentleman has in mind applies to nonprivileged matters and does not apply to privileged matters, which is provided for in another rule. *It can go on the calendar as unfinished business, subject to be called up when the House desires to consider it.*

Mr. Steenerson then proposed to proceed in debate when the Speaker ruled:

The rule is well established in the practice of the House that the Member reporting a resolution from the committee is entitled to recognition.

412. A resolution of inquiry undisposed of at adjournment retains its privilege and is the unfinished business when that class of business is again in order under the rules.

While the motion to lay on the table is not debatable, the chairman of a committee reporting a proposition to the House with the recommen-

[1] Second session Sixty-first Congress, Journal, p. 137. Record, p. 412.

[2] Joseph G. Cannon, of Illinois, Speaker.

dation that it be laid on the table is entitled to recognition for debate before moving to lay on the table.

While members of the committee are entitled to priority of recognition for debate, a motion to lay a proposition on the table is in order before the Member entitled to prior recognition for debate has begun his remarks.

On July 2, 1913,[1] Mr. Henry D. Clayton, of Alabama, from the Committee on the Judiciary, submitted as privileged a report on the following resolution with the recommendation that it lie on the table:

Resolved, That the Attorney General be, and he is hereby, instructed to transmit to the House of Representatives copies of all correspondence and other papers and memoranda on file in the office of the Attorney General or referred by the President to the Attorney General relating to the prosecution or trial of Maury Diggs and Drew Caminetti, or either of them, for violation of the Mann White Slave Act.

Mr. James R. Mann, of Illinois, asked time for debate, when Mr. Clayton took the position that the request could not be granted as the motion to lay on the table was not debatable.

The Speaker[2] ruled that while the motion to lay on the table is not debatable the chairman having reported a privileged resolution with the recommendation that it lie on the table, was entitled to an hour or any part thereof before offering the motion to lay on the table.

Debate continued until adjournment, and on July 15,[3] during a call of the committees, Mr. Mann demanded the regular order and said:

Then I will take the liberty of reminding the Chair that a highly privileged matter was pending before the House and is still pending before the House as the unfinished business, and hence is the regular order; namely, a report from the Committee on the Judiciary recommending that the resolution offered by the gentleman from California, Mr. Kahn, lie on the table.

The Speaker said:

If the gentleman makes such a demand, then it is the regular order.

Debate was resumed on July 18,[4] when Mr. Clayton, having withdrawn his motion to lay on the table in order to permit further debate, Mr. Joseph W. Byrns, of Tennessee, demanded recognition to offer the motion. Mr. Mann made the point of order that the chairman of the committee, having withdrawn his motion, was entitled to prior recognition to debate the resolution. The Speaker held that the chairman was entitled to priority of recognition for debate, but a motion to lay a proposition on the table is in order before the Member entitled to prior recognition for debate has begun his remarks, and recognized Mr. Byrns.

413. A resolution of inquiry may be reported at any time, and, when reported, remains privileged until disposed of.

No objection having been made to the reference of a resolution of inquiry adversely reported, it was held on one occasion that it could then

[1] First session Sixty-third Congress, Record, p. 2311.

[2] Champ Clark, of Missouri, Speaker.

[3] Record, p. 2442; Journal, p. 213.

[4] Record, p. 2538.

be called up from the calendar only by authorization of the committee reporting it.

A resolution of inquiry, to enjoy its privilege, should caR for facts rather than opinions and should not require an investigation.

A special order providing certain business "Shall be in order for consideration" does not preclude consideration of other privileged business which the House may prefer to consider.

A request in a resolution of inquiry for "The reason why" is a request for an opinion, and destroys its privilege.

On December 13, 1924,[1] Mr. Fiorello H. LaGuardia, of New York, claimed the floor to call up for consideration the following resolution of inquiry which had been reported adversely by the Committee on the Judiciary and by his request referred to the calendar in the absence of a point of order against such reference:

Resolved, That the Secretary of the Treasury be, and he is hereby, directed to inform the House of Representatives, if not incompatible with the public interest, as follows:

1. The reason and cause for the dismissal of Robert J. Owens, a prohibition agent, assigned to the prohibition office, New York City, and the facts and evidence upon which such dismissal was based.

2. Whether or not the said Robert J. Owens was given a hearing; and if so, when and where such hearing was held.

3. The disposition of a certain amount of liquor seized by said agent, Robert J. Owens, on or about August 1, 1924, in the premises known as 142 East Fifty-fourth Street, Borough of Manhattan, city of New York, State of New York.

4. Whether or not a hearing was held before a United States commissioner or other officer authorized by law to determine the legality of the possession of the said liquor.

5. Facts, evidence, and proof of the legality of the possession of the said liquor.

6. Such other information in the possession of the department or any bureau thereof concerning the seizure and disposition of said liquor and the dismissal from the service of the said Robert J. Owens.

Mr. L. C. Dyer, of Missouri, made the point of order that Mr. LaGuardia was not authorized by the committee reporting the bill to call up the resolution for consideration.

Mr. Nicholas Longworth, of Ohio, made the further point of order that the resolution was not privileged in that it called for an opinion rather than for facts.

Mr. Everett Sanders, of Indiana, submitted the additional point that by special order the day had been set apart for the consideration of certain bills on the Private Calendar, and consideration of the resolution of inquiry was not in order until they were disposed of.

In discussing the point of order presented by Mr. Dyer, Mr. Louis C. Cramton, of Michigan, said:

Mr. Speaker, I am not interested in the subject matter of the resolution. I am, however, somewhat jealous of the protection of the rights of Members and the protection of the rights of minorities with reference to resolutions of inquiry. If it should be held that the point of order is correct, it means to do away with the right which a minority heretofore has had with reference to resolutions of inquiry. I do not believe that is desirable.

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[1] Second session Sixty-eighth Congress, Journal, p. 49; Record, p. 604.

The point of order is that a report having been made upon the resolution, that report having been adverse, that no one now can call up that resolution and the report on it except a member of the committee. All that the rule definitely requires is that the committee shall report, but the report of the committee is an idle ceremony unless it does lead to possible consideration by the House. If it is to be held that the resolution itself when reported has no privilege, then it is easy to see how a majority in this House can entirely put the lid on resolutions of inquiry. The majority in the House having control of the Rules Committee, having a majority on the committees, can secure an adverse report, upon a resolution of inquiry. Is it to be understood that that adverse report absolutely prevents the getting up of a resolution for a vote by the House? It would be strange, indeed, if a man who introduces a resolution shall be held to lose the right to call it up in this House—a right equal to that of any other Member—unless there is something explicit in the rules to that effect, and there is not.

Whether it is a favorable or adverse report is immaterial. But if it should be held that a privileged right to consideration does not exist, then why should there be, first, a provision in the rule to require a report which could not be brought before the House? And, secondly, if it is not privileged, how could a joint motion to discharge the committee and call up a bill for consideration, to have both joined in one privileged motion, and both when joined together repeatedly sustained as privileged? The resolution of inquiry, from its very nature, is to be used by the minority. The majority in harmony with the administration can generally get their information, but if you are to hold that an adverse decision of a committee of this House shall prevent the House itself from having the right to decide the question, then you have done away with the resolution of inquiry.

The Speaker [1] said:

Three points of order are made. As to the day, the Chair finds that the order yesterday was simply that bills on the Private Calendar, reported from the Committee on Claims, be in order for consideration to-morrow. It seems to the Chair that does not prevent the consideration of other privileged business, if the House so desires.

The second point of order is: Can it be brought up by the gentleman from New York [Mr. LaGuardia], he not being a member of the committee which made the report? This rule was adopted in 1880, and when it was first reported by Mr. Randall it simply provided that any motion of inquiry should be referred to a committee. Then it was contended by some Members that there should be some constraint on that committee, and, therefore, the addition was made that such committee should report within one week, and since then, without any special provision in the rule, it has been held that if the committee did not report within that week the Member who offered the resolution should have the right to bring it up as a matter of privilege. There is no special reason, given in any decision the Chair has been able to find, for establishing that right but the Chair supposes it is to compel the committee to do its duty. It is logical, if the committee does not do its duty, that the House should have the right, without the action of the committee, to immediately proceed to consider the subject. But there is nothing in the rule which provides what shall be done when the committee does report, and consequently it has been held that such a report is privileged, and, it seems to the Chair, it must stand just like any other privileged report of a committee. The Chair can see no reason for any difference in the privilege, whether it is adverse or whether it is favorable. But the Chair is unable to see any reason why this case should be held by decision to be different from all other cases. It is always held that the only person who can bring up a bill is the Member authorized by the committee. There are some privileged bills now on the calendar which are subject to be brought up, but nobody can bring them up except the member of the committee authorized to do so, and in the absence of any expression in the rules or of any precedents by a decision the Chair does not feel authorized to hold that there is any different right in this case than in any other case.

Then as to the point that is made by the gentleman from Ohio [Mr. Longworth], the rulings have been continuous that such a resolution must call simply for the facts and not for opinions. It does seem to the Chair that calling for the reason why the act was done is calling for an opinion

[1] Frederick H. Gillett, of Massachusetts, Speaker.

by the official who performed that act. It is asking his motive. Of course, the language could be drawn so as to ask the facts on which he based his action, but to ask the motive and the reason of his action, it seems to the Chair, also makes this resolution subject to the point of order. So the Chair sustains the point of order.

414. Resolutions of inquiry when reported from the committee to which referred are privileged.

Instance wherein an amendment was recommended to protect the confidential files of the department.

In response to a request for information "not incompatible with the public interest," the head of a department replied that it would be incompatible with the public interest to submit the information requested.

On May 14, 1932,[1] Mr. Charles R. Crisp, of Georgia, from the Committee on Ways and Means, submitted, as privileged, a report on a resolution requesting certain information from the Secretary of the Treasury and asked for its immediate consideration.

The committee in reporting the bill recommended that it be amended by incorporating the following:

If not incompatible with the public interest.

Mr. Carl R. Chindblom of Illinois, in discussing the resolution explained that the reason for incorporating the amendment was that the inquiry related to—

the production to the House of all the testimony, evidence, exhibits, documents, and records, matters very clearly of a confidential nature, which have come to the Treasury Department in the course of an investigation. In my opinion, if this shall become anything like a common practice, it will utterly destroy the possibility of the Treasury Department and of the Tariff Commission securing evidence from outside sources, because, if these matters can not be treated confidentially by the representatives of the Government who obtain this information from manufacturers, producers, and tradesmen, then, of course, we will never get the information. The committee amendment, reading "if not incompatible with the public interest," will, in my opinion, protect the Government as well as private interests.

After brief debate, the resolution was agreed to, and on May 31, the Speaker[2] laid before the House a communication from the Secretary of the Treasury reading in part as follows:

TREASURY DEPARTMENT,
Washington, May 26, 1932.

DEAR MR. SPEAKER: I am in receipt of House Resolution 213, dated May 14, 1932, requesting that if not incompatible with the public interest I submit to the House of Representatives, as soon as practicable, all the testimony, evidence, exhibits, documents, and records presented in or pertaining to the investigation conducted under the authority of the antidumping act, 1921, relating to the importation of ammonium sulphate.

In passing the antidumping act the Congress decided to provide that the initial decisions as to the existence of dumping should be made by the Secretary of the Treasury in accordance with administrative procedure. It has been the practice of the department in acting under this statute to treat all information furnished by interested persons as confidential and not to disclose it unless such persons consent to the disclosure. This practice is founded upon the necessity for the department to obtain complete information concerning manufacturers' and importers' business transactions which it would be practically impossible to obtain if those furnishing the infor-

[1] First session Seventy-second Congress, Record, p. 10207.

[2] John N. Garner, of Texas, Speaker.

mation did not understand it would be treated as confidential and not divulged without their consent.

As consent has not been given to the disclosure of the information contained in the record before the Treasury Department, I am of the opinion that it would be incompatible with the public interest to comply with the request contained in the resolution.

Very truly yours,

OGDEN L. MILLS,
Secretary of the Treasury.

415. The motion to discharge a committee is not debatable, and the proposition to lay on the table a motion to discharge a committee from the consideration of a resolution of inquiry is in order and takes precedence even though the proponent of that motion demands the floor.

The motion to lay on the table is not debatable.

On the recapitulation of a yea-and-nay vote a proposition to correct a vote is not in order until the recapitulation has been concluded.

A motion to discharge a committee from consideration of a resolution of inquiry, when privileged, is not debatable.

On February 1, 1919,[1] Mr. Halvor Steenerson, of Minnesota, as a privileged question, moved to discharge the Committee on Agriculture from the consideration of a resolution of inquiry, requesting of the President information relative to action toward putting into effect the guaranteed price of wheat. This motion had not been reported within the time prescribed by the rule.

Mr. Asbury F. Lever, of South Carolina, made the point of order that the motion was not privileged which was overruled by the Speaker.[2] Mr. Lever then proposed to yield time for debate, when the Speaker held that the motion was not debatable.

415a. On April 8, 1908,[3] Mr. Sereno E. Payne moved to lay on the table a motion by Mr. Dorsey W. Shackleford, of Missouri, to discharge the Committee on Ways and Means from the further consideration of a privileged resolution of inquiry.

Mr. Shackleford made the point of order that he was entitled to recognition as the proponent of the motion to discharge the committee, and Mr. Payne did not have the floor to offer a motion.

The Speaker[4] said:

The motion to lay on the table takes precedence, even extending to the recognition that is given to the gentleman. The Chair has verified his recollection. Under the rule a motion to discharge the committee is not debatable, and a motion to lay on the table takes precedence. Neither motion is debatable, so far as that is concerned.

The question being taken, the yeas were 126, and the nays were 123.

Mr. John Sharp Williams, of Mississippi, demanded a recapitulation of the vote, which was ordered.

During the recapitulation Mr. Dorsey W. Shackleford, of Missouri, addressed the chair and proposed to challenge the correctness of the vote.

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[1] Third session Sixty-fifth Congress, Journal, p. 141. Record, p. 2522.

[2] Champ Clark, of Missouri, Speaker.

[3] First session Sixtieth Congress, Record, p. 4516.

[4] Joseph G. Cannon, of Illinois, Speaker.

The Speaker said:

After the recapitulation is completed corrections can be made.

416. A committee having been discharged from the further consideration of a resolution of inquiry, debate is in order under the hour rule unless the previous question is ordered.

On February 26, 1919,[1] the House agreed to a motion offered by Mr. Albert Johnson, of Washington, to discharge the Committee on Military Affairs from the further consideration of a privileged resolution of inquiry relating to charges of malfeasance against certain Army officers.

Thereupon Mr. Finis J. Garrett, of Tennessee, inquired if debate was then in order.

The Speaker[2] replied that discussion was then in order and a Member recognized was entitled to one hour.

417. The motion to discharge a committee from the consideration of a resolution of inquiry is not debatable, but the motion having been agreed to, the resolution is before the House and subject to debate under the hour rule.

The House having agreed to a motion to discharge a committee from further consideration of a resolution, the proponent of the motion was recognized to debate the resolution.

On June 5, 1919,[3] Mr. Thomas L. Blanton, of Texas, moved to discharge the Committee on Expenditures in the Department of Agriculture from consideration of a resolution of inquiry which had been referred to the committee more than a week previous.

Mr. J. Hampton Moore, of Pennsylvania, addressed the chair, when Mr. Blanton made the point of order that the motion to discharge a committee was not debatable.

The Speaker[4] sustained the point of order.

The motion was agreed to and the question recurring on the adoption of the resolution, Mr. Moore arose and asked if debate was in order.

The Speaker replied that the question was debatable and recognized Mr. Blanton.

418. A point of order may be raised against a substitute reported by committee, although the original resolution may have been privileged.

A resolution calling for "reasons which make it inexpedient" to take specified action was held to ask for opinions rather than facts, while a resolution asking "what facts make expedient" such action was admitted under the rule.

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[1] Third session Sixty-fifth Congress, Record, p. 4350.

[2] Champ Clark, of Missouri, Speaker.

[3] First session Sixty-sixth Congress, Record, p. 696.

[4] Frederick H. Gillett, of Massachusetts, Speaker.

On April 14, 1910,[1] Mr. Ebenezer J. Hill, of Connecticut, from the Committee on Expenditures in the Treasury Department, submitted as privileged the following report:

The Committee on Expenditures in the Treasury Department, to which was referred House resolution 480, respectfully report that they have had the same under consideration, and recommend the adoption of the following substitute:

Resolved, That the President be, and he is hereby, requested to inform the House if there still exist any reasons which make it inconvenient or inexpedient that a thorough examination at this time be made by the House of Representatives of the frauds in the customs service mentioned by the President in his annual message to the Congress at this session.

Mr. John J. Fitzgerald, of New York, made the point of order that the substitute in asking for reasons was not entitled to privilege.

The Speaker[2] ruled:

The substitute reported for this resolution is the same as the resolution, striking out the words "what facts which make it inexpedient" and inserting "what reasons which make it inexpedient."

Now, the Chair thinks it very likely that the condition may or may not have changed since the sending of the annual message. The Chair, of course, is not informed, but thinks the annual message referred to a condition, to facts in esse, in general terms. The substitute asks an expression of opinion—it might fairly be so construed—as to the reasons that exist, and so forth. This rule has been strictly construed. If this resolution or substitute is not privileged it would go upon the calendar, to be disposed of in the future as business not privileged. If it be privileged, it can be disposed of at this time.

The Chair is inclined to sustain this point of order; perchance there may be reasons other than the facts. The Chair therefore sustains the point of order.

Thereupon, Mr. Fitzgerald moved to discharge the committee from the consideration of the original resolution which was as follows:

Resolved, That the President be, and he is hereby, requested to inform the House what facts, if any, now exist which make inexpedient a thorough examination at this time by the House of Representatives of the frauds in the customs service mentioned by the President in his annual message to the Congress at this session.

Mr. Hill made the point of order that the original resolution in calling for facts which made the examination inexpedient asked for an opinion and was therefore without privilege.

The Speaker said:

Now, the resolution asks the President to inform the House of the facts, if any now exist, which make inexpedient a thorough examination at this time by the House of Representatives of the frauds in the customs service mentioned by the President in his annual message to the Congress at this session. The President, in the annual message just read, said that it would be embarrassing in the administration of justice to disclose the hand of the Department of Justice and of the Executive, and that it might give immunity, perchance, as well as embarrass the administration. Now, the resolution wants to know whether the condition has passed that was referred to by the President in his annual message. It is that which the House calls for, and the Chair overrules the point of order.

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[1] Second session Sixty-first Congress, Record, p. 4689.

[2] Joseph G. Cannon, of Illinois, Speaker.

419. A resolution of inquiry asking "why" certain action had not been taken was held to be a request for facts and not for opinions, and therefore to be privileged.

A privileged resolution should be reported from the floor and, if reported through the basket, loses its privilege, but if ruled out of order on that ground may be immediately submitted from the floor without loss of privilege.

On April 19, 1910,[1] Mr. John H. Stephens, of Texas, from the Committee on Indian Affairs, reported as privileged a resolution addressed the Secretary of the Interior making inquiries regarding certain cases pending before the department involving the citizenship of various Indians, and concluding as follows:

Third. Whether the said cases were considered with the same deliberation and with the average expenditure of time thereon as had been the practice of the department for several years prior thereto; and if not, why not.

Mr. Sereno E. Payne, of New York, made the point of order that the phrase "if not, why not" called for an opinion.

Mr. James R. Mann, of Illinois, made the further point of order that the bill had been reported through the basket instead of from the floor, thus precluding the reservation of points of order and was therefore deprived of any privilege to which it might have been entitled.

The Speaker[2] said:

Under the rule, this being a privileged report, the report should be made by the committee from the floor of the House, and not by dropping it in the basket. The Chair has a precedent in a ruling Mr. Speaker Reed on March 26, 1890. The report was at once made from the floor, as the gentleman might do now.

The Chair sustains the point of order.

Whereupon, Mr. Stephens forthwith submitted the report from the floor, and the Speaker continued:

Now, the Committee on Indian Affairs giving the gentleman authority to make the report, and it having been made not upon the floor of the House, the gentleman from Texas, from the Committee on Indian Affairs, makes the report on the resolution which he claims to be privileged. As to the point of order made by the gentleman from New York, Mr. Payne, to the following language: And if not, why not—

It seems to the Chair that this does not call for an expression of an opinion, but for a statement of fact; therefore the Chair overrules the point of order.

420. A resolution asking "the cause of delay" was held to be a request for facts and not a request for an opinion, and therefore privileged under the rule.

On June 25, 1910,[3] Mr. Eugene F. Kinkead, of New Jersey, called up, as privileged, the following resolution of inquiry:

Resolved, That the Secretary of the Treasury be, and he is hereby, directed to report to the House of Representatives the cause or causes of delay in the Auditor's Office of the War Depart-

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[1] Second session Sixty-first Congress, Record, p. 4987.

[2] Joseph G. Cannon, of Illinois, Speaker.

[3] Second session Sixty-first Congress, Record, p. 9106.

ment in the matter of the adjudication of claims filed by veterans of the civil war for back pay, bounty, and so forth.

Mr. James R. Mann, of Illinois, made the point of order that the resolution called for an expression of opinion rather than facts and was therefore not privileged.

The Speaker [1] overruled the point of order.

421. A resolution asking for the "cost" of an extended undertaking, an audit of which might give rise to a difference of opinion, was construed as a request for facts and not for opinions.

On August 19, 1911,[2] Mr. James M. Cox, of Ohio, offered a motion to discharge the Committee on Expenditures in the War Department from consideration of the following resolution which had been referred to the committee more than one week previously.

Resolved, That the President of the United States be, and he is hereby, requested to submit a statement to the House showing the cost which has accrued to the Government of the United States from the beginning of, and as the result of, the occupation of the Philippine Islands by the United States.

Mr. James R. Mann, of Illinois, raised a question of order and said:

That is a mere matter of opinion. No two persons, with the same set of books before them, would arrive at the same results as to the cost resulting from the occupation of the Philippine Islands. The resolution does not ask for the cost in the Philippine Islands. No one knows whether you could differentiate this cost from the cost of the Boxer revolution in China.

We had troops in the Philippine Islands at the time of the Boxer revolution. Who will say whether the cost of sending those troops there should be charged to the Philippine occupation or to our protecting our interests in China? Who will say whether the cost of fortifying Pearl Harbor after our annexation of Hawaii was a result of our occupation of the Philippine Islands? Already two reports have been asked for and made. The gentleman criticizes those reports because they are fragmentary and not complete, and the only effect of the passage of this resolution, and of obtaining the information which in the opinion of the President should be sent under it, would be to criticize somebody because that information did not include something that somebody thought it ought to include, or did include something that someone thought it ought to not include.

The rule is, Mr. Speaker, that a resolution is not privileged which calls upon a department of the Government to exercise its judgment as to what should be done. All you can call for is specific information. Here is a resolution requiring the President to indicate his judgment as to what are the costs resulting from the occupation of the Philippine Islands. I do not think we ought to pass a resolution asking the President for his opinion on a subject for the purpose of criticizing that opinion because it does not happen to agree with our opinion.

The Speaker [3] ruled:

Finding out how much the Philippine Islands cost is purely a question of arithmetic, and the point of order is overruled.

422. A resolution of inquiry to enjoy its privilege should call for facts rather than opinions.

The privilege of a resolution of inquiry may be destroyed by a preamble.

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[1] Joseph G. Cannon, of Illinois, Speaker.

[2] First session Sixty-second Congress, Record, p. 4201.

[3] Champ Clark, of Missouri, Speaker.

A resolution of inquiry should not require an investigation, but if on its face it calls for facts, the chair is not required to investigate the probability of the existence of those facts.

A request for facts "on which he based" certain charges was held not to constitute a request for an opinion.

If a portion of a resolution of inquiry is without privilege the entire resolution is without privilege.

On August 12, 1913,[1] Mr. Frank W. Mondell, of Wyoming, moved to discharge the Committee on Ways and Means from the further consideration of the following resolution referred to that committee more than a week previously:

Resolved, That the Secretary of the Treasury be, and he is hereby, directed to transmit to the House of Representatives the facts in his possession on which he based the charge recently made by him that the recent decline in the price of United States 2 per cent bonds is due "almost wholly to what appears to be a campaign waged with every indication of concerted action on the part of a number of influential New York City banks to cause apprehension and uneasiness about these bonds in order to help them in their efforts to defeat the currency bill."

That the Secretary of the Treasury is also hereby directed to inform the House as to the facts on which he based his statement, as follows: "That nothing has occurred to impair the value of the 2 per cent bonds, but the amendment already adopted by the Banking and Currency Committee of the House enhances their intrinsic value," together with a copy of the amendment thus referred to by him.

Mr. Oscar W. Underwood, of Alabama, made the point of order that the resolution was a request for an opinion and was based on statements the authenticity of which could be ascertained only by an investigation.

After extended debate the Speaker[2] ruled:

The practice in regard to a resolution of this kind is this, that it is in order if it calls for facts only or information only. It does not make any difference which one of the two words is used. But it is out of order if it calls for an opinion or an investigation. If part of the resolution is bad, it is all bad.

It may be that the Secretary of the Treasury used the language quoted here. The Chair does not know, and it is none of his business to inquire. The Secretary may not have had any facts whatever as to the second proposition. The Chair does not pronounce an opinion whether he had or had not any facts on which to base the statement—

That nothing has occurred to impair the value of the 2 per cent bonds, but the amendment already adopted by the Banking and Currency Committee of the House enhances their intrinsic value if the Chair undertook to make up his own mind about the question whether the Secretary of the Treasury had facts on which to base an opinion he would have to go on an exploring expedition to find out what the Secretary was talking about.

All that the Chair is required to pass on is this: Is this resolution in proper form and language in the light of the rules, practices, and precedents of the House? The Chair thinks it is, because on its face it simply calls for facts—merely that and nothing more. Therefore the Chair is constrained to overrule the point of order made by the gentleman from Alabama.

423. A resolution inquiring as to the "result" of certain proceedings was held to be a request for facts and therefore entitled to privilege.

On January 28, 1919,[3] Mr. Norman J. Gould, of New York, moved to discharge the Committee on the Judiciary from the further consideration of the following resolution, which had been referred to the committee more than one week previously:

[1] First session Sixty-third Congress, Record, p. 3315; Journal, p. 371.

[2] Champ Clark, of Missouri, Speaker.

[3] Third session Sixty-fifth Congress, Record, p. 2216.

Resolved, That the President is hereby requested to inform the House of Representatives of the result, in detail, of his administration of the provisions of the so-called Overman Act, approved May 20, 1918, entitled "An act authorizing the President to coordinate or consolidate executive bureaus, agencies, and offices, and for other purposes, in the interest of economy and the more efficient concentration of the Government."

Mr. Edwin Y. Webb, of North Carolina, made the point of order that the resolution was not privileged for the reason that it called upon the President to express an opinion as to the result in question.

The Speaker [1] overruled the point of order.

424. The report of the committee on a resolution of inquiry does not affect its privileged status, and such resolution is privileged for consideration from the time it is placed on the calendar.

An inquiry as to whether "facts exist to justify" a course of procedure was held to be a request for opinions rather than for facts and therefore not within the rule.

On February 20, 1919,[2] Mr. Charles E. Fuller, of Illinois, proposed to call up as a privileged resolution of inquiry the following:

Resolved, That the President, if not incompatible with the public interest, be requested to communicate to the House what, if any, facts exist to justify the War Trade Board in refusing license to American manufacturers to export manufactured goods to citizens of neutral countries with which we are not and have not been at war; and what, if any, facts exist to justify the refusal of the said War Trade Board to permit American manufacturers to communicate with their customers in such countries in regard to future business.

Mr. Thetus W. Sims, of Tennessee, made the point of order that the resolution having been reported by the committee and being on the calendar, was no longer entitled to a privileged status.

The Speaker [1] held that the committee could not by reporting a resolution of inquiry destroy its privilege as such, and overruled the point of order.

Mr. Sims then made the further point of order that the resolution, in asking for facts justifying the refusal of licenses, asked for opinions.

The Speaker sustained the point of order.

425. A resolution of inquiry asking for a citation of "the authority" under which certain action had been taken was held to call for facts rather than opinions.

On January 27, 1921,[3] Mr. Julius Kahn, of California, by direction of the Committee on Military Affairs, reported as privileged a resolution of inquiry asking for "the authority" under which the Postmaster General, the Secretary of War, and the Secretary of the Navy had purchased for their respective departments certain German airplanes.

Mr. Finis J. Garrett, of Tennessee, made the point of order that the resolution was not privileged for the reason that in asking for a citation of authority it called for opinions rather than for facts.

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[1] Champ Clark, of Missouri, Speaker.

[2] Third session Sixty-fifth Congress, Record, p. 3867.

[3] Third session Sixty-sixth Congress, Record, p. 2127.

The Speaker [1] said:

The Chair thinks that the authority upon which the Secretary acted is a matter of fact, and therefore the Chair overrules the point of order.

426. A resolution inquiring "Under the authority of what law" certain actions were taken, was construed to ask for facts rather than opinions.

On February 16, 1923,[2] Mr. Louis C. Cramton, of Michigan, moved to discharge the Committee on the Judiciary from the further consideration of a resolution in part as follows:

Resolved, That the Secretary of the Treasury be, and he is hereby, directed to inform the House of Representatives, if not incompatible with the public interest, as follows:

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3. If any such rules or regulations have been so adopted or put in force, or any such liquors have been so imported since January 17, 1920, under the authority of what law, if any, the Treasury Department acted in adopting or putting in effect such rules or regulations or in permitting such importations.

Mr. Finis J. Garrett, of Tennessee, made the point of order that the resolution asked for an opinion rather than for facts in that it required a construction of law, and was therefore a request for an opinion.

The Speaker [1] overruled the point of order.

427. The privilege of a resolution of inquiry is destroyed by a preamble reciting an assertion of fact.

Resolutions the adoption of which would commit the House to an assertion of fact do not come within the privilege.

A resolution requiring an investigation is not privileged under the rule.

The privilege of a resolution of inquiry, when in question, is strictly construed.

On March 14, 1908 [3] Mr. Thomas W. Hardwick, of Georgia, offered, as privileged, a motion to discharge the Committee on Interstate and Foreign Commerce from the further consideration of a resolution, asking for data reported to the President under a provision of law professed to be quoted in a preamble prefacing the resolution.

Mr. William P. Hepburn, of Iowa, made the point of order that the preamble destroyed the privilege.

The Speaker [4] quoted the rule relating to resolutions of inquiry and said:

There is nothing specific in the rule that makes the resolution privileged, but there has been a long line of decisions respecting resolutions of this kind that fairly well settle this point of order, and it has been held in the rulings of the Chair from time to time that if there is anything in the resolution, or in the preamble, for that matter, because the resolution and the preamble would have to be voted upon separately, which is aside from the purposes of a resolution of inquiry, then that destroys the privilege.

If the resolution itself were adopted, it identifies nothing. In the opinion of the Chair it would be unavailing. But suppose the resolution is adopted, and then the vote comes upon the

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[1] Frederick H. Gillett, of Massachusetts, Speaker.

[2] Fourth session Sixty-seventh Congress, Record, p. 3788.

[3] First session Sixtieth Congress, Record, p. 3315.

[4] Joseph C. Cannon, of Illinois, Speaker.

preamble, which professes to recite the law in part and in part not to recite the law. Let us assume that the preamble is voted down, as it might or might not be. The House would then be in the condition of having adopted a resolution that is unavailing. The value of the resolution is to call for information, and it should be strictly construed in the interests of the privileges of the House in order that the rule may be preserved. Therefore the Chair is of opinion, for the reasons assigned, that the preamble destroys the privilege of the resolution.

This preamble throws the burden upon the House to make an investigation of facts for itself as to whether the preamble correctly recites the law or as to whether the words not in quotations heretofore read by the Chair, are a part of the law or whether they are aliunde to the law, and such an investigation, whether it be little or much, is a distinct matter to which the House should not be brought in considering a privileged resolution of inquiry. Therefore the Chair sustains the point of order.

428. A resolution of inquiry asking "why" a certain course of action has been followed is a request for reasons and is without privilege.

On January 29, 1917,[1] Mr. Edward Keating, of Colorado, moved, as a privileged motion, to discharge the Committee on Reform in the Civil Service from the consideration of a resolution of inquiry requesting the President to inform the House "why," in the administration of the civil-service law, women were "denied appointment or promotion."

Mr. John J. Fitzgerald, of New York, having raised a question of order against the privilege of the resolution, the Speaker[2] said:

It destroys the privilege. You might just as well ask him in so many words to give his reasons. The rule is too well settled to warrant hunting up decisions on it.

429. A resolution of inquiry to be privileged as such should not ask for opinions or require an investigation.

A resolution inquiring whether certain agencies "Claim exemption" was held to require an investigation.

On September 29, 1917,[3] Mr. Halvor Steenerson, of Minnesota, moved to discharge the Committee on Agriculture from the further consideration of a resolution inquiring of the President of the United States whether the United States Food Administration in attempting to control the price of wheat and establish a fixed price "claims exemption from the antitrust laws of the United States."

Mr. Finis J. Garrett, of Tennessee, made the point of order that the resolution not only asked for an opinion but in inquiring whether exemption was claimed required an investigation.

The Speaker[2] sustained the point of order on the ground that the resolution both called for an expression of opinion and required an investigation, either of which was sufficient to destroy the privilege claimed.

430. A resolution of inquiry asking for for "reasons" was held to be a request for an opinion rather than for facts and therefore not entitled to privileges.

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[1] Second session Sixty-fourth Congress, Record, p. 2188.

[2] Champ Clark, of Missouri, Speaker.

[3] First session Sixty-fifth Congress, Journal, p. 426; Record, p. 7470.

On February 11, 1919,[1] Mr. Charles E. Fuller, of Illinois, offered, as privileged, a motion to discharge the Committee on Interstate and Foreign Commerce from the further consideration of the following:

Resolved, That the President, if not incompatible with the public interest, be requested to communicate to the House what, if any, reasons exist for the War Trade Board to refuse license to American manufacturers to export manufactured goods to citizens of neutral countries with which we are not and have not been at war; and what, if any, reasons exist for the refusal of the said War Trade Board to permit American manufacturers to communicate with their customers in such countries in regard to future business.

Mr. John N. Garner, of Texas. made the point of order that the resolution called for an expression of opinion.

The Speaker[2] sustained the point of order.

431. A resolution of inquiry asking for facts justifying a specified action was held to ask for an opinion and therefore to be without privilege.

The reference to the calendar of a resolution of inquiry does not operate to deprive it of any privilege it may possess.

On February 20, 1919,[3] Mr. Charles E. Fuller, of Illinois, called up as privileged the following resolution:

Resolved, That the President, if not incompatible with the public interest, be requested to communicate to the House what, if any, facts exist to justify the War Trade Board in refusing license to American manufacturers to export manufactured goods to citizens of neutral countries with which we are not and have not been at war; and what, if any, facts exist to justify the refusal of the said War Trade Board to permit American manufacturers to communicate with their customers in such countries in regard to future business.

Mr. John N. Garner, of Texas, made the point of order that the resolution, having been reported by the committee and placed on the calendar, was no longer privileged.

The Speaker[2] overruled the point of order.

Mr. Henry D. Flood, of Virginia, then raised the question of order that in calling for facts justifying an action the resolution asked for an expression of opinion.

The Speaker sustained the point of order.

432. While Cabinet officers are frequently summoned to testify before committees either voluntarily or by subpoena, they are no longer called to give information on the floor of the House.

A resolution of inquiry to enjoy its privileges should not require an investigation.

Instance wherein the Speaker, desiring further time for consideration of a point of order, reserved his decision until the following day.

A resolution calling upon an executive officer to give his reasons for pursuing any certain course of action is out of harmony with the principles governing the use of privileged resolutions of inquiry.

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[1] Third session Sixty-fifth Congress, Record, p. 3140.

[2] Champ Clark, of Missouri, Speaker.

[3] Third session Sixty-fifth Congress, Record, p. 3867.

A resolution of inquiry asking "why" certain action has been taken is a request for opinions and is not admissible under the rule.

On February 11, 1908,[1] Mr. George Edmond Foss, of Illinois, from the Committee on Naval Affairs, reported as privileged the following resolution:

Resolved, That the Secretary of the Navy inform the House of Representatives why a considerable reduction is being made in the skilled labor force employed at the Washington Navy Yard and at other navy yards of the country.

Mr. James R. Mann, of Illinois, submitted the point that the resolution, in asking for reasons, failed to come within the rule.

After debate, the Speaker[2] said:

Without intimating an opinion as to whether the point of order is or is not well taken, the Chair would prefer that the matter go over until tomorrow morning.

On the following day,[3] after the reading and approval of the Journal, the Speaker announced.

Yesterday, just before adjournment, a point of order was made to a resolution reported from the Committee on Naval Affairs, which was briefly argued. The Chair sustains the point of order, and it is proper, very briefly, to assign the reasons therefor.

The provision of the resolution offered by the gentleman from Illinois, calling upon the Secretary of the Navy to state his reasons for the action referred to, presents a new aspect of a principle already settled. The House from its earliest history has exercised and cherished its prerogative of calling on the Executive for information and documents. In 1792, at the very beginning of the Government, the House decided that the Secretaries of the President's Cabinet should not be called personally to the floor of the House to give information, and concluded that written information should be furnished instead. From that time until this no Cabinet officer has given information on the floor of the House, although they have been frequently called before committees to testify, either voluntarily or by subpoena.

Resolutions calling for written information and for documents have in the later years of the House been given a privileged status, but the precedents show that this privilege has been confined within somewhat strict lines. It is allowable to call upon the head of a Department for a statement of facts within the knowledge of his Department, but whenever an attempt has been made to call for opinions or to direct the officer to make an investigation, it has been held that these provisions destroy the privilege of the resolution of inquiry.

It is not necessary to cite here the precedents in these cases, as they are well known to the membership of the House.

The Chair is of the opinion that a call upon an executive officer for a statement of his reasons is likewise out of harmony with the principles governing the use of these resolutions. It would tend to create discussion and debate between the executive and legislative branches and would not assist in the orderly and proper transaction of the public business.

433. The President declined to submit to the Senate in response to its request certain papers touching the London Naval Treaty of 1930 on the ground that such compliance would be incompatible with the public interest.

A resolution addressed to the President requesting the transmission of papers having been offered, the Senate modified it by incorporation of the clause "if not incompatible with the public interest."

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[1] First session Sixtieth Congress, Record, p. 1793.

[2] Joseph G. Cannon, of Illinois, Speaker.

[3] Record, p. 1829.

On July 10, 1930[1] (legislative day of July 8), in the Senate, Mr. Kenneth McKellar, of Tennessee, moved this resolution:

Whereas on June 12, 1930, the Senate Committee on Foreign Relations by resolution requested the Secretary of State to send it the letters, minutes, memoranda, instructions, and dispatches which were made use of in negotiations prior to and during the sessions of the recent conference at London; and

Whereas that committee received only a part of such documents; and

Whereas the Secretary of State, by direction of the President, denied a second request from the Foreign Relations Committee for the papers above described, and in his letter to the chairman of that committee the Secretary of State has apparently attempted to establish the doctrine that the treaty of London must be considered by the Senate "from the language of the document itself and not from extraneous matter"; and

Whereas that committee dissented from such doctrine and regarded all facts which enter into the antecedent or attempted negotiation of any treaty as relevant and pertinent when the Senate is considering a treaty for the purpose of ratification; and

Whereas that committee continued to assert its rights as the designated agent of the Senate to have full and free access to all records, files, and other information touching the negotiation of the treaty, such right being based on the constitutional prerogative of the Senate in the treaty-making process; and

Whereas the chairman of that committee transmitted a copy of those resolutions to the President and Secretary of State; and

Whereas the President and Secretary of State refused to submit the papers and documents requested by the Foreign Relations Committee: Now, therefore, be it

Resolved, That the President be, and he is hereby, requested, if not incompatible with the public interest, to submit to the Senate, with such recommendation as he may make respecting their use, all letters, cablegrams, minutes, memoranda, instructions, and dispatches and all records, files, and other information touching the negotiations of said London naval treaty, to the end that the Senate may be able to do and perform its constitutional obligations with respect to advising and consenting to and ratifying such treaty or rejecting same.

On motion of Mr. Joseph T. Robinson, of Arkansas, an amendment inserting the clause "if not incompatible with the public interest" was agreed to and the resolution as amended was adopted.

On July 11, the President[2] replied by message[3] as follows:

I have received Senate Resolution No. 320, asking me, if not incompatible with the public interest, to submit to the Senate all letters, cablegrams, minutes, memoranda, instructions, and dispatches, and all records, files, and other information touching the negotiations of the London naval treaty.

This treaty, like all other international negotiations, has involved statements, reports, tentative and informal proposals as to subjects, persons, and governments given to me in confidence. The Executive, under the duty of guarding the interests of the United States, in the protection of future negotiations, and in maintaining relations of amity with other nations, must not allow himself to become guilty of a breach of trust by betrayal of these confidences. He must not affront representatives of other nations, and thus make future dealings with those nations more difficult and less frank. To make public in debate or in the press such confidences would violate the invariable practice of nations. It would close to the United States those avenues of information which are essential for future negotiations and amicable intercourse with the nations of the world. I am sure the Senate does not wish me to commit such a breach of trust.

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[1] Second session Seventy-first Congress, Record, p. 88.

[2] Herbert Hoover, of California, President.

[3] Senate Doc. No. 216.

I have no desire to withhold from the Senate any information having even the remotest bearing upon the negotiation of the treaty. No Senator has been refused an opportunity to see the confidential material referred to, provided only he will agree to receive and hold the same in the confidence in which it has been received and held by the Executive. A number of Senators have availed themselves of this opportunity. I believe that no Senator can read these documents without agreeing with me that no other course than to insist upon the maintenance of such confidence is possible. And I take this opportunity to repeat with the utmost emphasis that in these negotiations there were no secret or concealed understandings, promises, or interpretations, nor any commitments whatever except as appear in the treaty itself and in the interpretive exchange of notes recently suggested by your Committee on Foreign Affairs, all of which are now in the hands of the Senate.

In view of this, I believe that to further comply with the above resolution would be incompatible with the public interest.

On receipt of the message Mr. George W. Norris, of Nebraska, proposed the following reservation:

Reservation proposed by Mr. Norris to the treaty for the limitation and reduction of naval armament signed at London on April 22, 1930, by the plenipotentiaries of the President of the United States of America; the President of the French Republic; His Majesty the King of Great Britain, Ireland, and the British Dominions beyond the Seas, Emperor of India; His Majesty the King of Italy; and His Majesty the Emperor of Japan, submitted to the Senate by the President of the United States on the last day of May, 1930.

Whereas in the consideration of said treaty the Senate, on the 10th day of July, 1930, requested the President of the United States to submit to the Senate all letters, cablegrams, minutes, memoranda, instructions, and dispatches and all record files and other information touching the negotiations of said treaty; and

Whereas the President of the United States has declined to comply with said request, and the Senate therefore, in acting upon said treaty, has been compelled to do so without any opportunity to give consideration to the letters, memoranda, and other documents and communications leading up to the drafting of said treaty or in negotiating the same: Therefore be it

Resolved by the Senate, That in ratifying said treaty the Senate does so with the distinct and explicit understanding that there are no secret files, documents, letters, understandings, or agreements which in any way, directly or indirectly, modify, change, add to, or take away from any of the stipulations, agreements, or statements in said treaty; and that the Senate ratifies said treaty with the distinct and explicit understanding that there is no agreement, secret or otherwise, expressed or implied, between any of the parties to said treaty as to any construction that shall hereafter be given to any statement or provision contained therein.

This reservation, with the preamble omitted, was agreed to by the Senate on July 21,[1] in the following form:

Resolved (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of Executive I, Seventy-first Congress, second session, a treaty for the limitation and reduction of naval armament, signed at London on April 22, 1930.

Resolved further, That in ratifying said treaty the Senate does so with the distinct and explicit understanding that there are no secret files, document, letters, understandings, or agreements which in any way, directly or indirectly, modify, change, add to, or take away from any of the stipulations, agreements, or statements in said treaty; and that the Senate ratifies said treaty with the distinct and explicit understanding that, excepting the agreement brought about through the exchange of notes between the Governments of the United States, Great Britain, and Japan having reference to Article XIX, there is no agreement, secret or otherwise, expressed or implied, between any of the parties to said treaty as to any construction that shall hereafter be given to any statement or provision contained therein.

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[1] Record p. 390.

434. Instance wherein the Secretary of War declined to respond to an inquiry of the House on grounds of incompatibility with the public interest.

The Speaker may not treat as confidential official communications received from the heads of executive departments.

While a rule of the House provides for secret sessions, it is long obsolete, and the convening of the House in secret session is a procedure unprecedented for more than a century.

On June 25, 1910,[1] the House agreed to the following resolution:

Resolved, That the Secretary of War be, and he is hereby, directed, if not incompatible with the public interest, to submit to this House, with the least practicable delay, a report showing in detail—

First. The condition of the military forces and defenses of the Nation, including the Organized Militia.

Second. The state of readiness of this country for defense in the event of war, with particular reference to its preparedness to repel invasion if attempted (a) on the Atlantic or Gulf coasts, or (b) on the Pacific coast.

Third. The additional forces, armaments, and equipments necessary, if any, to afford reasonable guaranty against successful invasion of United States territory in time of war.

In response to this resolution the Secretary of War, on December 14, addressed to the Speaker a communication for presentation to the House, a portion of which was marked "Confidential."

To this communication the Speaker replied:

SPEAKER'S ROOM,
HOUSE OF REPRESENTATIVES,
Washington, D.C., December 14, 1910.

SIR: I herewith return your communication of December 14, in order that you may consider it in the light of the condition which arises in the House of Representatives. You have marked a portion of it confidential.

Rule XXX of the House provides:

"SECRET SESSION.

"Whenever confidential communications are received from the President of the United States, or whenever the Speaker or any Member shall inform the House that he has communications which he believes ought to be kept secret, the House shall be cleared of all persons except the Members and officers thereof, and so continue during the reading of such communications, the debates and proceedings thereon, unless otherwise ordered by the House."

Another rule of the House (Rule XLII) provides:

"EXECUTIVE COMMUNICATIONS.

Estimates of appropriations and all other communications from the executive departments, intended for the consideration of any committees of the House, shall be addressed to the Speaker, and by him referred as provided by clause 2 of Rule XXIV."

And still another rule of the House (sec. 1 of Rule XLV) provides:

"PRINTING.

"1. All documents referred to committees or otherwise disposed of shall be printed unless otherwise specially ordered."

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[1] Second session Sixty-first Congress, Record, p. 9105.

In view of the above rules it is practically impossible for the Speaker to treat this matter as "confidential," if it is to be brought to the attention of the House. I therefore respectfully return it to you.

This is done in view of the fact that your communication must be printed under the rules, and it is returned to you for such action as you may deem necessary, having in mind the language of the resolution as to the public welfare and in view of the fact that your communication can not be made confidential under our system without submitting it to a secret session, which would be a procedure unprecedented for nearly a century, and would probably result in at once bringing the matter into great publicity.

I am, with respect, etc.,

Yours truly,

J. G. CANNON.

Hon. J. M. DICKINSON,
Secretary of War, Washington, D. C.

On December 17,[1] 1910, the Speaker laid before the House the following:

WAR DEPARTMENT,
Washington, December 17, 1910.

SIR: In reply to your letter of December 14, returning my report of that date on House resolution No. 707, I beg to say that all of the facts which it is deemed proper should at this time proceed from the Secretary of War and be made public appear in the reports of the Secretary of War already submitted to Congress and the reports accompanying them. Inasmuch as you have returned to me my reply of December 14, 1910, with the appendices thereto attached, marked "Confidential," with the advice that it is practically impossible for you to treat the matters therein contained as confidential, by direction of the President, I respectfully say that it is not compatible with the public interest for me at this time to make a report answering in detail the questions embodied in the resolution.

Very respectfully,

J. M. DICKINSON,
Secretary of War.

Hon. J. G. CANNON,
Speaker of the House of Representatives.

435. The head of a department having failed to respond to a resolution of inquiry, the House transmitted a further resolution.

A resolution of inquiry, to enjoy its privilege, should call for facts rather than for opinions.

Discussion of the right of the House to send for original papers from the files of the department.

Instance wherein a resolution held to be without privilege was altered to conform to the requirements of the rule.

On August 1, 1919,[2] Mr. Thomas L. Blanton, of Texas, moved to discharge the Committee on Labor from the consideration of the following resolution which had been referred to the committee more than a week before, a previous resolution of similar tenor having been denied by the Secretary of Labor on the ground that transmission of the information was not deemed compatible with the public interest:

Resolved, That the Secretary of Labor be, and he is hereby, directed to report forthwith to the House of Representatives of the United States of America the following facts:

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[1] Third session Sixty-first Congress, Record, p. 448; Journal, p. 91.

[2] First session Sixty-sixth Congress, Record, p. 3524.

(1) What fact or facts, if any there are, have caused him to fail to comply with the request of the House of Representatives made upon him by H. Res. 128 passed by the House of Representatives on June 27, 1919, of the following tenor:

"Resolved, That the Secretary of Labor be, and he is hereby, requested to promptly report to the House of Representatives at the earliest date practicable the following facts:

"(1) What connection in behalf of the Department of Labor, if any, has John B. Densmore, now Director of the United States Employment Service, had with the case of Thomas J. Mooney, convicted in California of crime, stating in detail the activities of said Densmore concerning said case, and the expenses of same itemized that were paid by the Government, and upon what authority of law, attaching copies of all reports concerning same made to the Department of Labor by said John B. Densmore.

"(2) What connection in behalf of the Department of Labor, if any, since the punishment of said Thomas J. Mooney was commuted to life imprisonment, has any employee of said Department of Labor had with the said case of Thomas J. Mooney, stating such activities in detail, the purposes thereof, the expense itemized in connection therewith that has been paid or is to be paid by the Government, and upon what authority of law, attaching copies of all reports made to the Department of Labor concerning said case.

"(3) What requests on the Department of Labor, if any, have been made by a grand jury or a court in California for said John B. Densmore to appear in California to give evidence, and what action concerning same was taken by the Department of Labor."

(2) *Resolved further,* That said Secretary of Labor be, and he is hereby, directed to furnish forthwith to the House of Representatives the facts called for in the said H. Res. 128, set forth above, as passed June 27, 1919.

Mr. Finis J. Garrett, of Tennessee, made the point of order that the resolution was a request for reasons and not for facts.

The Speaker [1] said:

The Chair thinks it is a close question whether by verbally asking for only facts one does comply with the rule of the House, which says that the House can always ask for facts and nothing but facts. The Chair is disposed to think that, while in language a strict compliance with the rule, it really does ask for the reasons and opinion of the Secretary of Labor, and the Chair sustains the point of order.

On August 12, 1919,[2] Mr. Blanton moved to discharge the same committee from the consideration of a further resolution relating to the same subject, which had been referred more than a week previously:

Resolved, That the Secretary of Labor be, and he is hereby, directed to report forthwith to the House of Representatives of the United States of America the following facts:

(1) Copies of all such instructions mentioned by John B. Densmore as having been received by him during the months of May, June, July, August, September, and October, 1918.

(2) The names of all persons who, under the direction of any branch of the Department of Labor, had anything to do with the investigation of Thomas J. Mooney, charged with and convicted for heinous crime in California, stating in detail their respective activities, the amount of compensation paid them respectively, and the expenses of such investigation itemized in detail during the six months between May 1 and November 1, 1918.

(3) What connection in behalf of the Department of Labor, if any, since the punishment of said Thomas J. Mooney was commuted to life imprisonment, and since November 1, 1918, has any employee of the Department of Labor had with said case of Thomas J. Mooney, stating such activities in detail, the expense of same itemized in detail, and upon what authority of law, attaching copies of all reports made thereunder to the Department of Labor.

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[1] Frederick H. Gillett, of Massachusetts, Speaker.

[2] Record, p. 3802; Journal, p. 376.

(4) What activities, if any, are now being conducted in behalf of Thomas J. Mooney.

(5) Attach copies of vouchers of McPherson, Kelly, and Kilmer for July, 1918, covering their trip from San Francisco to Los Angeles, the purpose of such trip and expense of same itemized.

(6) Attach copy of letter of instructions sent by John B. Densmore to H. L. Cobb after Cobb was sent to Texas on propaganda trip for Employment Bureau and expense of trip itemized in detail.

(7) Attach all reports of Gallagher and Martin for their six weeks spent in Philadelphia, spring of 1919, investigating F.R. Welsh, with statement of expenses fully itemized in detail.

Mr. Joseph Walsh, of Massachusetts, made a point of order against the privilege of the resolution on the grounds that the phrases "what activities, if any" and "the purpose of such trip" called for an expression of opinion, and also that the phrase "in behalf of" involved an interpretation on the part of the Secretary of Labor.

Mr. Philip P. Campbell, of Kansas, raised the further point that under the law original copies from the files of the departments were not subject to requisition and certified copies only might be requested.

The Speaker said:

No authority has been cited to show that the House has not the right to order originals sent here. While it might be wise to amend the resolution, the Chair does not see how that question affects his decision.

These resolutions of inquiry are part of the privileges of the House. A resolution of inquiry is an engine which the House has to extort information from an administration, and it always indicates that the administration is unwilling to communicate certain facts which the House wishes to have; and so it seems to the Chair that the Chair ought, as a rule, in his decisions to lean in favor of the privileges of the House. The only privilege that this resolution has now is because the committee has failed to report it within seven days.

Now, the point of order which has been raised is that this resolution asks for an opinion rather than for facts.

The Chair thinks that while the language here and there throughout the resolution is inaccurate, as evidenced, for example, in the objection to section 6, to attach copies of letters sent "after Cobb was sent to Texas"—which is somewhat indefinite and vague—yet after all when the House asks for instructions from the department it is not presumed to know the exact facts and can not be precise in its averments, because otherwise there would be no reason for asking for the information, and therefore all that the House can do in the resolution is make its inquiry so definite that the department shall know what is intended and be able to determine whether the House is acting within its rights.

The only clause which gives the Chair any serious difficulty is clause 4. To clause 5, to be sure, the objection is made that the purpose of such a trip involves the expression of an opinion. But the Chair thinks it pretty clear that what is intended there is not the purpose in the mind of the man who made the trip, but the purpose of the department in sending him, and the Chair thinks that is a proper fact for Congress to ask for.

The fourth paragraph is "what activities, if any, are now being conducted in behalf of Thomas J. Mooney." That is vague. If it said, "What activities, if any, are now being conducted by the Department of Labor," the Chair thinks it would be very clear. But inasmuch as in the previous paragraphs it speaks of the activities of the Department of Labor, and inasmuch as the whole resolution is directed to the Department of Labor and the inquiry is made of that department, the Chair thinks it is not stretching the language but is a reasonable and fair interpretation to say that that means "what activities, if any, are now being conducted by the Department of Labor in behalf of Thomas J. Mooney"; and therefore the Chair overrules the point of order, and decides that the resolution is privileged.

Adjournment intervening, the resolution was agreed to on a subsequent day.[1]

[1] Record, p. 3869; Journal, p. 380.

436. While it is customary to use the clause "If not incompatible with the public interest" in resolutions of inquiry addressed to the President and to the State Department, it is not ordinarily used in resolutions addressed to other executive departments.

On March 1, 1910,[1] Mr. George E. Foss, of Illinois, from the Committee on Naval Affairs, submitted as privileged a report on a resolution requesting certain information from the Secretary of the Navy, with the following amendment:

Line 1, after "navy," insert "if not incompatible with the public interests."

Mr. James R. Mann, of Illinois, said:

Mr. Speaker, may I ask what is the object of putting in that provision, "if not incompatible with the public interest?"

It is usual in addressing the President and is usual in addressing the State Department on diplomatic matters, but it is not the usual form in addressing an ordinary department asking for information. We direct the department to send us information. We determine whether we want it or not, where it does not affect our diplomatic relations, and I hope the gentleman will not insist upon that amendment.

Where we want simply some plain information which the department has, it does not seem to me dignified for the House to insert that saving clause when directing information to be sent here which it knows the department has and of which we can judge just as well as the department as to whether it is incompatible with the public interests; it certainly is not the custom of the House to put those words in, and the Senate is extremely particular about striking them out.

Thereupon the amendment was rejected, and the resolution was agreed to without amendment.

437. Executive departments in response to resolutions of inquiry may not comment on debate in the House, include explanations tending to vindicate action by the department or enter into argument not specifically requested.

The House declines to receive from executive departments communications reflecting upon the House or any Member thereof.

On April 11, 1918,[2] the Speaker laid before the House a communication from the Postmaster General reflecting upon the Member introducing the resolution of inquiry in response to which the communication was written.

Mr. Clarence B. Miller, of Minnesota, moved that the House decline to receive the communication.

A motion by Mr. Finis J. Garrett, of Tennessee, to table Mr. Miller's motion was rejected, yeas 165, nays 165.

Mr. Miller then withdrew his motion and offered in lieu thereof a motion, that the communication be referred to a committee of five to be appointed by the Speaker. A motion by Mr. Garrett to lay on the table was rejected, yeas 172, nays, 175, and the motion to refer having been agreed to, the Speaker appointed the committee, which submitted the following report on April 19:[3]

Mr. CARAWAY, from the special committee appointed by the Speaker on the 11th day of April, 1918, in response to a resolution adopted by the House of Representatives to inquire into

[1] Second session Sixty-first Congress, Record, p. 2596.

[2] Second session Sixty-fifth Congress, Record, p. 4974.

[3] Record, p. 3363, Journal, p.305.

certain remarks alleged to have been included in a letter addressed to the Postmaster General by the chairman of the Committee on Public Information and by the Postmaster General transmitted to the House of Representatives on April 10, 1918, which language so complained of is as follows: "When Mr. Treadway stated in the House that he was 'reliably informed that there has been a very large amount of that class of mail matter sent over,' and 'it is a well-known fact that great quantities of that class of matter have been placed in their hands overseas,' he made assertions the absolute baselessness of which could have been ascertained by a telephone inquiry," begs leave to make the following report:

After a careful search of the precedents, the committee finds that the House of Representatives has uniformly refused to receive and make a part of its records communications reflecting upon the House as a whole or any Member thereof.

December 14, 1842, the Speaker laid before the House a communication from S. Pleasonton, Fifth Auditor of the Treasury Department, which was as follows:

"TREASURY DEPARTMENT,
"FIFTH AUDITOR'S OFFICE,
"December 14, 1842.

"SIR: In a report of a debate in the House of Representatives on Monday last, contained in the National Intelligencer of yesterday, it is stated that Mr. Sprigg, among other things, observed: 'He remembered, too, that the House at this instance had made a call upon the department (Treasury) for full and detailed information as to the whole system of managing the lighthouses of the United States, the contracts for buildings, for supplying oil, paying inspectors, etc., but no answer had ever been obtained, notwithstanding the clerks which the House had voted them and notwithstanding numerous and repeated promises made to him personally.'

"It was with extreme surprise I read this statement, as I had a perfect recollection that it was wholly erroneous; and as it is calculated, uncorrected, to injure the Treasury Department unjustly in the public estimation, I hope you and the House will excuse me for setting the Member right.

"It is sufficient to state that the whole of the information called for by the House in relation to lighthouses on Mr. Sprigg's motion was transmitted, as required by the resolution, partly to the Committee on Commerce on the 8th of March last and is contained in their printed report, No. 811, and partly to the House of Representatives direct by the Secretary of the Treasury on the 11th of March last, and by the House ordered to be printed, and will be found in Document No. 140 of the last session. These two documents contain all the information which was called for by the House.

"Mr. Sprigg individually called for the cessions of jurisdiction by the States over all the lighthouse sites, from the adoption of the Constitution; and, although so much labor and time as it required might have been declined on his individual call, yet, as I was desirous of furnishing all the information in my power to every person who sought it, the information was prepared and furnished as far as it was to be found in the office.

"I have the honor to be, very respectfully, your obedient servant,

"S. PLEASONTON.

"Hon. JOHN WHITE,
"Speaker of the House of Representatives."

The communication was by the House, after full consideration, adjudged objectionable and a resolution adopted as follows:

"Resolved, That the communication addressed to the Speaker of this House by S. Pleasonton on the 14th instant in relation to some remarks made in the House before that time by Mr. Sprigg, a Member from Kentucky, which paper was received by the Speaker and laid before the House without knowledge of its contents, was not such a communication as ought to have been received and presented to the House; that the same be withheld from the Journal and files of the House and the original be returned to the writer." (See Congressional Globe, 3d sess. 27th Cong., p. 101.)

In 1848 Mr. Medill, the Commissioner of Indian Affairs, addressed the following communication to the House of Representatives:

"To the honorable the House of Representatives of the United States:

"During the debate which took place in the House of Representatives on an amendment made by the Senate to the civil and diplomatic bill allowing to David Taylor the sum of $12,800 for a certain reservation claimed by him under the treaties of 1817 and 1835 with the Cherokees, as reported in the National Intelligencer of this morning, I find the following, viz:

"Mr. Clinman supported the claim and took occasion to warn the committee against any opposition which might have been made to it by Mr. Medill, the Commissioner of Indian Affairs, who, he understood, had endeavored to prejudice the claim because the agents of the claimant peremptorily refused to make an allowance for his favoring the claim. Mr. C. denounced the Indian Bureau as thoroughly corrupt. He had been credibly informed that the books in that bureau had been altered and falsified for corrupt purposes (though this, he believed, had been done during the incumbency of Mr. Crawford, the predecessor of the present commissioner). He had no confidence in Mr. Medill, nor would he believe any statement he should make. An application had been made to the department to have the books taken out of his office and deposited in some place where they would be safe from alterations."

"It is seldom that a public officer is justified in noticing attacks of this kind, but the above charges are of so grave and specific a character and so seriously reflect not only upon myself, personally and officially, but upon the administration of the whole of that branch of the public service entrusted to my charge that a different course on this occasion seems to be called for."

The House on the same day it was read adopted the following resolution:

"Resolved, That the communication of the Commissioner of Indian Affairs be returned to that officer, and that he be informed that this House considers the language thereof as offensive and indecorous."

This appears in a report of the second session of the Thirtieth Congress, date August 12, 1848, page 1070 of the Congressional Globe.

On the 3d day of February, 1865, the Senate adopted a resolution requesting the Secretary of the Navy for certain information. In answer to the resolution the Secretary of the Navy transmitted a letter from the Assistant Secretary of the Navy in which the Assistant Secretary undertook to reply to a speech that had before that time been made by Senator Hale on the floor of the Senate. This communication from the Secretary of the Navy was referred to the Committee on the Judiciary of the Senate for its consideration. On March 4, 1865, the committee reported as follows:

"The only information that the Secretary was instructed to give was in relation to the particular matters mentioned in the resolution. What may have been said by Senators, while it was under consideration, was not submitted to him either for approval or censure, nor was he called upon or authorized to vindicate himself or any person in his department from allegations made or supposed to have been made in the Senate. However, the person supposing himself assailed is not without redress; he may appeal to the public judgment through the press or request the Senate to constitute a committee of inquiry as to the truth of the charges; but there exists no right in an officer of the Government, in answer to specific inquiries, to comment on the debates of the body nor to vindicate his conduct, either individually or officially, in any matters not called for in the inquiries of the Senate. If differences exist between any member of the Senate and a citizen not a member, it is not the proper province of the body to settle them. Their duties are limited to matters proper for legislation or to such as refer to the public good and require investigation.

"With these views it is the opinion of your committee that the letter of the Assistant Secretary of the Navy, as accompanying the communication of the Secretary, should not have been sent to the Senate by the latter officer:

"1. Because the first part of it does not profess to relate to the Senate resolution but to be in response to the allegations of Hon. John P. Hale against the writer.

"2. Because the remainder of it merely gives a history of his conduct in attempting to relieve the garrison of Fort Sumter in 1861, an attempt worthy of praise, but which has not the most remote connection with a single inquiry embraced by the resolution.

"The committee therefore recommend the adoption of this resolution.

"'*Resolved,* That the letter to the Secretary of the Navy from the Assistant Secretary should not have been communicated in answer to the Senate resolution of February 3, 1865, and that the Secretary of the Senate be directed to return the same to the Secretary of the Navy.'"

The resolution was adopted and the communication returned to the Secretary of the Navy.

These proceedings are reported in the second session of the Thirty-eighth Congress on page 1365 of the Congressional Globe.

The House likewise refused to receive a message of Mr. Roosevelt, the President of the United States, in which there were statements calculated to reflect upon Members of Congress, and adopted the following resolution:

"Resolved, That the House in the exercise of its constitutional prerogatives declines to consider any communication from any source which is not in its own judgment respectful; and be it further

"Resolved, That the special committee and the Committee of the Whole House on the state of the Union be discharged from any consideration of so much of the President's annual message as relates to the Secret Service and is above set forth, and that the said portion of the message be laid on the table."

The language contained in the communication to the Postmaster General and attributed to the chairman of the Committee on Public Information is, in the opinion of the committee, impertinent and not respectful. In the language of the report of the Committee on the Judiciary in the Hale case, "there exists no right in an employee of the Government in answer to specific inquiries to comment on the debates of the body nor to vindicate his conduct, either individually or officially, in any matters not called for in the inquiries."

With these views it is the opinion of this committee that the letter of the chairman of the Committee on Public Information should not be received by the House. Therefore be it

"Resolved, That the Clerk of the House is hereby directed to respectfully return the communication containing the same to the Postmaster General."

The report was agreed to without division or debate:

Chapter CXC.[1]

PROCEDURE OF THE ELECTORAL COUNT.

438. The statutes designate the time for the choice of electors of President and Vice President and the time for their meeting to give in their votes.

A controversy in any State over the appointment of presidential electors settled in accordance with a law of that State six days before the time for the meeting of the electors shall not be a cause of question in the counting of the electoral votes by Congress.

The act approved May 29, 1928,[2] provides:

That the electors of President and Vice President of each State shall meet and give their votes on the first Wednesday in January next following their appointment at such place in each State as the legislature of such State shall direct.

439. The executive of each State is charged with the duty of transmitting to the Secretary of State of the United States a certificate of the appointment of electors and the names and votes; and of delivering a similar certificate to the electors.

It is the duty of the executive of any State wherein there may be a controversy as to the appointment of electors to transmit to the Secretary of State of the United States a certificate of the determination thereof.

The Secretary of State is required to transmit to Congress copies of certificates received from the State executives relating to the appointment of presidential electors.

The act approved May 29, 1928, provides:

That it shall be the duty of the executives of each State, as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment, to communicate by registered mail under the seal of the State to the Secretary of State of the United States a certificate of such ascertainment of the electors appointed, setting forth the names of such electors and the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast; and it shall also thereupon be the duty of the executive of each State to deliver to the electors of such State, on or before the day

[1] Supplementary to Chapter LVIII.

[2] 45 Stat. I. p. 945.

on which they are required by section 1 of this act to meet, six duplicates of original of the same certificate under the seal of the State; and if there shall have been any final determination in a State in the manner provided for by law of a controversy or contest concerning the appointment of all or any of the electors of such State, it shall be the duty of the executive of such State, as soon as practicable after such determination, to communicate under the seal of the State to the Secretary of State of the United States a certificate of such determination in form and manner as the same shall have been made; and the certificate or certificates so received by the Secretary of State shall be preserved by him for one year and shall be a part of the public records of his office and shall be open to public inspection; and the Secretary of State of the United States at the first meeting of Congress thereafter shall transmit to the two Houses of Congress copies in full of each and every such certificate so received at the State Department.

440. The statutes provide for transmitting the certificates of the action of the electors in each State to the President of the Senate.—The act approved May 29, 1928, provides:

That the electors shall make and sign six certificates of all the votes given by them, each of which certificates shall contain two distinct lists, one of the votes for President and the other of the votes for Vice President, and shall annex to each of the certificates one of the lists of the electors which shall have been furnished to them by direction of the executive of the State.

441. Certificates of the votes of the electors in the several States for President and Vice President are transmitted to the President of the Senate who may in case of delay send for them.

The act of May 29, 1928, provides:

That the electors shall dispose of the certificates so made by them and the lists attached thereto in the following manner:

First. They shall forthwith forward by registered mail one of the same to the President of the Senate at the seat of government.

Second. Two of the same shall be delivered to the secretary of state of the State, one of which shall be held subject to the order of the President of the Senate, the other to be preserved by him for one year and shall be a part of the public records of his office and shall be open to public inspection.

Third. On the day thereafter they shall forward by registered mail two of such certificates and lists to the Secretary of State at the seat of government, one of which shall be held subject to the order of the President of the Senate. The other shall be preserved by the Secretary of State for one year and shall be a part of the public records of his office and shall be open to public inspection.

Fourth. They shall forthwith cause the other of the certificates and lists to be delivered to the judge of the district in which the electors shall have assembled.

SEC. 5. That when no certificate of vote and list mentioned in this Act from any State shall have been received by the President of the Senate or by the Secretary of State by the third Wednesday in the month of January after the meeting of the electors shall have been held, the President of the Senate, or, if he be absent from the seat of government, the Secretary of State shall request, by the most expeditious method available, the secretary of state of the State to send up the certificate and list lodged with him by the electors of such State; and it shall be his duty upon receipt of such request immediately to transmit same by registered mail to the President of the Senate at the seat of government.

SEC. 6. That when no certificates of votes from any State shall have been received at the seat of government on the fourth Wednesday of the month of January, after the meeting of the electors shall have been held, the President of the Senate, or, if he be absent from the seat of government, the Secretary of State shall send a special messenger to the district judge in whose custody one certificate of votes from that State has been lodged, and such judge shall forthwith transmit that list by the hand such messages to the seat of government.

Chapter CXCI.[1]

THE ELECTORAL COUNTS, 1909 TO 1933.

442. Proceedings relating to the electoral counts in 1909, 1913, and 1917.

The conduct of the electoral count is frequently a matter of perfunctory routine.

The proceedings on the occasion of the electoral count in 1909, 1913,[2] and 1917, were similar in form and procedure and were, in each instance, concluded without unusual incident. The concurrent resolutions providing for convening the two Houses in joint session for these years were almost identical and the proceedings were practically uniform with the exception of minor variations in phraseology employed by presiding officers and tellers.

In 1909[3] the resolution reserving the galleries for the families of Members was used for the last time. The count for these years was a matter of such prefunctory routine that demand for admission to the galleries on these occasions was, in consequence, materially lessened. The reservation of seats in the galleries was continued, however, by direction of the Speaker, and special cards were issued as formerly.

Separate resolutions authorizing the appointment of tellers were last employed in 1917,[4] the authorization being that year incorporated in the resolution providing for the joint session and continued in each succeeding resolution convening the two Houses for the electoral count.

443. The electoral count of 1921.

The two Houses by concurrent resolution provided for the meeting to count the electoral vote.

In 1921 the provision authorizing the naming of tellers, which on the occasion of the electoral counts of 1909, 1913, and 1917 had been incorporated in separate resolutions, was included in the original resolution providing for the joint session.

In the absence of the customary resolution relating to disposition of the galleries during the electoral count, the usual reservations were made by the direction of the Speaker.

Form of the duplicate reports made by the tellers at the electoral count.

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[1] Supplementary to Chapter LXI.

[2] Third session, Sixty-second Congress, Record, p. 2469.

[3] Second session, Sixtieth Congress, Record, p. 1531.

[4] Second session Sixty fourth Congress, Record, p. 2464, 3069.

On January 10, 1921,[1] the Senate agreed[2] to the following resolution offered by Mr. William P. Dillingham, of Vermont:

Resolved by the Senate (the House of Representatives concurring), That the two Houses of Congress shall assemble in the Hall of the House of Representatives on Wednesday, the 9th day of February, 1921, at 1 o'clock in the afternoon, pursuant to the requirements of the Constitution and laws relating to the election of President and Vice President of the United States, and the President of the Senate shall be their presiding officer; that two tellers shall be previously appointed by the Vice President on the part of the Senate and two by the Speaker on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A; and said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted in manner and according to the rules by law provided, the result of same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses.

On January 21,[3] in the House, on motion of Mr. William E. Andrews, of Nebraska, by unanimous consent, the resolution was taken from the Speaker's table and agreed to without debate.

On January 22,[4] the Vice President said:[5]

The House of Representatives have concurred in Senate concurrent resolution 38, providing for a joint session of the two Houses for the purpose of canvassing the electoral votes for President and Vice President of the United States. The Chair appoints as tellers on the part of the Senate the Senator from Massachusetts, Mr. Lodge, and the Senator from Alabama, Mr. Underwood.

On January 27,[6] the Speaker said:

The Chair will appoint as tellers on the part of the House for the counting of the electoral vote Mr. Lampert and Mr. Rucker.

On February 9,[7] in the House,[8] seats were provided for the Senators at the right of the Presiding Officer; and then at 1 o'clock the Doorkeeper announced the Vice President and the Senate of the United States.

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[1] Third session, Sixty-sixth Congress, Record, p. 1184.

[2] The resolution providing for the electoral count in 1909 was in the Senate referred to the Committee on Privileges and Elections, and in the House to the Committee on Election of President, Vice President and Representatives in Congress, and by each committee reported to its respective House before consideration. The resolutions providing for the electoral count in 1913 and 1917, however, as in 1921, were in the Senate offered and agreed to and in the House taken from the Speaker's table and agreed to, without reference to committees.

[3] Record, p. 1829.

[4] Record, p. 1855.

[5] In this instance the resolution providing for the electoral count authorized the appointment of tellers by the presiding officers of the two Houses. Previously a separate concurrent resolution delegated to the Vice President and the Speaker, respectively, the appointment of tellers authorized by in the original resolution.

[6] Record, p. 2150.

[7] Record, p. 2868.

[8] On this occasion reservation of certain sections of the galleries and restriction of admission thereto were also by order of the Speaker. Of former occasions the House provided by resolution for such regulations during the electoral count.

The Senate entered the Hall, preceded by their Sergeant-at-Arms, and headed by the Vice President and the Secretary of the Senate, the Members and officers of the House rising to receive them.

The Vice President took his seat as Presiding Officer of the joint convention of the two Houses, the Speaker of the House occupying the chair on his left.

The Vice President said:

Gentlemen of the convention, the two Houses of Congress, pursuant to the requirements of the Constitution and the laws of the United States, are now in joint convention for the purpose of opening the certificates and ascertaining and counting the votes of the several States for President and Vice President. Under well-established precedents, unless demand shall be made in any case, the reading of the formal portions of the certificates will be dispensed with. After ascertainment has been had that the certificates are authentic and correct in form the tellers will count and make a list of the votes of the States.

Twelve years ago, upon an occasion similar to this, the then Vice President of the United States, my warm personal friend, Charles Warren Fairbanks, of Indiana, suppressed any manifestation of approval or disapproval upon the part of the galleries or the members of the joint convention, announcing at that time what seemed to me to be a proper statement, that this is a solemn and important occasion in the affairs of the people of America, and it should be discharged with dignity and in silence.

The tellers will please take their places at the desk.

Senators Lodge and Underwood, the tellers appointed on the part of the Senate, and Representatives Lampert and Rucker, the tellers appointed on the part of the House, took their places at the Clerk's desk.

The Vice President announced:

The tellers will count and make a list of the votes of the State of Alabama.

Mr. Lodge (one of the tellers) said:

Mr. President, the certificate of the electoral vote of the State of Alabama seems to be regular in form and authentic, and it appears therefrom that James M. Cox, of Ohio, received 12 votes for President and Franklin D. Roosevelt, of New York, 12 votes for Vice President.

The Vice President said:

If there be no objection, the reading of the formal portions of the certificates will be dispensed with, and the Chair will open in alphabetical order the certificates showing the electoral votes of each State, and the tellers will count and make announcement of the results in the several States.

There was no objection and the tellers proceeded to read, count, and announce, as was done in the case of Alabama, the electoral votes of the several States in their alphabetical order.

The Vice President said:

Gentlemen of the convention, the certificates of all of the States have now been opened and read, and the tellers will make final ascertainment of the result and deliver the same to the President of the Senate.

The tellers delivered to the Vice President the following report:

The undersigned, Henry Cabot Lodge and Oscar W. Underwood, tellers on the part of the Senate, and Florian Lampert and William W. Rucker, tellers on the part of the House of Representatives, report the following as the result of the ascertainment and counting of the electoral vote for President and Vice President of the United States for the term beginning on the 4th day of March, 1921:

Electoral votes of each State.	For President.	For President.		For Vice President.	
		Warren G. Harding, of Ohio.	James M. Cox, of Ohio.	Calvin Coolidge, of Massachusetts.	Franklin D. Roosevelt, of New York.
12	Alabama		12		12
3	Arizona	3		3	
9	Arkansas		9		9
13	California	13		13	
6	Colorado	6		6	
7	Connecticut	7		7	
3	Delaware	3		3	
6	Florida		6		6
14	Georgia		14		14
4	Idaho	4		4	
29	Illinois	29		29	
15	Indiana	15		15	
13	Iowa	13		13	
10	Kansas	10		10	
13	Kentucky		13		13
10	Louisiana		10		10
6	Maine	6		6	
8	Maryland	8		8	
18	Massachusetts	18		18	
15	Michigan	15		15	
12	Minnesota	12		12	
10	Mississippi		10		10
18	Missouri	18		18	
4	Montana	4		4	
8	Nebraska	8		8	
3	Nevada	3		3	
4	New Hampshire	4		4	
14	New Jersey	14		14	
3	New Mexico	3		3	
45	New York	45		45	
12	North Carolina		12		12
5	North Dakota	5		5	
24	Ohio	24		24	
10	Oklahoma	10		10	
5	Oregon	5		5	
39	Pennsylvania	38		38	
5	Rhode Island	5		5	
9	South Carolina		9		9
5	South Dakota	5		5	
12	Tennessee	12		12	
20	Texas		20		20
4	Utah	4		4	
4	Vermont	4		4	
12	Virginia		12		12
7	Washington	7		7	
8	West Virginia	8		8	
13	Wisconsin	13		13	
3	Wyoming	3		3	
531		404	127	404	127

HENRY CABOT LODGE,
OSCAR W. UNDERWOOD,
Tellers on the part of the Senate.
FLORIA LAMPERT,
WILLIAM W. RUCKER,
Tellers on the part of the House of Representatives.

The Vice President said:

Gentlemen of the convention, the report of the state of the vote as delivered to the President of the Senate is as follows:

The whole number of the electors appointed to vote for President of the United States is 531. of which a majority is 266.

Warren G. Harding, of the State of Ohio, has received for President of the United States 404 votes;

James M. Cox, of the State of Ohio, has received 127 votes.

The state of the vote for Vice President of the United States, as delivered to the President of the Senate, is as follows:

The whole number of the electors appointed to vote for Vice President of the United States is 531, of which a majority is 266.

Calvin Coolidge, of the State of Massachusetts, has received for Vice President of the United States 404 votes;

Franklin D. Roosevelt, of the State of New York, has received 127 votes.

This announcement of the state of the vote by the President of the Senate shall be deemed a sufficient declaration of the persons elected President and Vice President of the United States, each for the term beginning on the 4th day of March, 1921, and shall be entered, together with a list of the votes, on the Journals of the Senate and House of Representatives.

Gentlemen of the convention, the purpose for which this joint convention was called having been accomplished, as presiding officer I dissolve this joint convention, and the Senate will return to its Chamber.

Thereupon, the Senate retired from the Hall (at 1 o'clock and 37 minutes p. m.) when the Speaker resumed the chair, and the House was again called to order.

The Senate returned [1] to its Chamber at 1 o'clock and 40 minutes p. m., and the Vice President resumed the chair.

Mr. Lodge, one of the tellers appointed on behalf of the Senate in pursuance of the concurrent resolution of the two Houses to ascertain the result of the election for President and Vice President of the United States, said:

Mr. President, in accordance with law, and on behalf of the tellers of the electoral vote on the part of the Senate, I offer the report which I send to the desk, which I ask to be read and printed in the Journal.

The report which had been made and signed in duplicate was then read as previously submitted to the joint convention of the two Houses.

444. The electoral count of 1925.

Neither House recesses or adjourns for the electoral count.

The report by tellers is made and signed in duplicate, and is entered upon the Journal of each of the two Houses.

On January 16, 1925,[2] the House, without debate or amendment, agreed to the following concurrent resolution of the Senate:

Resolved by the Senate (the House of Representatives concurring), That the two Houses of Congress shall assemble in the Hall of the House of Representatives on Wednesday, the 11th day of February, 1925, at 1 o'clock postmeridian, pursuant to the requirements of the Constitution and laws relating to the election of President and Vice President of the United States, and

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[1] Record, p. 2837.

[2] Second session, Sixty-eighth Congress, Journal, p. 126; Record, p. 2004.

the President pro tempore of the Senate shall be their presiding officer; that two tellers shall be previously appointed by the President pro tempore on the part of the Senate and two by the Speaker on the part of the House of Representatives, to whom shall be handed as they are opened by the President of the Senate all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A; and said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted in manner and according to the rules by law provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses.

On February 9[1] (legislative day of February 3) the President pro tempore of the Senate announced:

Pursuant to law the Chair appoints the Senator from Missouri, Mr. Spencer, and the Senator from Utah, Mr. King, to act as tellers at the joint session of the Houses of Congress on the 11th instant to open and count the vote for President and Vice President.

On February 10[2] the Speaker said:

The Chair appoints as tellers to count the electoral votes to-morrow Mr. White of Kansas and Mr. Jeffers.

On February 11, upon announcement by the Speaker,[3] the first three rows of seats in the body of the Hall of the House were reserved for the Members of the Senate.

At 1 o'clock the Doorkeeper announced the President pro tempore and the Senate of the United States, and the Senate, preceded by their Sergeant-at-Arms and headed by their President pro tempore and the Secretary of the Senate, entered the Hall, the Members and officers of the House rising to receive them.

The President pro tempore of the Senate assumed the chair as Presiding Officer (the Speaker of the House occupying a place on his left), and seated the joint convention with the gavel.

The Presiding Officer said:

Gentlemen of the Congress, the two Houses of Congress, pursuant to the requirements of the Constitution and the laws of the United States, are now in joint session for the purpose of opening the certificates and ascertaining and counting the votes of the electors of the several States for President and Vice President. Under well-settled precedents the reading of the formal portion of the certificates which have been presented to the President of the Senate will be dispensed with unless demand therefor shall be made. After it is ascertained that the certificates are authentic and correct in form, the tellers will count and make a list of the votes cast by the electors of the several States.

The Chair is but repeating an observation made years ago by a distinguished Vice President of the United States, and renewed since that time until it has become traditionary for these cases,

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[1] Record, p. 3279.

[2] Record, p. 3451.

[3] Reservation of the galleries for the occasion of the electoral count is also by direction of the Speaker instead of by resolution of the House as formerly.

when it suggests that there should be no manifestation of approval or disapproval on the part of the galleries or on the part of the Members of the joint session as the counting proceeds, inasmuch, as that distinguished Vice President said, as we are engaged in a solemn and important duty imposed upon us by the Constitution of the United States, and that it should be discharged with dignity and in silence.

The tellers heretofore appointed will take their places at the desk.

The tellers previously appointed took places at the Clerk's desk, those from the Senate on the right and those from the House on the left, and the Presiding Officer continued:

The Chair hands to the tellers the certificate of the electors for President and Vice President of the State of Alabama, and they will count and make a list of the votes cast by that State.

The certificate was handed by the Presiding Officer to the teller on his extreme right and passed to and examined by each of the tellers in turn. The teller on the extreme left, Mr. Lamar Jeffers, of Alabama, having received and examined the certificate, said:

Mr. President, the certificate of the electoral vote of the State of Alabama seems to be regular in form and authentic, and it appears therefrom that John W. Davis, of the State of West Virginia, received 12 votes for President, and Charles W. Bryan, of the State of Nebraska, received 12 votes for Vice President.

The Presiding Officer submitted:

If there be no objection the Chair will omit in the further procedure the formal statement just made, and will open in alphabetical order the certificates showing the votes of the electors in each State, and the tellers will read, count, and announce the result in each State as was done with respect to the State of Alabama.

There was no objection, and the Presiding Officer proceeded to open and pass to the tellers the certificates of the several States in their alphabetical order, and the vote of each State following that of Alabama was read, counted, and announced in like manner.

At the conclusion of the count the Presiding Officer said:

Gentlemen of the Congress, the certificates of all the States have now been opened and read and the tellers will make final ascertainment of the result and deliver the same to the President pro tempore of the Senate.

Thereupon the tellers delivered to the Presiding Officer the following statement of the result:

The undersigned, Selden P. Spencer and William H. King, tellers on the part of the Senate, and Hays B. White and Lamar Jeffers, tellers on the part of the House of Representatives, report the following as the result of the ascertainment and counting of the electoral vote for President and Vice President of the United States for the term beginning on the 4th day of March, 1925:

Electoral votes of each State.	States.	For President.			For Vice President.		
		Calvin Coolidge of Massachusetts.	John W. Davis, of West Virginia.	Robert M. La Follette, of Wisconsin.	Charles G. Dawes, of Illinois.	Charles W. Bryan, of Nebraska.	Burton K. Wheeler, of Montana.
12	Alabama		12			12	
3	Arizona	3			3		
9	Arkansas		9			9	
13	California	13			13		
6	Colorao	6			6		
7	Connecticut	7			7		
3	Delaware	3			3		
6	Florida		6			6	
14	Georgia		14			14	
4	Idaho	4			4		
29	Illinois	29				29	
15	Indiana	15			15		
13	Iowa	13			13		
10	Kentucky	10				10	
10	Louisiana		10			10	
6	Maine	6			6		
8	Maryland	8			8		
18	Massachusetts	18			18		
15	Michigan	15			15		
12	Minnesota	12			12		
10	Mississippi		10			10	
18	Missouri	18			18		
4	Montana	4			4		
8	Nebraska	8			8		
3	Nevada	3			3		
4	New Hampshire	4			4		
14	New Jersey	14			14		
3	New Mexico	3			3		
45	New York	45			45		
12	North Carolina		12			12	
5	North Dakota	5			5		
24	Ohio	24			24		
10	Oklahoma		10			10	
5	Oregon	5			5		
38	Pennsylvania	38			38		
5	Rhode Island	5			5		
9	South Carolina		9			9	
5	South Dakota	5			5		
12	Tennessee		12			12	
20	Texas		20			20	
4	Utah	4			4		
4	Vermont	4			4		
12	Virginia		12			12	
7	Washington	7			7		
8	West Virginia	8			8		
13	Wisconsin			13			13
3	Wyoming	3			3		
531		382	136	13	382	136	13

The Presiding Officer announced:

Gentlemen of the Congress, the report of the tellers of the votes cast by the electors in all the States as delivered to the President pro tempore of the Senate is as follows:

The state of the vote for President of the United States, as delivered to the President of the Senate, is as follows:

The whole number of the electors appointed to vote for President of the United States is 531, of which a majority is 266.

Calvin Coolidge, of the State of Massachusetts, has received for President of the United States 382 votes.

John W. Davis, of the State of West Virginia, has received 136 votes.

Robert M. La Follette, of the State of Wisconsin, has received 13 votes.

The state of the vote for Vice President of the United States, as delivered to the President of the Senate, is as follows:

The whole number of the electors appointed to vote for Vice President of the United States is 531, of which a majority is 266.

Charles G. Dawes, of the State of Illinois, has received for Vice President of the United States 382 votes.

Charles W. Bryan, of the State of Nebraska, has received 136 votes.

Burton K. Wheeler, of the State of Montana, has received 13 votes.

The announcement of the state of the vote by the President pro tempore of the Senate, just made, is, under the Constitution and laws of the United States, deemed a sufficient declaration of the persons elected President and Vice President of the United States, each for the term beginning on the 4th day of March, 1925, and will be entered, together with a list of the votes so cast and ascertained, on the Journals of the Senate and the House of Representatives.

Gentlemen of the joint session, the purpose of this meeting having been accomplished, the joint session is now dissolved and the Senators will return to the Senate Chamber.

And then, at 1 o'clock and 45 minutes p.m. the Senate retired from the Hall and the Speaker resumed the chair.

The Senate having returned to its chamber,[1] Mr. Selden P. Spencer, of Missouri, one of the tellers appointed on behalf of the Senate, said:

Mr. President, the tellers who were appointed on behalf of the Senate pursuant to the provisions of law, and in accordance with the concurrent resolution of the two Houses, to ascertain the result of the election for President and Vice President, performed that duty in the joint session of the two Houses and present the following report.

The report, having been made and signed in duplicate, appears in the Journal of each of the two Houses.

445. Proceedings of the electoral count of 1929.

The date for the count of the electoral vote falling on Calendar Wednesday, the House by resolution provided for a recess on that day.

The Secretary of State having failed to receive from a State a separate certificate of the final ascertainment of electors, transmitted in lieu thereof a photostat copy which had been appended to the certificate of the electors; and subsequent to the counting of the electoral vote forwarded to the Senate the missing certificate which was substituted for the photostat copy on file.

Senators who had been candidates for the office of Vice President in the election did not attend the joint session for the count of the electoral vote.

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[1] Neither House adjourns or recesses for the electoral count.

On January 5, 1929,[1] the Senate agreed to the concurrent resolution (S. Con. 28) reported from the Committee on Privileges and Elections by Mr. Samuel M. Shortridge, of California, providing, in the usual form for a joint session of the two Houses on February 13, 1929, to count the electoral vote.

The resolution was received in the House on January 17, and the following day[2] was by unanimous consent taken from the Speaker's table and agreed to without reference to committee and without debate.

Thereupon Mr. John Q. Tilson, of Connecticut, offered the following resolution which was considered by unanimous consent and agreed to:

Resolved, That on Wednesday, February 13, 1929, it shall be in order to move that the House take a recess, subject to the call of the Speaker, for the purpose of counting the electoral vote, notwithstanding the provisions of clause 7 of Rule XXIV.

On February 5,[3] the Speaker announced:

Under authority of Senate Concurrent Resolution 28, the Chair appoints as tellers on the part of the House to count the electoral vote on February 13, 1929, the gentleman from Massachusetts, Mr. Gifford, and the gentleman from Alabama, Mr. Jeffers.

And on February 8,[4] the Senate transmitted to the House a message announcing the appointment of Mr. Shortridge and Mr. William H. King, of Utah as tellers on the part of the Senate.

On February 9,[5] the Speaker laid before the House the communication from the Secretary of State as follows:

DEPARTMENT OF STATE,
Washington, February 5, 1929.

The honorable the SPEAKER OF THE HOUSE OF REPRESENTATIVES.

SIR: According to the provisions of section 2 of the act approved May 29, 1928, the Secretary of State of the United States shall receive from each State two certificates relating to the presidential election. One certificate is that of the final ascertainment of electors of President and Vice President. The other certificate is that of the electors themselves and the law provides that to that certificate there shall be attached a copy of the certificate of the final ascertainment of electors of President and Vice President.

Your attention is called to the fact that the State of Mississippi, although it has sent in the second certificate, together with a copy of the first certificate properly certified by the governor, has not transmitted a separate certificate of the final ascertainment of electors for President and Vice President as provided by the act.

For your information there is inclosed a photostat copy of the certificate of final ascertainment of President and Vice President which was appended to the certificate of the electors as described above. It may be added that the department, under date of January 22, 1929, called the attention of the Governor of Mississippi to the fact that the certificate of final ascertainment had not been received by the department, but no reply has yet been received to this communication.

I have the honor to be, Sir, your obedient servant,

FRANK B. KELLOGG.

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[1] Second session Seventieth Congress, Record, p. 1192.

[2] Record, p. 1914.

[3] Record, p. 2864.

[4] Record, p. 3083.

[5] Record, p. 3170.

Subsequent to the electoral count, on February 16,[1] the Vice President laid before the Senate a communication from the Secretary of State, dated February 12, transmitting, pursuant to law, an authenticated copy of the certificate of the final ascertainment of electors appointed in the State of Mississippi which was requested to be substituted for the certificate transmitted on January 18, which with the accompanying papers was ordered to lie on the table.

On February 13[2] it being calendar Wednesday, the House recessed in accordance with the resolution previously agreed upon, and was called to order by the Speaker at 12 o'clock and 58 minutes p. m.

At 1 o'clock the Doorkeeper announced the Vice President and the Senate of the United States.[3] The House rose to receive them and the two houses and their officials were seated as required by law.

The Vice President[4] said:

Mr. Speaker and gentlemen of the Congress, the Senate and House of Representatives, pursuant to the requirements of the Constitution and laws of the United States have met in joint session for the purpose of opening the certificates and ascertaining and counting the votes of the electors of the several States for President and Vice President. Under well-settled precedents the reading of the formal portion of the certificates will be dispensed with unless demand therefore shall be made. After it is ascertained that the certificates are authentic and correct in form, the tellers will count and make a list of the votes cast by the electors of the several States.

In accordance with precedents, the Chair suggests that there should be no manifestation of approval or disapproval on the part of the galleries or on the part of the members of the joint session as the counting proceeds.

The tellers heretofore appointed will take their places at the desk.

The tellers took their places at the desk and the Vice President continued.

The Chair hands to the tellers the certificates of the electors for President and Vice President of the State of Alabama, and they will count and make a list of the votes cast by that State.

Mr. Jeffers (one of the tellers) responded:

Mr. President, the certificate of the electoral vote of the State of Alabama seems to be regular in form and authentic, and it appears therefrom that Alfred E. Smith, of the State of New York, received 12 votes for President, and Joseph T. Robinson, of the State of Arkansas, received 12 votes for Vice President.

The Vice President said:

If there be no objection, the Chair will omit in the further procedure the formal statement just made, and will open in alphabetical order the certificates showing the votes of the electors in each State, and the tellers will read, count, and announce the result in each State as was done with respect to the State of Alabama.

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[1] Record, p. 3560.

[2] Record, p. 3396.

[3] Mr. Charles Curtis, of Kansas, and Mr. Joseph T. Robinson, of Arkansas, respectively candidates for the office of Vice President, declined to attend the joint session and remained in the Senate Chamber during the electoral count.

[4] Charles G. Dawes, of Illinois, Vice President.

The tellers having likewise read, counted, and announced the electoral vote of the remaining States in alphabetical order, delivered to the Vice President the following statement of the result:

The undersigned, Samuel M. Shortridge and William H. King, tellers on the part of the Senate, and Charles L. Gifford and Lamar Jeffers, tellers on the part of the House of Representatives, report the following as the result of the ascertainment and counting of the electoral vote for President and Vice President of the United States for the term beginning on the 4th day of March, 1929:

Electoral votes of each State.	States.	For President.		For Vice President.	
		Herbert Hoover, of California.	Alfred E. Smith, of New York.	Charles Curtis, of Kansas.	Joseph T. Robinson, of Arkansas.
12	Alabama		12		12
3	Arizona	3		3	
9	Arkansas		9		9
13	California	13		13	
6	Colorado	6		6	
7	Connecticut	7		7	
3	Delaware	3		3	
6	Florida	6		6	
14	Georgia		14		14
4	Idaho	4		4	
29	Illinois	29		29	
15	Indiana	15		15	
13	Iowa	13		13	
10	Kansas	10		10	
13	Kentucky	13		13	
10	Louisiana		10		10
6	Maine	6		6	
8	Maryland	8		8	
18	Massachusetts		18		18
15	Michigan	15		15	
12	Minnesota	12		12	
10	Mississippi		10		10
18	Missouri	18		18	
4	Montana	4		4	
8	Nebraska	8		8	
3	Nevada	3		3	
4	New Hampshire	4		4	
14	New Jersey	14		14	
3	New Mexico	3		3	
45	New York	45		45	
12	North Carolina	12		12	
5	North Dakota	5		5	
24	Ohio	24		24	
10	Oklahoma	10		10	
5	Oregon	5		5	
38	Pennsylvania	38		38	
5	Rhode Island		5		5
9	South Carolina		9		9
5	South Dakota	5		5	
12	Tennessee	12		12	
20	Texas	20		20	
4	Utah	4		4	

Electoial votes of each State.	States.	For President.		For Vice President.	
		Herbert Hoover, of California	Alfred E. Smith, of New York.	Charles Curtis, of Kansas.	Joseph T. Robinson, of Arkansas.
4	Vermont	4		4	
12	Virginia	12		12	
7	Washington	7		7	
8	West Virginia	8		8	
13	Wisconsin	13		13	
3	Wyoming	3		3	
531		444	87	444	87

SAMUEL M. SHORTRIDGE,
WILLIAM H. KING,
Tellers on the part of the Senate.
CHARLES L. GIFFORD,
LAMAR JEFFERS,
Tellers on the part of the House of Representatives.

The state of the vote for President of the United States, as delivered to the President of the Senate, is as follows:

The whole number of the electors appointed to vote for President of the United States is 531, of which a majority is 266.

Herbert Hoover, of the State of California, has received for President of the United States 444 votes; Alfred E. Smith, of the State of New York, has received 87 votes.

The state of the vote for Vice President of the United States, as delivered to the President of the Senate, is as follows:

The whole number of electors appointed to vote for Vice President of the United States is 531, of which a majority is 266.

Charles Curtis, of the State of Kansas, has received for Vice President of the United States 444 votes; Joseph T. Robinson, of the State of Arkansas, has received 87 votes.

This announcement of the state of the vote by the President of the Senate shall be deemed a sufficient declaration of the persons elected President and Vice President of the United States, each for the term beginning on the 4th day of March, 1929, and shall be entered, together with a list of the votes, on the Journals of the Senate and House of Representatives.

The Vice President announced the result of the vote and concluded:

Gentlemen of the joint session, the purpose of this meeting having been accomplished, the joint session is now dissolved, and the Senators will return to the Senate Chamber.

Thereupon, at 1 o'clock and 32 minutes p. m. the Senate retired from the Hall and Speaker resumed the chair.

The Senate having returned to the Senate Chamber (at 1 o'clock and 37 minutes p. m.) the Vice President called the Senate to order and recognized Mr. Shortridge who read to the Senate a duplicate report of the count of the electoral vote previously announced in the House.

446. The electoral count of 1933.

Instance in which a teller resigned and suggested the appointment of a successor.

The Vice President elect, as Speaker of the House, participated in the ceremonies.

The customary resolution [1] providing for the counting of the electoral vote having been agreed to by both Houses, the Speaker, under the authority thereby conferred, announced on January 14, 1933 [2] the appointment of Mr. Patrick J. Carley, of New York, and Mr. Charles L. Gifford, of Massachusetts, as tellers on the part of the House.

On February 7,[3] the Speaker laid before the House the following communication:

FEBRUARY 6, 1933.

SPEAKER OF THE HOUSE OF REPRESENTATIVES,

Washington, D. C.

DEAR MR. SPEAKER: You have kindly designated me as chairman of the Committee on Election of President, Vice President, and Members of Congress to act as teller upon the occasion of the counting of the electoral vote on Wednesday, February 8.

I appreciate the honor, but find that I will be obliged to be away on Wednesday, so will appreciate it if you will designate the ranking Democratic member of the Committee, Mr. Jeffers, to act on that occasion.

Thanking you, I am, respectfully,

P. J. CARLEY.

The Speaker said:

Without objection, the resignation will be accepted.

There being no objection, the Speaker appointed Mr. Lamar Jeffers, of Alabama, to the place vacated by the resignation of Mr. Carley.

On February 8,[4] in compliance with the concurrent resolution, and conforming to the usual ceremonies observed on the occasion of the counting of the electoral vote, the two Houses assembled in the Hall of the House of Representatives, with Mr. John N. Garner, of Texas, the Vice-President-designate, occupying the place assigned to him by law [5] as Speaker of the House.

The Vice President,[6] as Presiding Officer, announced:

Mr. Speaker and gentlemen of the Congress, the Senate and House of Representatives, pursuant to the requirements of the Constitution and laws of the United States, have met in joint session for the purpose of opening the certificates and ascertaining and counting the votes of the electors of the several States for President and Vice President. Under well-established precedents, unless a motion shall be made in any case, the reading of the formal portions of the certificates will be dispensed with. After ascertainment has been had that the certificates are authentic and correct in form, the tellers will count and make a list of the votes cast by the electors of the several States.

The tellers heretofore appointed will take their places at the desk.

The count having been concluded, the tellers delivered to the Presiding Officer the following statement of the result:

The undersigned, Otis F. Glenn and William H. King, tellers on the part of the Senate; Lamar Jeffers and Charles L. Gifford, tellers on the part of the House of Representatives, report the following as the result of the ascertainment and counting of the electoral vote for President and Vice President of the United States for the term beginning on the 4th day of March, 1933.

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[1] H. Con. Res. 44.

[2] Second session Seventy-second Congress, Record, p. 1832.

[3] Record, p. 3546.

[4] Record, p. 3639.

[5] U.S. Code, title 3, sec. 20.

[6] Charles Curtis, of Kansas, Vice President.

Electoral vote for President and Vice President.

Electoral votes of each State.	State.	For President.		For Vice President.	
		Franklin D. Roosevelt, of New York.	Herbert Hoover, of California	John N. Garner, of Texas.	Charles Curtis, of Kansas.
11	Alabama	11		11	
3	Arizona	3		3	
9	Arkansas	9		9	
22	California	22		22	
6	Colorado	6		6	
8	Connecticut		8		8
3	Delaware		3		3
7	Florida	7		7	
12	Georgia	12		12	
4	Idaho	4		4	
29	Illinois	29		29	
14	Indiana	14		14	
11	Iowa	11		11	
9	Kansas	9		9	
11	Kentucky	11		11	
10	Louisiana	10		10	
5	Maine		5		5
8	Maryland	8		8	
17	Massachusetts	17		17	
19	Michigan	19		19	
11	Minnesota	11		11	
19	Mississippi	9		9	
15	Missouri	15		15	
4	Montana	4		4	
7	Nebraska	7		7	
3	Nevada	3		3	
4	New Hampshire		4		4
16	New Jersey	16		16	
3	New Mexico	3		3	
47	New York	47		47	
13	North Carolina	13		13	
4	North Dakota	4		4	
26	Ohio	26		26	
11	Oklahoma	11		11	
5	Oregon	5		5	
36	Pennsylvania		36		36
4	Rhode Island	4		4	
8	South Carolina	8		8	
4	South Dakota	4		4	
11	Tennessee	11		11	
23	Texas	23		23	
4	Utah	4		4	
3	Vermont		3		3
11	Virginia	11		11	
8	Washington	8		8	
8	West Virginia	8		8	
12	Wisconsin	12		12	
3	Wyoming	3		3	
531		472	59	472	59

OTIS F. GLENN,
WILLIAM R. KING,
Tellers on the part of the Senate.
LAMAR JEFFERS,
CHARLES L. GIFFORD,
Tellers on the part of the House of Representatives.

The state of the vote for President of the United States, as delivered to the President of the Senate, is as follows:

The whole number of the electors appointed to vote for President of the United States is 531, of which a majority is 266.

Franklin D. Roosevelt, of the State of New York, has received for President of the United States 472 votes.

Herbert Hoover, of the State of California, has received 59 votes.

The state of the vote for Vice President of the United States, as delivered to the President of the Senate, is as follows:

The whole number of the electors appointed to vote for Vice President of the United States is 531, of which a majority is 266.

John N. Garner, of the State of Texas, has received for Vice President of the United States 472 votes.

Charles Curtis, of the State of Kansas, has received 59 votes.

This announcement of the state of the vote by the President of the Senate shall be deemed a sufficient declaration of the persons elected President and Vice President of the United States each for the term beginning on the 4th day of March, 1933, and shall be entered, together with a list of the votes, on the Journals of the Senate and House of Representatives.

The Presiding Officer having announced the result, dissolved the joint convention; the Senate returned to its Chamber; and the Speaker resumed the chair.

Whereupon, Mr. Bertrand H. Snell, of New York, the minority leader, addressed the Chair and said in felicitation:

Mr. Speaker, I desire to take this opportunity to express publicly my personal congratulations to our able and efficient Speaker, who to-day has been so overwhelmingly elected Vice President of the United States.

The Members rose amid applause and stood while Mr. Snell continued:

May I wish him success in his new position, and may it be as pleasant to him as his service of many years in the House has been. I know I express the will of all your colleagues in the House when I extend to you our sincere congratulations and good wishes for the future.

The Speaker responded:

Mr. Minority Leader, may I express my appreciation for your kind words concerning my service as Speaker and accept your congratulations upon my election as Vice President?

I do not think it out of order for me to say publicly what I have said privately—I would rather remain in the House of Representatives. I have enjoyed my service here. My ears and my eyes and whatever intellect I may have may be over there, but my heart will always be in the House of Representatives.

Chapter CXCII.[1]

ELECTION AND INAUGURATION OF PRESIDENT.

1. Participation of House in inaugurations. Sections 447–453.

447. Participation of the House in the inaugural ceremonies in 1909. An instance wherein, owing to inclemency of the weather, the President elect took the oath and delivered his inaugural address in the Senate Chamber.

On March 4, 1909,[2] at 11 o'clock and 43 minutes a.m., in the Senate, the ambassadors and ministers of foreign countries were announced and occupied seats assigned to them on the floor of the Senate. They were followed by the Chief Justice and Associate Justices of the Supreme Court, who were escorted to seats provided for them, and last by the Members of the House of Representatives, preceded by the Speaker, accompanied by the Clerk and Sergeant at Arms. The Speaker was given a seat on the left of the Vice President, the Clerk and Sergeant at Arms occupied seats at the Secretary's desk, and the Members of the House took seats reserved for them in the body of the Chamber.

The heads of executive departments, the Chief of Staff of the Army and his aid, the Admiral of the Navy and his aid, governors of States, and other invited guests occupied designated seats on the floor.

The Vice President elect, James S. Sherman, was announced and was seated at the right of the Vice President.

The President of the United States, Theodore Roosevelt, and the President elect, William H. Taft, were announced and escorted to seats in the space in front of the Secretary's desk, the members of the joint committee on arrangements of the two Houses occupying seats on either side of them.

The Vice President, Charles W. Fairbanks, administered the oath to the Vice President elect, and at 12 m., declared the Senate adjourned without day.

Whereupon the Vice President, James S. Sherman,[3] took the chair and called the Senate to order in the special session convened by proclamation of the President.

The Chaplain having offered prayer, the Vice President addressed the Senate. At the conclusion of his address the proclamation of the President convening the special session of the Senate was read, and the Senators elect were sworn in.

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[1] Supplementary to Chapter LXII.

[2] Second session Sixtieth Congress, Record, p. 3824.

[3] First session Sixty-first Congress, Senate Journal, p. 1.

Immediately thereafter the President elect was escorted to the Vice President's chair by a Member of the Senate, and the Chief Justice administered to him the oath of office.

The President delivered his inaugural address from the Vice President's desk.

The President then retired from the Chamber, followed by the guests of the Senate in the following order:

The Sergeant at Arms of the Senate and the Sergeant at Arms of the House of Representatives.

The marshal of the Supreme Court.

The Chief Justice, Associate Justices, clerk, and reporter of the Supreme Court.

The ex-President of the United States, the committee of arrangements, and the President of the United States.

Ambassadors to the United States and ministers plenipotentiary.

Ex-members of the Cabinet.

The ex-President.

The Vice President and the Secretary of the Senate.

The Speaker and the Clerk of the House of Representatives.

Retiring Members, Members elect, and officers of the House of Representatives.

Heads of the executive departments.

Governors of States and Territories.

The Chief of Staff of the Army and his aid.

The Admiral of the Navy and his aid.

And then, at 1 o'clock and 45 minutes p.m., the Senate adjourned.

448. The inaugural ceremonies of 1913.

The inauguration ceremonies in 1913 were without incident and took place in the usual form with unimportant variations of minor character.

On March 4, 1913,[1] the Members of the House of Representatives, Diplomatic Corps, and justices of the Supreme Court appeared in the Senate in the order named. President elect Woodrow Wilson was accompanied by the retiring President, William H. Taft.

President pro tempore Jacob H. Gallinger administered the oath to Vice President elect Thomas R. Marshall and declared the Senate adjourned sine die. The Vice President[2] called the Senate to order and after prayer addressed the Senate.

The inaugural procession proceeded, in the usual order, to the platform on the central portico at the east front of the Capitol where the President elect took the oath of office and delivered his inaugural address.

449. When the inaugural date falls on Sunday the inauguration of the President of the United States occurs at noon, the following day.

On Sunday, March 4, 1917[3] (legislative day of March 2) the Senate had been in continuous session since 10 o'clock a.m. the previous Friday. Prolonged obstruc-

[1] Third session Sixty-second Congress, Record, p. 4842.

[2] First session Sixty-third Congress, Record, p. 1.

[3] Second session Sixty-fourth Congress, Record, p. 5020.

tion in the consideration of the bill (H. R. 21052) to arm merchant ships continued until the hour of 12 m. on Sunday, March 4, when the President pro tempore, interrupting debate, declared the Senate adjourned sine die.

On Monday, March 5, at 12 m.[1] the Senate was called to order by the President pro tempore.

The Members of the House of Representatives, the Diplomatic Corps, the Justices of the Supreme Court, and the Chief of Staff of the Army and Admiral of the Navy were announced and seated in customary form.

President Woodrow Wilson was escorted to the Chamber by the committee on arrangements and was seated with them and the members of his Cabinet in the area in front of the Vice President's desk.

After prayer by the Chaplain, the President pro tempore caused the proclamation of the President convening the Senate in extra session to be read and administered the oath of the Vice President elect, Thomas R. Marshall.

The Vice President addressed the Senate and administered the oath to the Senators elect.

The inaugural procession then proceeded to the platform at the east front of the Capitol in the usual order of precedence and the President elect took the oath of office and delivered his inaugural address.

450. Procedure at the inauguration of the President in 1921.

On December 13, 1920[2] pursuant to concurrent resolution previously adopted by the two Houses, the Speaker announced:

> The Chair will announce as the House members of the inaugural committee Mr. Cannon, Mr. Reavis, and Mr. Rucker.

In the Senate the Vice President announced:

> Pursuant to the provision of the concurrent resolution (S. Con. Res. 34) providing for the appointment of a committee to make the necessary arrangements for the inauguration of the President elect of the United States on the 4th day of March next, the Chair appoints Mr. Knox, Mr. Nelson, and Mr. Overman members of the committee on the part of the Senate.

On March 4, 1921,[3] at 11 o'clock and 45 minutes a.m., the Doorkeeper of the Senate announced the Speaker and the Members of the House of Representatives. The Speaker was escorted to a seat at the left of the Vice President, and the Members of the House occupied seats reserved for them on the left of the Vice President, in the body of the Chamber.

They were followed by the ambassadors and ministers of foreign countries, the General of the Army and his aid, the Chief of Naval Operations and his aid, the Chief Justice and the associate justices of the Supreme Court, who were in turn escorted to seats provided for them on the floor of the Senate.

The Vice President elect (Calvin Coolidge, of Massachusetts) entered the Chamber accompanied by members of the joint committee on arrangements and was conducted to a seat on the right of the Vice President.

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[1] First session Sixty-fifth Congress, Senate Journal, p. 1; Record, p. 1.

[2] Third session Sixty-sixth Congress, Record, pp. 304, 308.

[3] Record, p. 4532.

Several minutes before noon the Sergeant at Arms announced Warren G. Harding, of Ohio, President elect of the United States, accompanied by the chairman and members of the committee on arrangements. The President elect was seated in the area in front of the Secretary's desk with the members of the committee occupying seats on either side.

The retiring Vice President administered the oath to the Vice President elect, and then at 12 m. declared the Senate adjourned sine die.

The Vice President called the Senate to order in special session [1] and, after prayer by the Chaplain, delivered his address, at the conclusion of which the proclamation of the President convening the extra session was read and the oath of office was administered to Senators elect.

The Vice President then directed the Sergeant at Arms to execute the order of the inauguration ceremonies, and the President elect, escorted by the justices of the Supreme Court and accompanied by the joint committee, proceeded to the inaugural stand at the east front of the Capitol.

They were followed by the members of the Diplomatic Corps, the Chief of Naval Operations and his aid, the Chief of Staff of the Army and his aid, the Commandant of the Marine Corps, the Vice President, Sergeant at Arms and Secretary of the Senate, the Senate of the United States, the Speaker and the Clerk of the House of Representatives, the Members of the House of Representatives, and then by other guests admitted to the floor of the Senate.

The Chief Justice administered the oath of office to the President elect.

The President delivered his inaugural address.

The inaugural party on the platform rose and remained standing while the President retired from the stand. The Senate then returned to its Chamber and resumed its session.

451. Ceremonies participated in by the House at the inauguration of the President in 1925.

Arrangements for the inauguration of the President and Vice President of the United States made by a joint committee of the two Houses.

On December 19, 1924 [2] the House passed without amendment the following concurrent resolution of the Senate:

Resolved by the Senate (*the House of Representatives concurring*), That a joint committee consisting of three Senators and three Representatives, to be appointed by the President of the Senate and the Speaker of the House of Representatives, respectively, is authorized to make the necessary arrangements for the inauguration of the President elect of the United States on the 4th of March next.

The Speaker thereupon appointed the committee on the part of the House.

On March 4, 1924,[3] at 11 o'clock and 45 minutes a.m., under the escort of the Doorkeeper, the Members of the House of Representatives, preceded by the Sergeant at Arms and the Clerk, and headed by the Speaker and the Speaker designate, entered the Senate Chamber. The Senators and Senators elect had been previously

[1] First session Sixty-seventh Congress, Senate Journal, p. 1.

[2] Second session Sixty-eighth Congress, Journal, p. 836; Record, p. 5521.

[3] First session Sixty-ninth Congress, Record, p. 1.

seated on the east side of the Chamber, and the Speaker and the Members of the House were escorted to the seats on the west side. The Clerk and the Sergeant at Arms were seated at the Secretary's desk.

The ambassadors and ministers of foreign countries, the Members of the President's Cabinet, the Chief of Naval Operations, the Commandant of the Marine Corps and the Chief of Staff of the Army and their aides, and the Chief Justice and associate justices of the Supreme Court arrived in the order named and were shown to seats reserved for them.

The Vice President elect (Charles G. Dawes) entered the Chamber, escorted by-members of the joint committee on arrangements for the inauguration, and was conducted to a seat at the right of the President pro tempore.

Several minutes before noon the President elect, Calvin Coolidge, escorted by the Sergeants at Arms of the Senate and the House and accompanied by the chairman and members of the committee on arrangements of the two Houses, was announced.

Those present rose to receive them and remained standing until they were seated.

The President elect was seated in the space in front of the Secretary's desk, the chairman and members of the joint committee on arrangements occupying the seats on either side.

The President pro tempore administered to the Vice President elect the oath of office prescribed by law.

And then, the hour of 12 m. having arrived, the President pro tempore declared the Senate of the Sixty-eighth Congress adjourned sine die.

Thereupon the Vice President took the chair and called the Senate to order in the extra session of the Sixty-ninth Congress.

After prayer by the Chaplain of the Senate, the Vice President addressed the Senate. The proclamation of the President convening the Senate in extra session was read, after which the oath was administered to the Senators elect.

The Vice President then directed the Sergeant at Arms to carry out the order of the inauguration ceremonies.

The President elect, preceded by the Sergeant at Arms of the Senate and accompanied by the committee on arrangements, was conducted to the President's room. The Supreme Court retired from the Chamber to their robing room, and the Diplomatic Corps, the Chief of Staff of the Army, the Chief of Naval Operations, and the Commandant of the Marine Corps and their aides were escorted to the Marble Room in the Capitol.

Members of the Senate, headed by the President pro tempore and the Secretary of the Senate, proceeded to the inaugural platform, on the central portico at the east front of the Capitol, followed by the Members of the House of Representatives, preceded by the Clerk and the Doorkeeper, headed by the Speaker and the Speaker designate, followed in turn by governors of States and other guests of the Senate.

These having been seated on the platform, the President elect, accompanied by the committee on arrangements, escorted by the Sergeants at Arms of the Houses, left the President's room. When the Marble Room was reached, the Diplomatic Corps, the Chief of Staff of the Army, the Chief of Naval Operations, and the Com-

mandant of the Marine Corps followed. At the door of the Supreme Court the Chief Justice and associate justices took places at the head of the line and proceeded to the inaugural platform.

The President elect of the United States having arrived on the platform, the oath of office was administered to him by the Chief Justice of the United States.

The President delivered his inaugural address.

And then the President, followed by the inaugural procession, left the platform in the reverse order to that in which it had arrived, the President departing to the White House and the Senate returning to its Chamber, and the ceremonies were concluded.

452. The concurrent resolution creating a joint committee authorized to arrange for the quadrennial inauguration ceremonies is considered sufficient authorization for the necessary appropriations for that purpose.—On December 14, 1928,[1] Mr. Bertrand H. Snell, of New York, in reporting from the Committee on Rules the usual joint resolution (S. J. Res. 24) providing for the appointment of the joint committee to make necessary arrangements for the inauguration of the President elect on March 4, 1929, explained:

> Mr. Speaker, I simply desire to state that this is the usual resolution that is passed once in four years preceding the inauguration of a new President. This resolution is considered to be an authorization for an appropriation which will be carried in the deficiency bill. I move the previous question on the resolution.

453. Arrangements for the inauguration of the President of the United States, in 1933.

The Speaker, having been elected Vice President, continued in office until the expiration of his term.

Mr. Speaker Garner, having been elected simultaneously to the Vice Presidency and to Membership in the next Congress, transmitted to the Executive of his State his resignation as a Member elect of the Seventy-third Congress.

Resolutions preliminary to the inaugural ceremonies of 1933 were passed by the House, providing for the appointment of committees on arrangements, December 8, 1932;[2] exempting inaugural tickets from taxation, January 8, 1933;[3] quartering of troops participating in the ceremonies, January 26;[4] granting permits for the use of public facilities, January 27;[5] and providing for the maintenance of order, February 7.[6]

Mr. Speaker Garner, the Vice President elect, presided in the House on March 4, until adjournment sine die, at 11 o'clock and 21 minutes p.m.,[7] and was sworn in as Vice President in the Senate Chamber at 12 o'clock noon.[8]

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[1] Second session Seventieth Congress, Record, p. 607.

[2] Second session Seventy-second Congress, Record, p. 205.

[3] Record, p. 2031.

[4] Record, p. 2607.

[5] Record, p. 2705.

[6] Record, p. 3545.

[7] Record, p. 5668.

[8] Record, p. 5656.

Chapter CXCIII.[1]

NATURE OF IMPEACHMENT.

454. Discussion by English and American authorities of the general nature of impeachment.

On January 3, 1913[2] in the Senate sitting for the trial of the impeachment of Judge Robert W. Archbald, Mr. Manager Henry D. Clayton, of Alabama, submitted on behalf of the House of Representatives, a brief from which the following is an excerpt:

THE GENERAL NATURE OF IMPEACHMENTS.

The fundamental law of impeachment was stated by Richard Wooddeson, an eminent English authority, in his Law Lectures delivered at Oxford in 1777, as follows (pp. 499 and 501, 1842 ed.):

"It is certain that magistrates and officers intrusted with the administration of public affairs may abuse their delegated powers to the extensive detriment of the community and at the same time in a manner not properly cognizable before the ordinary tribunals. The influence of such delinquents and the nature of such offenses may not unsuitably engage the authority of the highest court and the wisdom of the sagest assembly. The Commons, therefore, as the grand inquest of the nation, became suitors for penal justice, and they can not consistently, either with their own dignity or with safety to the accused, sue elsewhere but to those who share with them in the legislature.

"On this policy is founded the origin of impeachments, which began soon after the constitution assumed its present form.

* * * * * * *

"Such kind of misdeeds, however, as peculiarly injure the commonwealth by the abuse of high offices of trust, are most proper—and have been the most usual—grounds for this kind of prosecution."

Referring to the function of impeachments, Rawle, in his work on the Constitution (p. 211), says:

"The delegation of important trusts affecting the higher interests of society is always from various causes liable to abuse. The fondness frequently felt for the inordinate extension of power, the influence of party and of prejudice, the seductions of foreign states, or the baser appetite for illegitimate emoluments are sometimes productions of what are not unaptly termed political offenses' (Federalist, No. 65), which it would be difficult to take cognizance of in the ordinary course of judicial proceeding.

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[1] Supplementary to Chapter LXIII.

[2] Third session Sixty-second Congress, record of trial, p. 1051.

"The involutions and varieties of vice are too many and too artful to be anticipated by positive law."

In Story on the Constitution (vol. 1, 5th ed., p. 584) the parliamentary history of impeachments is briefly stated as follows:

"800. In examining the parliamentary history of impeachments it will be found that many offenses not easily definable by law, and many of a purely political character, have been deemed high crimes and misdemeanors worthy of this extraordinary remedy. Thus, lord chancellors and judges and other magistrates have not only been impeached for bribery, and acting grossly contrary to the duties of their office, but for misleading their sovereign by unconstitutional opinions and for attempts to subvert the fundamental laws and introduce arbitary power. So where a lord chancellor has been thought to have put the great seal to an ignominious treaty, a lord admirato have neglected the safeguard of the sea, an ambassador to have betrayed his trust, a privy councilor to have propounded or supported pernicious and dishonorable measures, or a confidential adviser of his sovereign to have obtained exorbitant grants or incompatible employments—these have been all deemed impeachable offenses. Some of the offenses, indeed, for which persons were impeached in the early ages of British jurisprudence, would now seem harsh and severe; but perhaps they were rendered necessary by existing corruptions, and the importance of suppressing a spirit of favoritism and court intrigue. Thus persons have been impeached for giving bad counsel to the King, advising a prejudicial peace, enticing the King to act against the advice of Parliament, purchasing offices, giving medicine to the King without advice of physicians, preventing other persons from giving counsel to the King except in their presence, and procuring exorbitant personal grants from the King. But others, again, were founded in the most salutary public justice, such as impeachments for malversations and neglects in office, for encouraging pirates, for official oppression, extortions, and deceits, and especially for putting good magistrates out of office and advancing bad. One can not but be struck, in this slight enumeration, with the utter unfitness of the common tribunals of justice to take cognizance of such offenses, and with the entire propriety of confiding the jurisdiction over them to a tribunal capable of understanding and reforming and scrutinizing the polity of the State, and of sufficient dignity to maintain the independence and reputation of worthy public officers."

455. Discussion as to what are impeachable offenses.

Argument as to whether impeachment is restricted to offenses which are indictable, or at least of a criminal nature.

On January 8, 1913,[1] in the Senate sitting for the impeachment trial of Judge Robert W. Archbald, Mr. Manager John A. Sterling, of Illinois, said in final argument:

Mr. President, the record which has been made proves the charges set forth in the articles of impeachment constitute impeachable offenses. It is plain from the statement made by counsel for respondent, and from the brief which was filed that they rely for acquittal on the single proposition that these offenses do not constitute impeachable offenses for the reason that, as they claim, they do not constitute indictable offenses.

In their brief, counsel for the respondent lay down, as the first proposition, that no offense is impeachable unless it is indictable; and, as a second proposition, and the only other proposition that they submit, is that, if the offense in order to be impeachable need not be indictable, it must at least be of a criminal nature.

As to the first proposition, the contention of counsel for the respondent is not sustained either by the language of the Constitution, by the decisions of the Senate in former impeachment cases, by the decisions of other tribunals in this country which have tried impeachment cases, or by the decisions of the English Parliament; nor is that contention sustained, so far as I have been able to read the authorities and the law writers on constitutional law, by a single American writer. The language of the Constitution so far as it relates to the trial of this case is this:

[1] Third session Sixty-second Congress, Record, p. 1200.

"The Senate shall have the sole power to try all impeachments.

* * * * * * *

"Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States.

* * * * * * *

All civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

* * * * * * *

"The judges * * * shall hold their offices during good behavior."

I have stated all the language of the Constitution with which the Senate has to deal in determining the case now before it. I ask the Senate to consider that nowhere in that language is there any limitation as to the nature or extent of the crimes, misdemeanors, and misbehaviors in office. The Constitution does not undertake to define those terms with reference to the jurisdiction of the Senate in removing public officers for the violation of those provisions of that instrument, nor does it limit the time as to the commission of these offenses. It does not provide that the offenses shall be committed during the service from which it is sought to remove him, nor does it limit Congress as to when it may proceed to impeach and try an offending servant. Under the plain language of the Constitution the House of Representatives has the power to impeach, and the Senate has the power to try and convict for offenses of the character described in the Constitution, let them have been committed at any time during the term of office from which the respondent is sought to be removed, during his service in some other office, or during some other term, or for offenses committed before he became an officer of the United States and while he was a private citizen.

If the Constitution puts no limitation on the House of Representatives or the Senate as to what constitutes these crimes, misdemeanors, and misbehaviors, where shall we go to find the limitations? There is no law, statutory nor common law, which puts limitations on or makes definitions for the crimes, misdemeanors, and misbehaviors which subject to impeachment and conviction.

It will not be maintained either by the managers or by the counsel for the respondent that precedents bind, and yet we may well consider them, because they are so uniform on the question as to what constitutes impeachable offenses. The decisions of the Senate of the United States, of the various State tribunals which have jurisdiction over impeachment cases, and of the Parliament of England all agree that an offense, in order to be impeachable, need not be indictable either at common law or under any statute.

I desire to read briefly from some of the law writers of this country, giving their conclusions as to what constitute impeachable offenses, after they had reviewed and considered cases that have been tried in the Senate and in other forums where impeachment cases have been tried.

After reading from Tucker on the Constitution, page 416, Cooley's Principles of Constitutional Law, page 178, and volume 15 of the American and English Encyclopedia of Law, paragraph 2, page 1066, Mr. Sterling concluded:

And so, Mr. President, I say, that outside of the language of the Constitution which I quoted there is no law which binds the Senate in this case today except that law which is prescribed by their own conscience, and on that, and on that alone, must depend the result of this trial. Each Senator must fix his own standard; and the result of this trial depends upon whether or not these offenses we have charged against Judge Archbald come within the law laid down by the conscience of each Senator for himself.

On January 9, 1913,[1] Mr. Alexander Simpson, of counsel for respondent, quoting the last statement in this address, said:

[1] Record, p. 1269.

Sirs, if that be so, I want to know what has become of the Constitution in this case? Of what use was it to write into the Constitution that a man shall be impeached only for "treason, bribery, or other high crimes and misdemeanors" if there is no law to govern you, and if you may, out of your own consciences, evolve the thought that you will dismiss this respondent from the public service simply because you wish to get rid of him? You need no proof of "treason, bribery, or other high crimes and misdemeanors" to discharge him if that is the position you are to take in this case, for those words, under such circumstances, are unnecessary and meaningless.

I submit that that is not and can not be the true legal position. It must be precisely the reverse of that. You must find somewhere, whether it is under the "good behavior" clause of the Constitution, or whether it is under the article relating to impeachments themselves, that upon which you can lay your finger and say that this respondent has violated that thing, or you must under your oaths of office say that he shall go free.

And that is the position which Mr. Manager Sterling, speaking for the managers, asks you to take here. He asks you not to look to the law of the land for that which shall govern the rights of the parties here; but he asks you, out of your own conscience, whether your conscience agrees with mine or his or anybody's, to evolve a law which shall apply to this case and which when this case is over shall cease ever thereafter to be the law. In this, as in everything else, the Constitution is only a frame of government. It remains for the Congress to verify many of its provisions. It remains for Congress to write on the statute books what shall constitute "high crimes and misdemeanors," and there are already in the Revised Statutes many provisions upon that point.

On January 9, 1913,[1] Mr. A. S. Worthington, of counsel on behalf of the respondent, also referred to the position taken by Mr. Sterling in this address and said:

It has been insisted here by the managers on the part of the House of Representatives that the question of Judge Archbald's guilt or innocence is to be determined by what you individually consider to be an offense which justifies his removal from office; not that he has been brought here charged with anything of that kind, but having brought him here charged with certain specific offenses for which he and his counsel have prepared themselves and have summoned their witnesses he is now to be disgraced and forever branded as a criminal because you may find that he is not fit to be a judge.

It might humbly suggest that if there is ever to be presented to this great body the question whether or not you have the right to impeach an officer of the United States and remove him from his office because you think that on general principles he is not fit to hold his office, there might be presented an article of impeachment which would charge that that was the case and that he and his counsel might be prepared to meet it. But instead of that we have him charged with a certain number of specific acts, and when he comes here to meet those and the evidence is closed and the verdict is about to be reached, then we are told for the first time that you individually—each for himself—are to decide whether upon what you have heard here in evidence you think that on general principles he ought to be ejected from his office.

The Constitution of the United States says that civil officers of the United States may be impeached for treason, bribery, or other high crimes and misdemeanors.

If this were the first time that that sentence was heard by the Members of this body, I should like to know whether there is one of you to whose mind it would ever have occured for a moment that it meant anything except an offense punishable in a court of justice. I do not like the word "indictability," because a great many crimes are punished by information and not upon indictment. When I use that term I mean it in the sense of punishment in any way in a criminal court.

Now, my friend Mr. Manager Sterling when he read certain provisions of the Constitution at the outset of his argument said those were all that were necessary to be considered in this matter.

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[1] Record, page 1282.

The sixth amendment says:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Where is the man in this United States of America who would suggest that Judge Archbald could be required to answer without being informed of what is the accusation against him? Where is the man who would suggest that it is not necessary to confront him with the witnesses against him? Where is the man who would say he is not entitled to have subpoenas issued to bring his witnesses here to testify for him? Where is the person who will say that you could turn his counsel out of this Chamber and say he has to defend himself? Why? Because it is a criminal prosecution, and if it be not a criminal prosecution, then it is nothing known to the laws of this land.

On this subject Mr. Manager Edwin Yates Webb, of North Carolina, said by way of rebuttal: [1]

Mr. President, the respondent's counsel in his brief devotes 26 pages to a discussion of this proposition:

"Impeachment lies only for offenses which are properly the subject of a prosecution by indictment or information in a criminal court."

In those 26 pages of argument most of the quotations are from counsel who have appeared for respondents in various impeachment trials. I do not remember just at present a single noted constitutional authority that counsel quotes to maintain that proposition.

I wish to quote authority in opposition to this position.

Mr. Webb here quoted from Wooddeson (p. 355); Rawle, on the Constitution; Story, on the Constitution; Tucker, on the Constitution; Christian, Fourth Blackstone, footnote, p. 5, Lewis's ed.; Cooley's Principles of Constitutional Law, p. 178; Constitutional History of the United States, George Ticknor Curtis, vol. 1, pp. 481–482; Watson, on the Constitution, vol. 2, p. 1034; Wharton's State Trials, 263; Story, on the Constitution, page 583; and American and English Encyclopedia of Law, vol. 15, p. 1066.

One can not but be struck in this slight enumeration with the utter unfitness of the common tribunals of justice to take cognizance of such offenses and with the entire propriety of confiding jurisdiction over them to a tribunal capable of understanding and reforming and scrutinizing the policy of the State and of sufficient dignity to maintain the independence and reputation of worthy public officers.

The cases, then, seem to establish that impeachment is not a mere mode of procedure for the punishment of indictable crimes; that the phrase of "high crimes and misdemeanors" is to be taken not in its common-law but in its broader parliamentary sense, and is to be interpreted in the light of parliamentary usage; that in this sense it includes not only crimes for which an indictment may be brought, but grave political offenses, corruptions, maladministration, or neglect of duty involving moral turpitude, artibrary and oppressive conduct, and even gross improprieties by judges and high officers of State, although such offenses be not of a character to render the offender liable to an indictment either at common law or under any statute.

456. Argument that a civil officer of the United States may be impeached for an unindictable offense.

Discussion of the nature of impeachable offenses in minority views submitted in the Daugherty case.

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[1] Record, p. 1215.

On January 25, 1923,[1] Mr. R. Y. Thomas, jr., of Kentucky, from the Committee on the Judiciary, submitted the following minority views to accompany the report of that committee on the investigation into the conduct of Attorney General Harry M. Daugherty:

It was strongly intimated if not directly contended by several members of the committee that the Attorney General could not be impeached except for an indictable offense. I think this view is absolutely incorrect. Impeachment is an extraordinary remedy born in the parliamentary procedure of England, and the principles which govern it have long been enveloped in clouds of uncertainty. The practice of impeachment began in the reign of Edward the Third of England, and statutes for prosecutions for offenses of this character were first enacted in the reign of Henry the Fourth.

By usage of the English Parliament so far back that the memory of man runneth not to the contrary, offenses were impeachable which were not indictable or punishable as crimes at common law. Therefore, the phrase "high crimes and misdemeanors" must be as broad and extended as the offense against which the process of impeachment affords protection. Every case of impeachment must stand alone, and while certain general principles control the judgment and conscience, the Senate alone must determine the issue.

In my opinion, the conclusion is irresistible that an impeachment proceeding by a committee of the House is only an inquiry into the charges like a grand jury investigation, and an official can be impeached for high crimes and misdemeanors which are not indictable offenses. If there ever was any doubt of this, that question has been entirely set at rest in the impeachment proceedings in 1912 against Robert W. Archbald, United States circuit judge. None of the articles exhibited against Judge Archbald, on which he was impeached, charged an indictable offense, or even a violation of positive law.

457. Summary of deductions drawn from judgments of the Senate in impeachment trials.

The Archbald case removed from the domain of controversy the proposition that judges are only impeachable for the commission of crimes or misdemeanors against the laws of general application.

On January 13, 1914,[2] on motion of Mr. Elihu Root, of New York, a monograph by Wrisley Brown, of counsel on behalf of the managers in the impeachment trial of Judge Robert W. Archbald, was printed as a public document. The following is an excerpt:

The impeachments that have failed of conviction are of little value as precedents because of their close intermixture of fact and law, which makes it practically impossible to determine whether the evidence was considered insufficient to support the allegation of the articles, or whether the acts alleged were adjudged insufficient in law to constitute impeachable offenses. The action of the House of Representatives in adopting articles of impeachment in these cases has little legal significance, and the deductions which have been drawn from them are too conjectural to carry much persuasive force. Neither of the successful impeachments prior to the case of Judge Archbald was defended, and they are not entitled to great weight as authorities. In the case of Judge Pickering, the first three articles charged violations of statutory law, although such violations were not indictable. Article four charged open and notorious drunkenness and public blasphemy, which would probably have been punishable as misdemeanors at common law. In the case of Judge Humphreys, articles three and four charged treason against the United States. The offense charged in articles one and two probably amounted to treason, inasmuch as the ordinance of secession of South Carolina had been passed prior to the alleged recessionary speeches of the re-

[1] Fourth session Sixty-seventh Congress, House Report No. 1372.

[2] Second session Sixty-third Congress, Senate Document No. 358, p. 16.

spondent, and the offenses charged in articles five to seven, inclusive, savored strongly of treason. But, it will be observed, none of the articles exhibited against Judge Archbald charged an indictable offense, or even a violation of positive law. Indeed, most of the specific acts proved in evidence were not intrinsically wrong, and would have been blameless if committed by a private citizen. The case rested on the alleged attempt of the respondent to commercialize his potentiality as a judge, but the facts would not have been sufficient to support a prosecution for bribery. Therefore, the judgment of the Senate in this case has forever removed from the domain of controversy the proposition that the judges are only impeachable for the commission of crimes or misdemeanors against the laws of general application. The case is constructive, and it will go down in the annals of the Congress as a great landmark of the law.

458. Argument as to whether a judge may be impeached for offenses committed in prior judicial capacity.

On January 8, 1913,[1] in the Senate sitting for the impeachment trial of Judge Robert W. Archbald, Mr. Manager Edwin Yates Webb, of North Carolina, said in final argument:

There is no merit in the argument that this respondent can not be impeached at present for acts committed by him while he was district judge. It is true that he is now a circuit judge, but it is also true that immediately before he became a circuit judge he was a district judge. He never ceased to be a judge or civil officer of the United States.

This question was raised in the impeachment trial of Judge D. M. Furches, in North Carolina, in 1901. There the respondent was impeached while he was chief justice of North Carolina for acts committed while he was an associate justice, two distinct and separate offices, but his defense did not avail. Both the authorities and reason compelled the repudiation of such a defense, and, to use the language of Judge William R. Allen, now of the supreme court of our State, then one of the managers in the Furches impeachment trial—

"The purpose of impeachment is to remove an officer whose conduct is a menace to the public interest, and it would be strange indeed if he could escape punishment by being elevated to a higher official position. If such a defense could be sustained one could by resignation avoid an investigation into his conduct by a court of impeachment, and if he was of the same political faith as the head of the executive department and in sympathy with it, he could be transferred from one office to another and thus avoid impeachment altogether. The effect of such defense would be to practically destroy the power of impeachment, and at any rate it would be greatly impaired. We believe that the authorities are practically unanimous in sustaining our contention that the change of office does not affect the power of impeachment. He is now exercising the same powers that he exercised when he was an associate justice. He is performing the same duties; he is practically filling the same office."

Mr. Foster, on this subject, says:

"The power of impeachment is granted for the public protection in order to not only remove but perpetually disqualify for office a person who has shown himself dangerous to the Commonwealth by his official acts. The object of this salutary constitutional provision would be defeated could a person by resignation from office obtain immunity from impeachment. State senates have sustained articles of impeachment for offenses committed at previous and imediately preceding terms of the same or a similar office."

Is it not true that Judge Archbald now holds a similar office to that which he held in 1908? He is now a circuit judge, and the powers and duties of district and circuit judges are almost identical. State *v.* Hill, Thirty-seventh Nebraska Reports.

We have, then, five precedents—one by the Senate of the United States, one by the senate of New York, one by the senate of North Carolina, one by the State of Wisconsin, and another by the court of impeachment of Nebraska, indorsed by the Supreme Court of Nebraska, and by Foster in his work on the Constitution.

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[1] Third session Sixty-second Congress, Record, p. 1218.

We therefore confidently maintain that the respondent in this trial is now impeachable for acts which he committed while district judge of the middle district of Pennsylvania.

I shall not go into the discussion of the origin of impeachment trials, but will just quote this excerpt from one constitutional writer. Mr. Foster, in his splendid work on the Constitution, says:

"Impeachment trials are a survival of the earliest kinds of jurisprudence, when all cases were tried before an assembly of the citizens of the tribe or State. Later, ordinary cases, both civil and criminal, were assigned to courts created for that purpose, but matters of great public importance were still reserved for a decision of the whole body of citizens or subsequently of the council of elders, heads of families, or holders of fiefs."

This arrangement could be preserved in earlier times when population was sparse and business intercourse small and human affairs were not intricate; but as civilization became more complex, and the division of labor in administering judicial affairs became more urgent, the right to decide and pass upon various questions was allotted to different officers, and so to-day we have a judicial system in which all judicial power is lodged, but distributed to different courts, but in all this evolution and distribution of judicial power there is one great right which the people have always reserved unto themselves, and that is the right to supervise the conduct of public officials and, through their representatives, to remove such officials from office for misconduct or misbehavior, and so, Senators, you sit today, theoretically at least, as the court of 90,000,000 people who have commanded us through the popular branch of Congress to bring this respondent before you to inquire into his conduct, and ascertain if the condition on which he was appointed to the high office which he now holds has not been broken by him.

Quoting Foster again:

"What, it may be asked, is the true spirit of the institution itself? Is it not designed as a method of national inquest into the conduct of public men?"

This right to inquire into the conduct of public officials has been reserved to the people themselves, and this great Senate is the tribunal in which such questions must be tried, and necessarily and properly the powers of this court are "broad, strong, and elastic, so that all misconduct may be investigated and the public service purified." The fathers of the Constitution realized the importance of reserving unto the people the right to remove an unworthy or unsatisfactory official, and they were indeed wise in not attempting to define or limit the powers of the court of impeachment, but left that power so plenary that no misconduct on the part of a public official might escape its just punisbnent.

In reply, Mr. Alexander Simpson, jr., counsel for respondent, in his concluding argument on January 9 [1] said:

The first question which arises is whether or not the Senate can now consider an article of impeachment which relates to acts done while Judge Archbald was a district judge before his appointment to and confirmation as a judge of the Commerce Court. The managers in their brief say this in referring to this question:

"In this respect the case here presented seems to be unique in the annals of impeachment proceedings under our Constitution."

And they say further in that regard that they can justify the articles of impeachment, notwithstanding the change of office, because the two offices are substantially the same within the contemplation of the constitutional provisions relating to impeachments.

That argument necessarily concedes the points decided in the Blount case and considered and voted upon in the Belknap case, that he who is out of office can no longer be impeached. It necessarily also concedes that the constitutional provision has for its primary purpose the removal of the delinquent from the particular office in which he is said to have done a wrong. That is the necessary conclusion from the provision of Article I, section 3, of the Constitution, which provides what shall be the penalty in case of impeachment. It is considered also by Judge Story in his work on the Constitution, and if the argument which was presented by Judge Story is sound it must

[1] Record, p. 1278.

necessarily follow that the similarity of the two offices is not and can not be of any moment whatsoever. Can it be said that if a civil officer, say in the Cabinet of the President, is transferred from one portfolio to the other and continues steadily in office, that he may be impeached while holding the second office for that which was done in the first, and yet if he passes from the Cabinet to the Senate or into private life he can not be impeached at all? There is no logic or sound reasoning in any such proposition as that, nor is it in accord with any well-settled principles. In the provision which the managers quote in their brief from Mr. Foster he says this in regard to that:

"It includes such action by an officer when acting as a member ex officio of a board of commissioners; and such action in the same or a similar office at an immediately preceding term."

Now, I want to know why limit it to the immediately preceding term if the similarity of the office is the test in determining whether the impeachment will lie or not. Of course, that can not be sound; and the only reason why Foster wrote in his commentaries the "immediately preceding term" was because he felt that the line must be drawn somewhere. He knew that in certain of the State courts, under the language of their constitutions, it had been held that in a succeeding term of the same office there might be an impeachment for that which occurred in the immediately preceding term. But it remained for the managers to evolve the doctrine that it was to be a substantially similar office which was the test in determining the matter.

I submit that the proper test is the one to which I have already adverted. It is that the office, during the incumbency of which the acts were done of which complaint was made, shall be the determinative factor in deciding whether or not impeachment shall lie for the offense charged. If that is not so, there is no logical conclusion from the position which one of the managers assumed, that so long as the man is in public office whether the office is substantially similar or no, or whether there is a continuity of term or no—so long as he is in public office he may be impeached for anything which he has ever done in the past, because, as it was claimed, the purpose of the constitutional provision is to put out of office all those who by their past lives have shown that they are unfit to occupy it. That position would be a logical one; but there can not be a case found to sustain it; and all the authorities decide precisely the reverse.

On January 3, 1913,[1] Messrs. R. W. Archbald, jr., M. J. Martin, Alexander Simpson, jr., and A. S. Worthington, of counsel for the respondent, offered a brief covering various phases of the case, from which the following extract relates to this question:

III.

The last six articles of impeachment in this case must fail, if for no other reason, because they relate to a time when the respondent held the office of district judge of the United States. He may not be impeached for alleged offenses committed prior to January 31, 1911, when he ceased to be district judge by appointment to a different office.

Articles VII, VIII, IX, X, XI, and XII, and Article XIII in part, charge offenses alleged to have been committed by the respondent before he was appointed to his present position as circuit judge and assigned to duty on the Commerce Court. He was a district judge of the United States from March, 1901, until the 31st day of January, 1911.

No useful information on this subject can be obtained from the English precedents, because in England a private citizen could be impeached as well as officers of the Government.

In this country there have been two attempts to impeach persons who had ceased to be officers for acts done by them while they were officers. One of these cases was that of William Blount in 1798; the other that of William W. Belknap in 1876.

In Blount's case when he was called upon to answer the articles he filed a plea which set up in substance these two defenses: (1) That a Senator is not impeachable, and (2) that he had ceased to be a Senator. (3 Hinds' Precedents, 663.)

This double plea was sustained by the Senate by a vote of 14 to 11. (3 Hinds' Precedents,. 679.)

[1] Record of trial, p. 1007.

There is nothing in the record of the case to enable us to determine whether all the 14 Senators who voted to sustain the plea did so because they held that a Senator is not impeachable, or because Blount was out of office at the time. And, of course, it may be that some voted to sustain the plea on one of those grounds and some on the other.

It will be seen that the managers in that case actually contended that in the United States, as in England, private persons may be impeached as well as officers. It is not thought necessary to consider that question, because that contention has never been made since it was made by the managers in Blount's case. Mr. Ingersoll, of counsel for Blount, said in the course of the argument that he would not contend that an officer might escape an impending impeachment by resigning his office for that purpose.

This admission of Mr. Ingersoll's gave great comfort to the managers and some embarrassment to the counsel for the respondent in Belknap's case. In that case the respondent filed a plea in which he averred:

"That this honorable court ought not to have or take further cognizance of the said articles of impeachment * * * because he says that before and at the time when the said House of Representatives ordered and directed that he, the said Belknap, should be impeached at the bar of the Senate, and at the time when the said articles of impeachment were exhibited and presented against him * * * he, the said Belknap, was not, nor hath he since been, nor is he now, an officer of the United States; but at the said times was, ever since hath been, and now is, a private citizen of the United States and of the State of Iowa. (3 Hinds' Precedents, 919.)"

To this plea the managers for the House of Representatives filed a replication, in which they set up: (1) That at the time the acts charged in the articles of impeachment were committed, Belknap was Secretary of War; and (2) that Belknap had resigned to escape impeachment, after he had learned that the House of Representatives, by its proper committee, had completed its investigation into his official conduct, and was considering the report it should make to the House upon the same. There were further pleadings, but those above stated set forth sufficiently what the issues were. (3 Hinds' Precedents, 921.)

After much discussion the Senate determined to hear first the question of the sufficiency of the replication. After a long debate, it was decided, by a vote of 37 to 29, that Belknap was amenable to trial by impeachment for acts done as Secretary of War, notwithstanding his resignation before he was impeached. (3 Hinds' Precedents, 964.)

Belknap was called upon to plead to the merits, but declined to do so on the ground, as set forth on the record by his counsel, that, as less than two-thirds of the Senate had sustained the jurisdiction, the respondent was entitled to be discharged, without further proceedings. (3 Hinds' Precedents, 936–937.)

The Senate, however, went on and took evidence in the case, with the result that Belknap was acquitted. The vote on the several articles ranged from 35 to 37 for conviction. On each article 25 voted not guilty. Most of those who voted not guilty stated that they did so because they believed the court was without jurisdiction, for the reason that the respondent had ceased to be a civil officer of the United States at the time he was impeached by the House of Representatives.

Hence, in Belknap's case, as in Blount's case, it will be seen that the final vote does not indicate that any of the Senators who voted "guilty" did so on the ground that one who has been a civil officer remains liable to impeachment as long as he lives, for acts done during the time he held the office. The evidence in the case showed that Belknap was advised at 10 o'clock of the morning of the day that he resigned, that the Judiciary Committee of the House was about to report a resolution recommending his impeachment. He hurried to the President, tendered his resignation, and had it accepted, a few hours only before the Judiciary Committee did present to the House the resolution recommending his impeachment. There was much controversy in the discussion of the case before the Senate by the managers and counsel, respectively, as to whether Belknap was an officer when the resolution of impeachment was presented to the House, on the theory that the law takes no notice of fractions of a day. But, aside from this, it was strenuously contended by the managers that even if the general rule be that an officer ceases to be subject to impeachment when he leaves the office, there should be an exception to that rule when the officer resigns for the very purpose of escaping impeachment.

It is impossible to determine what proportion of the Senators who voted against Belknap at the conclusion of the trial did so on the ground that he could not escape impeachment by resigning for that purpose, even if he would not be subject to impeachment had he not vacated the office in that way and for that purpose. In other words, the case is not a precedent for the proposition that one whose term of office has expired remains subject to impeachment during the whole of his life for acts done while he held the office.

When Manager Hoar was making his argument a Member of the Senate interrupted him and propounded the following question:

"There are no doubt several Members of the Senate who have been in past years civil officers of the United States. Are they liable to impeachment for an alleged act of guilt done in office?"

The manager did not flinch at this question, but said, as he was evidently required to say or abandon his contention: "The logic of my argument brings us to that result."

It will be seen that the contention which was made on behalf of the House in Belknap's case, and which we understand is maintained by the managers in the case at bar, is far-reaching. The present President of the United States at one time held the office of Solicitor General; at another time he was circuit judge of the United States; at another time he was governor of the Philippine Islands; at another time he was Secretary of War. Is it possible that he can now be the subject of impeachment for any act committed by him at the time he held either one of those offices? If so, he may be removed from his present office as President of the United States by a majority of the House and two-thirds of the Senate for alleged offenses charged to have been committed while he held any one of the other positions above mentioned.

And so of any other public man who has ever held office under the United States.

It would seem that a contention which leads to such absurd results can not be sustained.

459. On January 9, 1913,[1] in the Senate sitting for the Archbald impeachment trial, Mr. Manager George W. Norris, of Nebraska, said in concluding argument:

The authorities are practically unanimous that a public official can be impeached for official misconduct occurring while he held a prior office if the duties of that office and the one he holds at the time of the impeachment are practically the same, or are of the same nature. The Senate must bear in mind, as stated by all of the authorities, that the principal object of impeachment proceedings is to get rid of an unworthy public official. In the State of New York it was held in the Barnard case that the respondent could be impeached and removed from office during his second term for acts committed during his first term. And in the State of Wisconsin the court held the same way in the impeachment of Judge Hubbell. To the same effect was the decision in Nebraska upon the impeachment trial of Governor Butler. On this point the respondent relies upon the case of the State *v.* Hill (37 Nebr., p. 80).

In that case the State treasurer of Nebraska was impeached after he had completed his term and retired to private life. The articles of impeachment were not passed on by the legislature—in fact, were not even introduced in the legislature—until after the respondent had served his full term, and the court there held that impeachment did not lie, but it expressly approved the judgment of the New York court in the Judge Barnard case, the judgment of the Wisconsin court in the Judge Hubbell case, and the prior judgment of the Nebraska court in the Butler case.

460. Argument that an impeachable offense is any misbehavior or maladministration which has demonstrated unfitness to continue in office.

On January 9, 1913,[2] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, Mr. Manager Paul Howland, of Ohio, in final argument said:

[1] Third session Sixty-second Congress, Record, p. 1265.

[2] Third session Sixty-second Congress, Record, p. 1259.

The managers contend that the power to impeach is properly invoked to remove a Federal judge whenever, by reason of misbehavior, misconduct, malconduct, or maladministration, the judge has demonstrated his unfitness to continue in office; that misbehavior on the part of a Federal judge is a violation of the Constitution, which is the supreme law of the land, and a violation also of his oath of office taken in compliance with the requirements of the statute law. If the Senate should adopt this view of the law, then the only question to be passed on by the Senate would be whether the acts alleged and proven constitute such misbehavior as to render the respondent unfit to continue in office.

The learned counsel for the respondent, by insisting that only indictable offenses are impeachable, would seem to be placing himself in the position of holding that the object of impeachment was punishment to the individual. This conception of the object of impeachment is entirely erroneous, and whatever injury may result to the individual is purely incidental and not one of the objects of impeachment in any sense. An impeachment proceeding is the exercise of a power which the people delegated to their representatives to protect them from injury at the hands of their own servants and to purify the public service. The sole object of impeachment is to relieve the people in the future, either from the improper discharge of official functions or from the discharge of official functions by an improper person. This view of impeachment is clearly demonstrated by the judgment which the Constitution authorizes in case of conviction and which shall extend no further than removal from office and disqualification to hold or enjoy any office of honor, trust, or profit under the Government of the United States, leaving the punishment of the individual for any crime he may have committed to the criminal court. (See Art. I, sec. 3, par. 7, Constitution of the United States.)

As bearing upon the question of law raised by the demurrer of the respondent I wish to call attention to two provisions of the Federal Constitution. Section 4, Article II, provides:

"The President, Vice President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors"—

To which I shall hereafter refer as the removal section, and section 1, Article III, the second sentence thereof, which provides that—

"The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior"—

To which I shall hereafter refer as the judicial-tenure section.

It will be noted that the removal section immediately precedes the judicial-tenure section. The limitation of the judicial tenure to good behavior is the only limitation of that character to be found in the Federal Constitution upon the tenure of any of the civil officers of the Government. I therefore contend that it was the plain intention of the framers of the Constitution that, in so far as the Federal judges were concerned, the removal section was not intended to be antagonistic in its terms to the judicial-tenure section, immediately following it, and that the judicial-tenure section, which provides that the judicial term shall be during good behavior, was not intended to be antagonistic to the removal section, which immediately precedes it. These two sections must be construed together, and when so construed the judicial-tenure section is of necessity either an addition to the enumerated offenses in the removal section or a definition of the term "high crimes and misdemeanors," when applied to the judiciary, as including misbehavior. To say that the judicial tenure shall be limited to good behavior in one section of the Federal Constitution and then contend that the section of the Constitution immediately preceding that has destroyed its force and effect and has left the Federal Government without any machinery to pass upon the question of the forfeiture of the judicial tenure, or to take jurisdiction of acts which constitute misbehavior but are not criminal, is to treat the words "during good behavior" as surplusage. Such an interpretation violates all rules of construction.

What is the legal status of the judicial tenure and what determines that status? There are some considerations on which to base the claim that the legal status of the judicial tenure should be determined by the same principles that are applicable to a contract of hiring. The parties to the contract are the people of the United States and the candidate for a Federal judgeship. When he has been nominated by the President and confirmed by the Senate the commission

tendered or delivered to him is an offer on the part of the people of the United States to the candidate whereby they agree to enter into a contract on certain terms and conditions with the candidate and offer to pay him a fixed sum of money for the performance of certain services for them in accordance with the terms of the offer. No obligation on the part of the Government has yet attached; the candidate need not accept the offer; he is not compelled to qualify; that is a voluntary act on his part. (See Marbury *v.* Madison, 1 Cranch, 137.)

Section 257 of the judicial code provides that the Federal judges shall take a certain prescribed oath before they proceed to perform the duties of their respective offices.

The acceptance of the offer on the part of the candidate is evidenced by his oath, and when the oath is taken the contract of hiring becomes valid and binding on the parties to the same in accordance with the terms and conditions of the contract.

In this case the contracts between the United States and the respondent are evidenced by the various commissions and the various oaths accepting the same.

Under this state of facts, if we were not dealing with the Government as one of the parties to the contract, under constitutional limitations, the contract could be abrogated for breach of condition if necessary and the rights of the parties determined in the courts of law.

If it should be objected that the legal status of the judicial tenure must be placed on a higher ground than an ordinary contract right by reason of the solemnities necessary to create the status and by reason of the important and sacred functions of government with which the judge is charged, we perhaps would be justified in saying that a fiduciary relation of the highest and most sacred character known to the law is created by the commission of appointment and the oath of acceptance of a Federal judge. Under this conception of the status of the judicial tenure the judge is acting as a trustee. The subject matter of the trust is the judicial power of the United States, and the beneficiaries of the trust are the people thereof. Given this status in a court of equity, the trustee, under well-known and well-recognized principles of equitable jurisprudence, can always be removed on application of the beneficiary and a showing that the trustee is not performing his duties as such trustee in such a manner as to satisfy the conscience of the chancellor that he is acting for the best interest of the beneficiary. Realizing, however, the manifest impropriety of leaving the question of forfeiting the judicial tenure to the judges, the framers of the Constitution wisely provided a different forum, viz, the Congress, to raise and try the question of the forfeiture. We have now seen that whether we apply principles of law or equity to the status created by the appointment of the Federal judge there would be a forum to adjudicate the rights of the parties, and reasoning by analogy we are driven to the conclusion that the framers of the Constitution were not unmindful of the importance of the subject with which they were dealing, and intended to and did provide a forum before which the people of the United States could bring their judges and on proper showing of misbehavior, which demonstrates the unfitness of the judge to continue in office, work a forfeiture of the judicial tenure.

461. Summary of State trials of impeachments with reference to their holdings on the question of whether acts of a judge must be indictable to be impeachable.

On January 9, 1913,[1] in the Senate, sitting for the Archbald impeachment trial, Mr. Manager Paul Howland, of Ohio, filed as part of his final argument a record of impeachment trials in various States, with particular reference to their holdings on the question as to whether an offense in order to be impeachable must be indictable. The summary appears in full in the Congressional Record of that date.

462. Discussion of the meaning in English parliamentary law and in the constitution, of the phrase "high crimes and misdemeanors" as applied to judicial conduct.

Arguments as to whether acts of maladministration which are not indictable are subject to impeachment.

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[1] Third session Sixty-second Congress, Record, p. 1261.

On January 9, 1913,[1] in the Senate, sitting for the trial of the impeachment of Judge Robert W. Archbald, Mr. Manager Paul Howland, of Ohio, in final argument said:

In the removal section of the Constitution we find the words "high crimes and misdemeanors." These words are used in the same sense that had attached to them for centuries in the impeachment trials of England. They were used as part of the well-recognized terminology of the law of Parliament as distinguished from the common law. We must bear in mind that these terms are used in a section of the Constitution which is plainly intended to protect the State against its own servants.

The two enumerated offenses of treason and bribery are offenses peculiarly against the state as distinguished from offenses against the individual. In construing a clause of this character in the Constitution, where the whole object is to protect and preserve the Government, such a construction should be placed upon the language used as will best accomplish the results desired. To insist that the technical definition of the criminal law should be applied in construing the meaning of the term "high crimes and misdemeanors" is to insist on the narrowest possible construction, and loses sight of the object and purpose of this clause in the Constitution. To insist that it is impossible to impeach a judge unless he has committed some indictable offense is to say that the people of this country are powerless to remove a Federal judge so long as he is able to keep out of jail. While no criminal is fit to exercise the judicial function, it does not follow that all other persons are fit to be judges. Such a construction is absolutely repulsive to reason and ought not to be and is not a correct interpretation of the term "high crimes and misdemeanors."

Attention is often called to the discussion that took place in the Constitutional Convention between Colonel Mason and Mr. Madison in which Mr. Madison suggested that the term "maladministration" was too vague and the phrase "high crimes and misdemeanors" was adopted. Attention was called to that by the distinguished counsel for the respondent in his opening statement.

On the strength of this passage in Madison's papers it is contended that Mr. Madison did not construe the phrase "high crimes and misdemeanors" as including maladministration. (3 Madison's Papers, 1528.)

We find, however, that Mr. Madison in a speech in Congress on the 16th day of June, 1789, on the bill to establish a department of foreign affairs, in discussing the possibility of abuse of power by the Executive, said:

"Perhaps the great danger of abuse in the Executive's power lies in the improper continuance of bad men in office. But the power we contend for will not enable him to do this, for if an unworthy man be continued in office by an unworthy President the House of Representatives can at any time impeach him and the Senate can remove him, whether the President chooses or not. (4 Elliot's Debates, 375.)

This language clearly demonstrates that Mr. Madison believed that acts of maladministration which were not indictable were impeachable.

Nowhere in the English law of impeachment or in the Constitution of the United States or any of the States do we find any definition of impeachable offenses. The language of the Federal Constitution attempts no definition of impeachable offenses, and the general term "high crimes and misdemeanors" is not and was not intended to be a definition.

Under the State constitutions we sometimes find the added terms "mal and corrupt conduct," "corruption in office," and "maladministration"—all general terms, without attempting any technical definition. The reason for this is perfectly obvious, and is that the subject matter is not capable of technical definition. Who is wise enough to anticipate every manifestation of fraud that would give a chancellor jurisdiction and write it into a statute? It is the effect of acts under the circumstances of each particular case that confers jurisdiction. So it is with impeachment. No one can tell in advance in what way or from what source the danger may arise which demands

[1] Third session Sixty-second Congress, Record, p. 1260.

the exercise of this power. The power of impeachment is recognized and authorized in every one of our constitutions, Federal and State, but the circumstances which warrant the exercise of that power are not defined and the necessity for its exercise is in the first instance left to the discretion of the House of Representatives. It is an indefinite and broad power incident to sovereignty, and its exercise in this country is demanded whenever the agents of sovereignty have acted in such a manner as to destroy their efficiency in the discharge of their duties to the sovereign. The existence of this power is necessary to the permanence of the State, and the exercise of the power is necessary whenever and however the welfare of the State may be threatened by its civil officers.

Mr. Alexander Simpson, counsel for respondent, took issue with this argument, saying: [1]

It was claimed by Mr. Manager Howland to-day, that the words "high crimes and misdemeanors" as used in this provision of the Constitution were taken bodily out of the English practice, the English parliamentary law, as they said. That is unquestionably true. It is not true that in all the impeachments in England they used the words "high crimes and misdemeanors," but those words are used in a number of their impeachments. This being so, you must either accept the constructions placed upon those words in the lex parliamentii, or you must decline to accept that construction. If you decline to accept it, of course that branch of the argument falls by the wayside at once. But if you accept it, then the question arises which of the English precedents are you going to accept, in view of the fact that some hold that an impeachable offense need not be an indictable one, and others hold a precisely antagonistic view. Are you going back to the days when a man was impeached simply because he happened to have been put in office by those who have themselves just been turned out? If that is the view you are going to accept then perhaps every four years in this country there will be a wholesale slaughter. But if you are going to accept the best precedents which appear upon the English reports, and especially those down near to the time when the Constitution of the United States was adopted, then those best precedents show that, except for an indictable offense, no impeachment would lie under the laws of England.

But what are you going to do if the matter is to be considered solely under the language of the Constitution itself? The word "misdemeanors" in that clause must be taken either in the technical sense or in the proper sense. If that word is taken in the technical sense everybody knows that a misdemeanor taken technically is a crime pure and simple. If it is taken in the popular sense, then, notwithstanding what some text writers have said, I venture the assertion that if you go out into the cars or on the streets or in your homes and ask the people you meet what is meant by the words "treason, bribery, or other high crimes and misdemeanors," you will not find one in a thousand but will say that every one of those words imports a crime. If that is so, then necessarily, when you come to construe those words after this trial is over, you will necessarily have to reach the conclusion that these charges must be indictable or they can not be impeachable.

463. On January 9, 1914 [2] in the Senate, sitting for the Archbald impeachment trial, Mr. Manager John W. Davis, of West Virginia, said in final argument:

The issue narrows itself down to the meaning of the phrase "high crimes and misdemeanors" occurring in Article II, section 4, of the Constitution; and the respondent now renews the oft-repeated contention that this language can be used only with reference to offenses which, either by common law or by some express statute, are indictable as crimes. Every canon of construction which can be applied to this clause of the Constitution negatives the position which counsel for the respondent assume. Test it by the context, by contemporary interpretation, by precedent, by the weight of authority, and by that reason which is the life of every law, and the answer is always the same.

In the first place, when we read this clause of the Constitution, as we are required to do in the light of the context of the instrument, we are confronted at once by the clause fixing the tenure

[1] Record, p. 1270.

[2] Third session Sixty-second Congress, Record, p. 1266.

of judges of the Federal courts during good behavior; and if it be difficult, as counsel for respondent assert, to enlarge the phrase "high crimes and misdemeanors" so as to embrace acts not indictable as crimes, it is certainly far more difficult to restrict "good behavior" to the narrow limits fixed by the criminal law. To say that a judge need take as the guide of his conduct only the statutes and the common law with reference to crimes, and that so long as he remains within their narrow confines he is safe in his position, is to overlook the larger part of the duties of his office and of the restraints and obligations which it imposes upon him. We insist that the prohibitions contained in the criminal law by no means exhaust the judicial decalogue. Usurpation of power, the entering and enforcement of orders beyond his jurisdiction, disregard or disobedience of the rulings of superior tribunals, unblushing and notorious partiality and favoritism, indolence and neglect, all are violations of his official oath, yet none may be indictable. Personal vices, such as intemperance may incapacitate him without exposing him to criminal punishment. And it is easily possible to go further and imagine such indecencies in dress, in personal habits, in manner and bearing on the bench; such incivility, rudeness, and insolence toward counsel, litigants, or witnesses; such willingness to use his office to serve his personal ends as to be within reach of no branch of the criminal law, yet calculated with absolute certainty to bring the court into public obloquy and contempt and to seriously affect the administration of justice. Can it be possible that one who has so demonstrated his utter unfitness has not also furnished ample warrant for his impeachment and removal in the public interest?

Stated in its simplest terms, the proposition of counsel is to change the language of the Constitution so that instead of reading that—

"the judges both of the Supreme and inferior courts shall hold their offices during good behavior"—

it will read that—

"the judges both of the Supreme and inferior courts shall hold their offices so long as they are guilty of no indictable crime."

If the latter were the true meaning, is it conceivable that the careful and exact stylists by whom the Constitution was composed would have used an ambiguous term to express it?

But counsel ask: What shall be done with that clause which provides that in case of impeachment—the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment according to law.

This, they insist, is a definition by implication, and signifies that the scope of impeachment and indictment is one and the same, although the mode of trial and the penalty to be inflicted may differ. We submit, on the contrary, that this clause, instead of being a declaration that impeachment and indictment occupy the same field, is a recognition of the fact that the field which they occupy may or may not be identical; and, recognizing this fact, it declares merely that when the field of impeachment and the field of indictment overlap there shall be no conflict between them, but that the same offense may be proceeded against in either forum or in both.

The light drawn from contemporary speeches and writings confirms the position for which we contend. It is true, as counsel will point out, that in the Constitution Convention when the word "maladministration" was proposed it was objected to by Mr. Madison as too vague, and the words "high crimes and misdemeanors" were inserted instead; but it is also true that on the 16th day of June, 1789, when debating in the House of Representatives the propriety of giving to the President the right to remove an officer, he said:

"The danger, then, consists merely in this: The President can displace from office a man whose merits require that he should be continued in it. What will be the motives which the President can feel for such abuse of his power and the restraints that operate to prevent it? In the first place he will be impeachable by this House before the Senate for such an act of maladministration; for I contend that the wanton removal of meritorious officers would subject him to impeachment and removal from his own high trust."

Mr. Davis then cited numerous authorities and said:

It can be safely said that nothing was further from the minds of the men who framed the Constitution than the construction here contended for by respondent's counsel.

Again we may look to the precedents only to find that the word "misdemeanor" has always been treated as having a meaning of its own in parliamentary law, and that one impeachment proceeding after another has been based upon offenses not within the law of crimes. I do not repeat the many authorities for this statement which my colleagues have cited. This body, of course, being a law unto itself, is bound by no precedents save those of its own making, and even as to them no doubt has the power which any other court enjoys to overrule a previous decision if convinced of its error.

After citing authorities, Mr. Davis continued:

But, without stopping to multiply precedents further, we next call attention to the long list of eminent authorities and commentators on the Constitution who uphold the construction for which we contend—Story, Curtis, Cooley, Tucker, Watson, Foster—all these and many more have been cited in the course of this discussion. Speaking as a lawyer, it must be said that the weight of authority in our favor is overwhelming.

Last of all we resort to the highest of all canons for the construction of constitutions and statutes alike, viz, "The reason of the thing." It is true that the framers of the Constitution intended to create an independent judiciary, but they never contemplated a judiciary which should be totally irresponsible. Regarding public office as a public trust, they found it necessary to lodge somewhere the power to determine whether that trust had or had not been abused. In the appointment of judges they required that the judgment of the President with reference to individual fitness should be concurred in by the Senate, and quite naturally they gave to the body which had approved the appointment the power to withdraw that approval and dismiss the officer when he had shown himself faithless to his trust. In requiring first of all a majority of the House of Representatives in order to prefer articles of impeachment and then two-thirds of the Members of the Senate present to convict they hedged the power about with all the safeguards necessary to protect the upright official and yet leave it sufficient play to preserve the public welfare. Experience has shown how more than adequate the machinery so provided has been to prevent hasty or intemperate action. Indeed, it would seem that if the fathers erred it was in making too slow and difficult the process of removing the unfaithful and unfit. I hope—indeed, I believe—that this high court will never sanction any construction of the Constitution which will render it practically impotent for the purposes of its creation.

But in the brief filed by counsel for the respondent it is suggested that if an impeachable offense need not be criminal in fact it must still be criminal in its nature. It will at once be clear that it is a definition which does not define, and that the phrase "criminal in its nature" has no more certainty to commend it than has "good behavior." Recognizing this to be true, counsel go on to say, in the attempt to define their own language, that—

"For the same reason, even if the misdemeanors for which impeachment will lie are not necessarily indictable offenses, yet they must be of such a character as might properly be made criminal."

We are not called on to agree with their position as so stated, but have no great cause to fear it.

We understand a crime or misdemeanor to be, in the language of Blackstone:

"An act committed or omitted in violation of a public law either forbidding or commanding it."

If the phrase "criminal in nature" means those things which might be made crimes by legislative prohibition, every act here charged against this respondent comes within the description. Certainly Congress could by express criminal statute forbid a Federal judge to accept gifts of money from members of his bar, to communicate in private either orally or by letter with counsel in reference to cases pending for decision, to request financial favors from parties litigant before him, and as to the Commerce Court might well forbid the members of that court to engage in the business of hunting bargains from railroad companies engaged in interstate commerce. And certainly if such things are not already misdemeanors or misconduct or misbehavior, a statute to forbid them can not come too soon.

464. Discussion of the question of impeachability of a judge for offenses not subject to prosecution by indictment or information in a criminal court.

Argument that impeachment is not restricted to offenses indictable under Federal law, and that judges may be impeached for breaches of "good behavior."

On January 9, 1913,[1] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, Mr. Manager George W. Norris, of Nebraska, in the final argument said:

It is strenuously argued by attorneys for respondent that an impeachment lies only for offenses which are criminal in their nature, and which could legally be the subject of prosecution by indictment.

The Constitution provides (Art. I, sec. 2) that the House of Representatives shall have the sole power of impeachment, and in section 3 of the same article it is provided that the Senate shall have the sole power to try all impeachments. It is undisputed, and, indeed, has never been questioned, that to remove a United States judge from office two things are essential: First, he must be impeached by the House of Representatives, and, second, he must be tried and convicted by the Senate upon the articles of impeachment presented by the House. There is no other way provided by the Constitution of the United States for the removal from office of a judge. In the consideration of this subject, I shall draw a distinction between a judge of the United States court and all other civil officers of the United States. I shall demonstrate from the Constitution itself that a judge of the United States court can properly be impeached, convicted, and removed from office for any act from treason down to conduct that tends to bring the judiciary into disgrace, disrespect, or disrepute. Section 4 of Article II of the Constitution reads as follows:

"The President, Vice President, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."

It will be noted that this provision of the Constitution applies to all civil officers of the United States alike. It is undisputed that it includes judges, and were there no other provision of the Constitution applying particularly to the conduct or the tenure of office of judges, then there would be no distinction between the impeachment and trial of judges and any other civil officer, including the President and Vice President. But section 1, Article III, so far as the same is applicable to this case, provides: "The judges, both of the Supreme Court and inferior courts, shall hold their offices during good behavior." This provision of the Constitution, it will be observed, applies only and exclusively to judges. It has no relation to any other civil officer of the Government, and if we are not to nullify it entirely, we will find that it bears a very important part in the consideration of the particular branch of the case under discussion. I desire the Senate to continually bear in mind and to faithfully observe at all times during the consideration of this subject that in the construction of any legal document or instrument the court will so construe it as to give life and vitality to every part of the instrument, if it can reasonably and logically do so. It is our duty to construe these two provisions of the Constitution together and, if possible, to give equal vitality and life to them both.

Most of the civil officers provided for by the Constitution have a definite fixed term, but the judges hold office during good behavior. Much of the contention arises over what is meant in section 4, Article II, by the word "misdemeanor." It is contended by the respondent that this word is intended only to apply to such offenses as are indictable and punishable under the criminal law, and that a judge can not be impeached and removed from office unless his offense, whatever it may be called, is at least of so high a degree as to make it criminal and indictable. This construction, if adhered to, absolutely nullifies that provision of section 1, Article III, above quoted which provides that judges shall hold their offices during good behavior. If judges can hold their offices only during good behavior, then it necessarily and logically follows that they can not

[1] Third session Sixty-second Congress, Record, p. 1264.

hold their offices when they have been convicted of any behavior that is not good. If good behavior is an essential to holding the office, then misbehavior is a sufficient reason for removal from office. And if, therefore, we give full life and vitality to both of these provisions of the Constitution, we must hold that the lack of good behavior, or misbehavior, mentioned in section 1, Article III, is synonymous with the word "misdemeanor" in section 4, Article II, in all cases where the offense is less in magnitude than in indictable one.

This view of these provisions of the Constitution has been sustained by practically all of the leading law writers upon the subject. It has also been sustained by the Senate in the trial of prior impeachment cases that have taken place. (John Randolph Tucker, Commentaries on the Constitution, vol. 1, sec. 200; George Ticknor Curtis, Constitutional History of the United States, p. 481; Watson, on the Constitution, vol. 2, p. 1034.) These citations showed that the Senate has in the past found officials guilty where the crime charged was not an indictable offense.

But suppose, for the sake of argument, it be admitted that "misdemeanors" as used in section 4, Article II, was intended by the framers of the Constitution to exclude all offenses that were not indictable under the law, it would still not necessarily follow that judges could not be impeached and removed from office for misdemeanors of so low a grade that they were not indictable. This section simply provides that all the civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, and other high crimes and misdemeanors. If in any other provision of the Constitution additional reasons for impeachment are given of some of these specified officers, or additional reasons are given why some of them should cease to hold office, then under such provision such specified officers could be tried, impeached, and removed, even though the offense of which they might be guilty was not included in any of those enumerated in section 4, Article II.

While I believe the construction placed on "misdemeanors" by the respondent is wrong, yet they have not made a defense to the various charges of misbehavior in office, even if we accept their construction of the law that misdemeanors in this section means only indictable offenses. If, for instance, the President was expressly excluded, from the officers named in this section, then I concede there would be no way under the Constitution for him to be impeached, tried, and removed from office, because there is no other provision of the Constitution that provides for any offense on the part of the President or limits his tenure of office, excepting the expiration of his regular term. But if judges were expressly eliminated from this section, and it read, "all civil officers of the United States except judges, etc.," it would not follow that they could not be impeached, convicted of misbehavior, and removed from office, because section 1, Article III, expressly provides that they shall only hold their offices during good behavior. In other words, our forefathers in framing the Constitution have wisely seen fit to provide for a requisite of holding office on the part of a judge that does not apply to other civil officers. The reason for this is apparent. The President, Vice President, and other civil officers, except judges, hold their positions for a definite, fixed term, and any misbehavior in office on the part of any of them can be rectified by the people or the appointing power when the term of office expires. But the judge has no such tenure of office. He is placed beyond the power of the people or the appointing power and is, therefore, subject only to removal for misbehavior. Since he can not be removed unless he be impeached by the House of Representatives, tried and convicted by the Senate, it must necessarily follow that misbehavior in office is an impeachable offense.

Any authority that has been cited by the respondent which shows or tends to show that a President, Vice President, or other civil officer other than a judge can not be impeached except the offense is at least of the grade of a misdemeanor that is indictable, does not apply to the impeachment or trial of a United States judge. To hold that an officer whose tenure of office is definite and fixed and who will necessarily go out of office within the course of a year or two, should not be impeached and removed from office for a misbehavior that does not reach in magnitude an indictable offense, is entirely different from holding that an officer whose term of office ordinarily lasts for life should not be so impeached and removed. And our forefathers evidently had this distinction in mind when they applied exclusively to judges that provision of the Constitution which provides that judges shall hold their offices during good behavior.

If I am not right in my construction of the Constitution, then the Congress and the country are absolutely helpless in any attempt to get relief from a judge who drags the judicial ermine down into disgrace, but is careful in doing so not to commit any criminal offense. If I am not right in my construction, then that provision of the Constitution which says that judges shall hold office during good behavior is absolutely nullified, and as far as the good behavior part of it is concerned it has no vitality, no life, no effect. The judge who secretly arranges with attorneys on one side of a case to make a private argument—who not only makes such arrangement, but who initiates it—is guilty of a misbehavior. Every lawyer knows this; every Senator will admit it. Are we helpless in the premises simply because such an act is not indictable under the law? The judge who is continually asking favors of litigants in his court, if he is careful, can not be convicted of any crime, but he is guilty of a misbehavior. No one will dispute it. He is perverting the ends of justice. He is bringing the judiciary into disgrace and into disrepute. Carried to its logical conclusion, such conduct would soon mean that our judicial system would fall. It could not survive. Are we helpless? Must we say that, although the Constitution says the judge shall only hold his office during good behavior, the House of Representatives and the Senate are unable to apply those provisions of the Constitution which provide for impeachment, trial, and removal? If our forefathers meant anything when they provided in the Constitution that the judges should hold their offices during good behavior, they certainly intended that when the judge misbehaved he should be removed from office. Such a construction of the Constitution will not violate any principle of law, but, on the other hand, it will give full effect to a constitutional provision that would otherwise be meaningless and a dead letter. Our forefathers wisely, I think, refrained in the Constitution from giving any definition to "crimes and misdemeanors," and likewise refrained from defining what would be an abuse or a violation of "good behavior." Misbehavior, the opposite of good behavior, and I think the proper appellation of any conduct that is not good behavior, implies innumerable offenses of greater or less magnitude.

As to what is misbehavior in office must be determined in the first place by the House of Representatives when they adopt the articles of impeachment. It must be redetermined by the Senate when, after listening to the evidence, they pass judgment upon the case. I think all will agree that any conduct on the part of a judge which brings the office he holds into disgrace or disrepute, or which results or has a tendency to result in the denial of absolute justice to all persons engaged in litigation in his court, is a misbehavior. Certainly such conduct is not good behavior, and the Constitution provides that he shall only hold office during good behavior. Therefore it follows that in the absence of good behavior on the part of the judge he should be removed from office. It is undoubtedly true that the House of Representatives, in passing upon articles of impeachment, and the Senate upon the trial of the offense charged in such articles, where only misbehaving in office was shown, would take into consideration in reaching their conclusions not only the magnitude of such misbehaviors but the frequency of their occurrence. Where the evidence shows that a judge is continually misbehaving by engaging in conduct and practices that bring his office into disrespect and disrepute, the House and the Senate can not avoid their duty or their responsibility by saying that each distinct offense is in itself of small magnitude and not indictable.

465. Discussion of the clause "during good behavior" in relation to tenure of judicial offices, and effect by implication of misbehavior upon such tenure.

On January 8, 1913,[1] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, Mr. Manager Edwin Yates Webb, of North Carolina, in final argument said:

If the Constitution, Article III, section 1, means anything, then we want to bring it before the Senate to-day and ask Senators to say what it does mean when it provides that judges of the Supreme Court and inferior courts shall hold their offices "during good behavior."

[1] Third session Sixty-second Congress, Record, p. 1217.

The provision in Article II of the Constitution, section 4, Mr. President, refers to impeachment of the President, Vice President, and other civil officers for treason, bribery, or other high crimes and misdemeanors; but later on in that same great instrument, after Article II had been adopted, the constitutional fathers say the judges of the United States shall hold their offices "during good behavior."

It has been pointed out by many constitutional writers, and you yourselves see, that the people have no way of getting rid of a judge who has violated this provision by misbehavior except it is done by this great body. What does "during good behavior" mean?

The Century Dictionary says:

"During good behavior: As long as one remains blameless in the discharge of one's duties or the conduct of one's life; as, an office held during good behavior."

Mr. Foster in his work on the Constitution (p. 586) makes this statement:

"The Constitution provides that 'the judges, both of the Supreme and inferior courts, shall hold offices during good behavior.'"

This necessarily implies that they can be removed in case of bad behavior; but no means except impeachment is provided for their removal, and judicial misconduct is not indictable by either a statute of the United States or the common law.

Says Elliott in his Debates on the Constitution:

"Mr. Dickinson moved as an amendment to Article XI, section 2, after the words 'good behavior,' the words: '*Provided,* That they may be removed by the Executive on the application of the Senate and the House of Representatives.'"

This was in respect of the judges. Mr. Gerry seconded the motion. Mr. Gouverneur Morris thought it a contradiction in terms to say that the judges should hold their offices during good behavior and yet be removable without a trial. Besides, it was fundamentally wrong to subject judges to so arbitrary an authority.

But, mark you, the object then was to remove for bad behavior, but to give them a trial, as the Senate is doing in this particular case.

Judge Lawrence, in the Johnson impeachment case (p. 643), says:

"Impeachment was deemed sufficiently comprehensive to cover every proper case for removal."

In Watson on the Constitution the proposition is stated as follows (vol. 2, pp. 1036–1037):

"What will those who advocate the doctrine that impeachment will not lie except for an offense punishable by statute do with the constitutional provision relative to judges, which says: 'Judges, both of the Supreme and inferior courts, shall hold their offices during good behavior'? This means that as long as they behave themselves their tenure of office is fixed and they can not be disturbed. But suppose they cease to behave themselves? When the Constitution says 'a judge shall hold his office during good behavior' it means that he shall not hold it when it ceases to be good."

I suppose the argument in the Federalist, Mr. President, had as much to do with the adoption of the Constitution of the United States as any other authority. I quote:

"The principle of this objection would condemn a practice, which is to be seen in all the State governments—if not in all the governments with which we are acquainted—I mean that of rendering those who hold offices during pleasure dependent on the pleasure of those who appoint them." (Federalist, p. 306.)

And that is yourselves, Senators, for the President nominates judges and you appoint them.

"According to the plan of the convention, all the judges who may be appointed by the United States are to hold their offices during good behavior; which is conformable to the most approved State constitutions." (Federalist, p. 355.)

"Upon the whole, there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have established good behavior as the tenure of judicial offices in point of duration, and that so far from being blamable on this account their plan would have been inexcusably defective if it had wanted this most important feature of good government," (Federalist, p. 361; Publius.)

Mr. President, after counsel for the respondent has discussed in 26 pages of his brief the proposition that the respondent is not impeachable unless he is indictable, he then makes this concession: That if it is not necessary to prove indictable offenses against the judge it is necessary, at least, to prove some offense of a criminal nature.

Mr. President, after all crime is nothing but misconduct. The only thing that is made criminal in this country is some form of misconduct.

Before proceeding to argue the facts in the case, I maintain that any judge of a high court who will dicker and traffic with litigants in his court while their cases are pending ought to be indictable, because such conduct is criminal in its nature, and the reason it has not been made indictable long ago is because the people of the United States have never thought it necessary to surround the judiciary with such a statute.

In reply to this argument, Mr. Alexander Simpson, counsel for respondent, said: [1]

Now, I want to know what good behavior means. This is the provision:

"The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office."

If you take that whole clause and consider it, either historically or grammatically, you will find that the words "good behavior" relate to good behavior in office. The compensation which is to be paid is for service in the office. The good behavior which is the tenure is to be good behavior in the office. But, say the managers, it is not good behavior in office which is the test at all, and you may impeach and remove a man even though he has behaved perfectly well in his office. Personally I agree with that; I am not challenging that position, but it answers their proposition now being considered that good behavior in office is the tenure by which the respondent holds, and for a breach of that he may be removed from office without considering the impeachment clause of the Constitution.

I do not think that the good-behavior clause has anything whatever to do with the impeachment. Everybody knows how the good-behavior clause came into being. In the ancient days the judges, like all other civil officers, held their positions at the pleasure of the King. Then the barons wrested from the King his power of dismissal and required that there should a good-behavior tenure rather than a tenure at the pleasure of the King, subject at that time only to the power of impeachment. And then, a little later—I think it was in 1701, after the Revolution—there was added the removal power; so that, upon address, judges might be removed the same as upon impeachment. without a trial Those are the circumstances under which the good-behavior tenure came into existence.

But what does "good behavior" mean if you are going to take that alone into consideration? A man ill behaves if he speaks unduly cross to his wife and children. May he be removed from office because of that? If he is the happy owner of an automobile he may violate the speed laws and be hailed before some magistrate and fined. Is he to be removed from office because of that? No one would answer "yes" to either of those questions, and hence you must get down to something definite, something upon which you can lay your finger and say, "There is the definite thing which this man should have known, and as he should have known it and has chosen to violate it he must pay the penalty of his violation." That definite thing can be ascertained only by reference to the clause which says that he may be impeached for "treason, bribery, or other high crimes and misdemeanors." In the ordinary sense of the term one can understand how a man can be of perfectly good behavior in everything else and still be guilty of treason, but does anybody doubt but that he could be removed from office if he was guilty of treason? In truth, you have to go back from the good-behavior clause to the impeachment clause to find out what are the causes for an impeachment. It is the impeachment clause which is the controlling clause and not the good behavior clause at all.

The argument that grows out of the claim that a, violation of the good-behavior clause is sufficient justification for an impeachment is as clearly reasoning in a circle as anybody can well imagine. Concede that good behavior is the tenure, still you can not remove a man from office,

[1] Record, p. 1270.

under the Constitution, unless he is guilty of "treason, bribery, or other high crimes and misdemeanors," and hence the determinative factor as to whether or not a judge was of good behavior is whether or not he was guilty of "treason, bribery, or other high crimes and misdemeanors."

On January 3, 1913,[1] Mr. Manager Henry D. Clayton, of Alabama, presented a brief on behalf of the House of Representatives, covering this question, among others, as follows:

THE TENURE OF FEDERAL JUDGES LIMITED TO "DURING GOOD BEHAVIOR."

The provision in Article III, section 1, of our Constitution that "the judges, both of the Supreme and inferior courts, shall hold their offices during good behavior," which was also borrowed from the English laws, must be considered in pari materia with Article IV, section 2, providing that all civil officers of the United States shall be removed from office upon "impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors."

Good behavior is thus made the essential condition on which the tenure to the judicial office rests, and any act committed or omitted by the incumbent in violation of this condition necessarily works a forfeiture of the office. The Constitution provides no method whereby a civil officer of the United States can be removed from office save by impeachment. It follows, therefore, that the framers of our Constitution must have intended that Federal judges, who are civil officers, should be removable from office by impeachment for misbehavior, which is the antithesis of good behavior. Otherwise the constitutional provision limiting the tenure of the judicial office to "during good behavior" would be entirely without force and effect.

466. Review of impeachments in Congress showing the nature of charges upon which impeachments have been brought and judgments of the Senate thereon.

On January 3, 1913,[2] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, Mr. Manager Henry D. Clayton, of Alabama, filed, on behalf of the House of Representatives, a brief, in which the following appears:

IMPEACHMENT TRIALS IN THE UNITED STATES SENATE.

A concise statement of the general character of the several impeachment trials which have been heretofore conducted by the Senate of the United States:

IMPEACHMENT OF WILLIAM BLOUNT.

William Blount, a Senator from Tennessee, was impeached in 1797, on a charge of conspiracy to create, promote, and set on foot within the jurisdiction of the United States, and to conduct and carry on from thence, a hostile military expedition against the territories and dominions of Spain in Florida and Louisiana for the purpose of wresting such territories from Spain and conquering the same for Great Britain, with which Spain was at war; conspiring to incite the Creek and Cherokee Nations of Indians to commence hostilities against the subjects of Spain in violation of the then existing treaty between the United States and Spain, and conspiring to alienate the confidence of these Indian tribes from the principal agent of the United States appointed by the President, in accordance with law, to reside among the tribes; conspiring to seduce the official interpreter appointed by the United States to reside among the said Indian tribes from the duty and trust of his appointment, and conspiring to impair the confidence of the Cherokee Nation in the United States and create discontent among the Indians relative to the ascertainment of the boundary line of the United States and the Cherokee Nation under treaty provisions.

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[1] Record, of trial, p. 1051.

[2] Third session Sixty-second Congress, Record of trial, p. 1051.

Shortly after Blount had been impeached by the House he was expelled by the Senate, and he was thereafter acquitted of the impeachment on the ground that he was not a civil officer of the United States.

IMPEACHMENT OF JOHN PICKERING.

John Pickering, judge of the United States District Court for the District of New Hampshire, was impeached in 1803, on the ground that he had disobeyed the law in the course of proceedings brought by the United States to condemn a ship with its cargo for a violation of the customs laws, in that the judge delivered the ship to the claimant after its attachment by the marshall without requiring a bond, in accordance with the requirements of law; that in such proceedings he had refused to hear the testimony offered in behalf of the United States; that he had refused to grant an appeal by the Government from his arbitrary decree to the circuit court; and that he had attempted to perform his official functions while in a state of intoxication. The respondent did not appear to answer the articles exhibited against him, but his son presented a petition, alleging the insanity of his father and praying an opportunity to adduce evidence in that behalf. Evidence was admitted and considered by the Senate in support of this petition. The facts alleged in the articles of impeachment were proved to the satisfaction of the Senate, and the respondent was convicted on each of the articles against him and removed from office.

IMPEACHMENT OF SAMUEL CHASE.

In 1804 the House impeached Samuel Chase, a justice of the United States Supreme Court, on the ground that he had been guilty of certain misconduct to the prejudice of the defendants in the trials of John Fries for treason and James Thompson Callender for breach of the sedition laws; that he had improperly attempted to induce a grand jury in Delaware to find an indictment against the editor of a newspaper for breach of the sedition laws; and for addressing an intemperate and inflammatory harangue to a jury in the State of Maryland.

On a party vote, the respondent was acquitted as to all of the articles exhibited against him.

IMPEACHMENT OF JAMES H. PECK.

In 1830 James H. Peck, judge of the United States District Court for the District of Missouri, was impeached on the ground that he had grossly abused his power as a judge in sentencing an attorney to 24 hours imprisonment and suspension from the bar of his court for 18 calendar months for writing and publishing a moderate criticism of one of Judge Peck's decisions in a case in which this attorney had appeared in behalf of the plaintiff, with the result that the attorney was practically prevented from further participation in the case. The respondent was acquitted by the Senate on all of the articles presented against him on the ground that he was justified in assuming that he was legally clothed with the power that he had exercised, and that the element of malice had not been established.

IMPEACHMENT OF WEST H. HUMPHREYS.

In 1862 West H. Humphreys, judge of the United States District Court for the District of Tennessee, was impeached for making a public speech declaring the right of secession and inciting revolt and rebellion against the Government of the United States; with the support and advocacy of the ordinance of secession; with aiding in the organization of an armed rebellion against the United States; with conspiring to oppose the authority of the Government of the United States by force; with refusing to hold his court or perform its functions; and with unlawfully acting as judge of the Confederate district court in causing arrests, imprisonments, and confiscations. The respondent made no appearance, and the trial proceeded in his absence. The respondent was convicted on all the charges, with the exception of the unlawful arrests and confiscations, and was removed and disqualified from holding office.

IMPEACHMENT OF ANDREW JOHNSON.

Andrew Johnson, President of the United States. was impeached in 1868 on 11 articles charging the attempted removal of E. M. Stanton, the Secretary of War, in violation of the so-called

tenure-of-office act; in attempting to induce a general of the Army to violate the provisions of an act of Congress; and of attempting to bring into contempt and reproach the Congress of the United States by intemperate and inflammatory speeches. The respondent was acquitted on each of the charges by a margin of one vote.

IMPEACHMENT OF WILLIAM W. BELKNAP.

In 1876 William W. Belknap, Secretary of War, was impeached on five articles, charging that he had accepted a portion of the profits of an Army post tradership from a post trader whom he had appointed while he held the War portfolio. A few hours before the House formally adopted the articles of impeachment against him, Belknap resigned as Secretary of War and the President accepted his resignation. His counsel interposed a plea to the jurisdiction in the Senate on the ground that the respondent was not a civil officer of the United States at the time of his impeachment. This plea was overruled by a majority of less than two-thirds and the trial proceeded. The respondent was ultimately acquitted by the votes of the Senators who had originally voted in favor of the plea to the jurisdiction.

IMPEACHMENT OF CHARLES SWAYNE.

In 1904 Charles Swayne, judge of the United States District Court for the Northern District of Florida, was impeached on 12 articles, charging that he had rendered false claims against the Government in his expense accounts; that he had appropriated to his own use, without making compensation to the owner, a certain railroad car belonging to a railroad company then in the possession of a receiver appointed by the respondent, and that he had allowed the credit claimed by the receiver for and on account of the expenditure incident to the improper use of this car as a part of the necessary expenses of operating the road; that he had resided outside of his district in violation of a statute of the United States; and that he had maliciously adjudged certain parties to be in contempt of court and imposed excessive fines and prison sentences therefor without just cause or warrant of law.

A trial was had and the respondent was ultimately acquitted.

Chapter CXCIV.[1]

FUNCTION OF THE HOUSE IN IMPEACHMENT.

467. A summary of impeachment proceedings resulting in trial, with reference to methods of their institution, and the number and manner of appointment of managers on the part of the House.

An examination of the comparatively few impeachment cases which have resulted in trial shows a wide variance in the manner in which preliminary investigations in the House have originated and in the method of selecting managers on the part of the House to conduct impeachment in the Senate.

The case of Senator William Blount, of Tennessee,[2] the first in the history of the Congress to reach trial, had its inception in a confidential letter from the President to the House.

The eleven managers selected by the House were elected by ballot. All were, of course, members of the Federalist Party.

In this, and in the two cases following, procedure was through special committees, as the Judiciary Committee did not come into existence as a standing committee until 1813.

The case of Judge Pickering[3] originated in response to a special message from the President, to which were affixed certain ex parte affidavits.

The special committee to which the message was referred having reported in favor of impeachment, and the report being agreed to by the House, eleven managers were elected by ballot, all of whom were from those voting for impeachment, seven being members of the majority party of the House and one of the minority party. The party affiliations of the remaining three are not of record.

Action against Judge Chase[4] was begun as the result of a formal statement in the House by Mr. John Smilie, of Pennsylvania, who incorporated in his remarks a statement made by Mr. John Randolph, of Virginia, criticizing the official conduct of Judge Chase.

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[1] Supplementary to Chapter LXIV.
[2] Hinds' Precedents, sections 2294–2318.
[3] Hinds' Precedents, sections 2319–2341.
[4] Hinds' Precedents, sections 2342–2363.

Two members of the select committee chosen to inquire into the charges were chosen from those opposing the investigation, but all of the seven managers, elected by the House by ballot had voted both for the investigation and in favor of impeachment. Four of them were members of the majority party.

The case of Judge Peck [1] originated as the result of a memorial by an individual, which was referred to the Committee on the Judiciary and was by that committee reported to the House with a recommendation in favor of impeachment.

Five managers were selected by ballot, three of whom served on the Judiciary Committee, three belonging to the majority party of the House and two to the minority.

In the case of Judge Humphreys [2] the Committee on the Judiciary, as the result of an investigation authorized by resolution, reported recommending impeachment.

Five managers were appointed by the Speaker, three from the Judiciary Committee and four representing the majority party of the House.

The first attempt to impeach President Andrew Johnson [3] was initiated by Mr. James Ashley, of Ohio, who rose in the House and impeached the President, submitting specific charges, which were by resolution referred to the Committee on the Judiciary for investigation.

Congress having adjourned without action on the subject, a second proceeding looking to impeachment was begun in the succeeding Congress and referred to what was known as the Committee on Reconstruction, which recommended impeachment.

Under authority conferred by resolution, the Speaker appointed seven managers, two of whom were members of the Committee on the Judiciary and six of whom were members of the majority party of the House.

The impeachment of Secretary of War William W. Belknap [4] resulted from an investigation by a select committee appointed to look into the affairs of the Government in general. On report of this committee, the Committee on the Judiciary was instructed to draw up articles of impeachment.

Seven managers were appointed by the Speaker, three of whom were from the Committee on the Judiciary and five of whom belonged to the majority party in the House.

Mr. William Lamar, of Florida,[5] rising in his place, impeached Judge Swayne, making specific charges, which were referred to the Committee on the Judiciary. The Judiciary Committee reported in favor of impeachment and, by resolution, a select committee was appointed to draw up articles of impeachment. This was in keeping with the procedure in each previous impeachment case, with the exception of that of Secretary Belknap, where, as in the case of Judge Archbald, following, the investigating committee reported the articles of impeachment.

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[1] Hinds' Precedents, sections 2364–2384.

[2] Hinds' Precedents, sections 2385–2397.

[3] Hinds' Precedents, sections 2408–2443.

[4] Hinds' Precedents, sections 2444–2468.

[5] Hinds' Precedents, sections 2469–2485.

Seven managers to conduct the impeachment of Judge Swayne were appointed by the Speaker, five of whom were members of the Committee on the Judiciary and four of whom were from the majority party of the House.

The original charges against Judge Archbald [1] were filed by a commissioner of the Interstate Commerce Commission in a letter to the President. Later, in the House, Mr. George W. Norris, of Nebraska, introduced a resolution asking that the President transmit this letter to the House. The letter having been messaged to the House by the President, was referred to the Committee on the Judiciary, which, after investigation, recommended impeachment.

Seven Members were named by resolution to act as managers, all of them members of the Committee on the Judiciary, the only instance in the history of impeachment proceedings in which all managers were selected from one committee. Four of the managers belonged to the majority party of the House.

In most of the cases cited a select committee was appointed by the Speaker to take the case of impeachment to the bar of the Senate. The function of this committee was simply to report to the Senate the fact that an impeachment had been voted in the House and to report back to the House that they had so reported to the Senate.

In some cases the Speaker appointed a select committee to draw up the articles of impeachment, the work of the committee being completed when the articles so drawn had been adopted by the House.

It is to be noted that managers have been selected in three ways:

(*a*) By resolution authorizing the Speaker to appoint managers and naming the number thereof;

(*b*) By resolution naming both the number and the personnel of the committee;

(*c*) By election by ballot.

In case of election by ballot a majority vote has been necessary to the selection of each of the seven managers.

Where six received a majority vote and the seventh (although the next highest) failed to receive a majority vote another ballot on the seventh manager was taken.

468. A proposition to impeach a civil officer of the United States is presented as a question of constitutional privilege.

The inquiry into the conduct of H. Snowden Marshall, United States district attorney for the southern district of New York.

An instance in which a Member after submitting articles of impeachment which were referred to a committee of the House, later submitted amended articles of impeachment which were referred to the same committee.

The incorporation of unprivileged matter in a resolution proposing impeachment destroys its privilege.

A resolution directly proposing impeachment is privileged but the same is not true of one proposing investigation with a view to impeachment.

A Member submitting a privileged resolution proposing impeachment is entitled to recognition for one hour in which to debate it.

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[1] Sections 7727–7741 of this work.

A Member recognized to present a privileged resolution may not be taken from the floor by a motion to refer.

On December 14, 1915,[1] Mr. Frank Buchanan, of Illinois, submitted as a privileged subject the following:

Mr. Speaker, by virtue of the power conferred on me by the Constitution of the United States as a Member of this House, and to the end that justice may be restored in the administration of the office of United States district attorney for the southern district of New York, I impeach H. Snowden Marshall, United States district attorney for the southern district of New York, for the following specific offenses:

1. He has corruptly neglected and refused to prosecute gross and notorious violations of law by the most powerful and dangerous criminal trusts and monopolies in the United States within his said judicial district.

2. He has prostituted the great office intrusted to him by the people to the service of the great criminal trusts.

He has used the powers of his said office for the purpose of publicly defaming, slandering, and libeling the good name of peaceful and law-abiding citizens of the United States, to their great injury.

4. He has violated persistently the eight-hour laws of the United States and of the State of New York.

5. He has corruptly neglected and refused to prosecute men who have made the port of New York within his said district a naval base for foreign belligerent powers.

6. He has corruptly neglected and refused to prosecute violators of the Federal statutes prohibiting the loading and shipment of explosives on ships carrying passengers.

And for other high crimes and misdemeanors.

On motion of Mr. Buchanan, of Illinois, the charges were referred to the Committee on the Judiciary.

On January 11, 1916,[2] Mr. Buchanan again asked recognition for a question of privilege and said:

I rise to offer a resolution amending my impeachment charges against H. Snowden Marshal and I desire to send the following resolution to the Clerk's desk, to be read.

The Clerk read as follows:

Whereas on the 14th day of December, 1915, certain charges of impeachment were presented in this House by me against the United States district attorney for the southern district of New York, H. Snowden Marshall; and

Whereas said charges were not accompanied by a resolution empowering the Judiciary Committee sufficiently:

Therefore I present the following amended impeachment charges contained in the resolution which I am now offering:

Resolved, That the Committee on the Judiciary be directed to inquire and report whether the action of this House is requisite concerning the alleged official misconduct of H. Snowden Marshall, United States attorney for the southern district of New York.

The resolution here details at length specific items, and concludes:

And in making this investigation, the said committee is hereby authorized to send for persons and papers, administer oaths, take testimony, employ a clerk and stenographer, and is also authorized to appoint a subcommittee to act for and on behalf of the whole committee whenever and

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[1] First session Sixty-fourth Congress, Record, p. 240.

[2] Record, p. 913.

wherever it may be deemed advisable to take testimony for the use of said committee. The said subcommittee, while so employed, shall have the same powers in respect to obtaining testimony as are herein given to said Committee on the Judiciary, with a sergeant at arms, by himself or deputy, who shall serve the process of said committee or subcommittee and shall attend the sitting of the same as ordered and directed thereby. The Speaker shall have authority to sign, and the Clerk to attest, subpoenas for any witness or witnesses.

The expense of such investigation shall be paid out of the contingent fund of the House.

Mr. James R. Mann, of Illinois, made the point of order that the resolution was not privileged, in that it included a provision for the payment of expenses from the contingent fund of the House, and said:

To begin with, it provides for the payment of the expenses out of the contingent fund of the House, and under the rules no resolution providing for that is privileged unless it is reported from the Committee on Accounts.

That is far enough; but my colleague from Illinois has impeached this official and the House had referred that matter to the Committee on the Judiciary. Now he presents a resolution, not of impeachment, but a resolution authorizing a committee to make an investigation, which of itself is not a privileged matter.

The privileged matter is the impeachment. That is not concerned in this case. The Speaker could very readily see that if to-day I can impeach a judge or other official of the United States and have it referred to the Committee on the Judiciary and immediately thereafter present a resolution providing for an investigation, and that is privileged, then I am entitled to have an hour in the House in the discussion of that, and if that be voted down I can present another resolution, if it be privileged, in a little different form, and take another hour in the House, and if that be laid upon the table or something else be done with it, then I present another resolution along the same lines, and so on ad infinitum.

Now, the privilege is the presenting of the impeachment. A Member on his responsibility in the House impeaches an official of the Federal Government. That is a matter of high privilege. But when the House has disposed of that it is not a privileged matter to present another resolution referring to an investigation of that subject.

The Speaker sustained the point of order, and Mr. Buchanan withdrew the resolution and immediately reoffered it with the provision for expenses omitted.

Mr. Mann made the point of order that the resolution proposed an investigation with view to impeachment rather than impeachment as such, and was therefore without privilege. The Speaker sustained the point of order, and Mr. Buchanan withdrew the resolution.

Finally, on January 12[1] Mr. Buchanan again presented a resolution similar in form to that last offered omitting the preamble, and moved its adoption.

Mr. John J. Fitzgerald, of New York, interrupting at the conclusion of the reading of the resolution, moved that it be referred to the Committee on the Judiciary. Mr. Buchanan made the point of order that he had not yielded the floor.

The Speaker held that Mr. Buchanan was entitled to the floor for one hour to debate the resolution, at the conclusion of which Mr. Fitzgerald might move to commit, and recognized Mr. Buchanan.

After debate, on motion of Mr. Fitzgerald, the resolution was referred to the Committee on the Judiciary, yeas 133, noes 71.[2]

469. A proposition to impeach civil officers of the United States presents a question of high constitutional privilege.

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[1] Record p. 962.

[2] For further proceedings in this case see sections 7747–7751, Chapter CXCIV in this volume.

The investigation of the Federal Reserve Board in 1917.

An arraignment of impeachment may interrupt the reading of the Journal or business proceeding under a unanimous consent agreement.

An instance in which a Member proposed impeachment individually and collectively against members of an official board.

Articles of impeachment were referred by the House to the Committee on the Judiciary.

In the absence of evidence to support charges the House declined to institute impeachment proceedings.

A member having submitted articles of impeachment, it was held that his privilege had expired.

On February 12, 1917,[1] Mr. Charles A. Lindbergh, of Minnesota, rising to a matter of privilege, said:

Mr. Speaker, I rise to a point of the highest privilege to prefer impeachment proceedings.

Mr. James R. Mann, of Illinois, inquired if pending business under a unanimous consent agreement could be interrupted by the proposed matter of privilege.

The Speaker[2] said:

The gentleman can interrupt the reading of the Journal with a question of that kind. A question of the highest privilege takes precedence over everything.

Subsequently[3] Mr. Lindbergh, as a privileged subject, submitted the following:

Mr. Speaker and the House of Representatives, I, Charles A. Lindbergh, the undersigned, upon my responsibility as a Member of the House of Representatives, do hereby impeach W. P. G. Harding, governor; Paul M. Warburg, vice governor; and Frederick A. Delano, Adolph C. Miller, and Charles S. Hamlin, members, each individually as a member of the Federal Reserve Board, and also all of them collectively as the five active working members of said board, of high crimes and misdemeanors.

I, upon my responsibility as a Member of the House of Representatives, do hereby impeach the said W. P. G. Harding, governor; Paul M. Warburg, vice governor; and Frederick A. Delano, Adolph C. Miller, and Charles S. Hamlin, members, and each of them as members of the Federal Reserve Board, and also impeach all of them collectively as the five active working members of the Federal Reserve Board, of high crimes and misdemeanors in aiding, abetting, and conspiring with certain persons and firms hereinafter named, and with other persons and firms, known and unknown, in a conspiracy to violate the Constitution and the laws of the United States and the just and equitable policies of the Government, which said conspiracy developed and grew out of and was consummated from the following facts and acts, to wit:

Mr. Lindbergh then presented in detail fourteen charges upon which the arraignment was based. At the conclusion of the arraignment Mr. Lindbergh inquired if his privilege ceased with the presentation of charges. The Speaker replied that it did. Thereupon, on motion of Mr. Claude Kitchin, of North Carolina, the articles of impeachment were referred to the Committee on the Judiciary.

On March 3,[4] Mr. Edwin Yates Webb, of North Carolina, from the committee, submitted a report recommending that no further proceedings be had in the matter. The report was adopted by the House without debate.

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[1] Second session Sixty-fourth Congress, Record, p. 3117.

[2] Champ Clark, of Missouri, Speaker.

[3] Record p. 3126.

[4] House Report No. 1628.

470. Questions relating to impeachment while of high privilege must be submitted in the form of a resolution to entitle the proponent to recognition for debate.—On January 18, 1933,[1] Mr. Louis T. McFadden, of Pennsylvania, announced that he rose to a question of constitutional privilege relating to impeachment proceedings, and asked recognition for one hour.

Mr. Robert Luce, of Massachusetts, made the point of order that recognition to raise a question of constitutional privilege could not be granted unless preceded by a resolution or motion in writing.

The Speaker[2] sustained the point of order and said:

The rules of the House provide that the gentleman must send a resolution to the Clerk's desk in raising a question of constitutional privilege.

In order for the gentleman to have the right to make such a statement to the House, he must send a resolution to the Clerk's desk and have it read, on which the House may then act. The gentleman would then have one hour in which to address the House, if he presented a question of constitutional privilege.

Mr. McFadden submitted that he was entitled under the rules governing the presentation of questions of privilege to make a statement of his proposition.

The Speaker dissented and said:

Not prior to the submission of a resolution. That is true of a question of personal privilege, but the gentleman rises to a question of constitutional privilege. This can only be done by the presentation of a resolution upon which the constitutional question is based. A mere statement by the gentleman does not comply with the rules of the House. If the gentleman has no resolution involving a constitutional question, the Chair thinks he is not entitled to recognition. The gentleman must present a resolution in the first instance on which to base his statement to the House, and then would be entitled to one hour.

Mr. McFadden called attention to occasions on which impeachment proceedings had been set in motion through memorials and other methods than those referred to by the Speaker:

The Speaker rejoined:

When such memorials and petitions are presented to the House, they are referred to the committee having jurisdiction of the particular subject. If a Member of the House bases his question of privilege on a memorial or petition, the memorial or petition must first be reported by the Clerk, and then the House may take such action as it sees fit. If the gentleman has a communication of that character, let him send it to the Clerk's desk and the Clerk will report it. Then the House can take such action as it deems proper. The gentleman can not get the floor under the proposition he has presented at the present time unless he sends up a resolution or motion.

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[1] Second session Seventy-second Congress, Record, p. 2042.

[2] John N. Garner, of Texas, Speaker.

Chapter CXCV.[1]

FUNCTION OF THE SENATE IN IMPEACHMENT.

1. Does the Senate sit as a court? Section 471.

471. During the Archbald trial the functions of the Senate sitting for an impeachment trial were discussed by managers and counsel for respondent.

On January 9, 1913[2] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, Mr. Alexander Simpson, of counsel for respondent, in final argument said:

The question is whether or not the duty which you have to perform is in point of fact a judicial duty. It must be conceded that it is not a legislative duty. That is perfectly clear. It is certainly equally clear that it is not an executive duty. I can not see what else remains unless it is a judicial duty.

But the Constitution in its various articles has made that exceedingly clear. In Article I, section 3, it says "the Senate shall have the sole power to try all impeachments." It says, "when the President of the United States is tried the Chief Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the Members present." It says, "judgment in cases of impeachment shall not extend further than to removal from office," and so on, "but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to the law." It says in Article II, section 2, "the President * * * shall have power to grant reprieves and pardons for offenses against the United States except in cases of impeachment," and Article III, section 2, lastly says, "the trial of all crimes except in cases of impeachment shall be by jury, and such trial shall be held in the State where the said crime shall have been committed.

Now, I want to ask if it is possible to use words more clearly demonstrative that that which you as Senators are doing, you are doing in a judicial capacity? That is what I am claiming at this stage. It will reach up itself to its proper conclusion after a little while. The point is, you are in fact sitting as judges. I read, for it expresses briefly the thought, the language of Professor Dwight in 6 American Law Register (n. s.), 258–259:

"When a criminal act has been committed, it may evidently be regarded in three aspects: first, the injury to the individual or his family may be considered; second, the wrong to the executive officer charged with the administration of the laws may be looked at; and, third, the mind may dwell upon the general wrong done to the State, or 'the people,' as we say in modern times. This view was early taken in the common law; the injury to the individual was redressed by a proceeding called an appeal; the injury to the King by a process called an indictment; the wrong to the entire nation by a proceeding called an impeachment. In process of time the injury

[1] Supplementary to Chapter LXV.

[2] Third session Sixty-second Congress, Record, p. 1271.

to the individual came to be regarded as a private and not as a public wrong, so that in the progress of the law there remained two great criminal proceedings-indictment and impeachment."

If the position I have taken on this point be accurate, we ought to be able to take the next step, and a long one, in regard to this matter. If this is a court then it is perfectly evident that the rules which experience has demonstrated to be wise and applicable in trials in other courts ought to be applied here; and among those rules, which are down at the very foundation of Anglo-Saxon jurisprudence, are those which relate to the effect of character evidence, to the effect of the reasonable doubt doctrine, to the effect of the presumption of innocence, and to the effect to be given to admissions made during the trial.

Replying to this argument on the following day,[1] Mr. Manager Henry D. Clayton, of Alabama, said:

Mr. President, much has been attempted by counsel for the respondent in their effort to show that this is a court in the ordinary acceptance of that term. Whatever name you may call this body sitting here now, whatever functions they may discharge, it can not be said to be a court as that word is employed in the Constitution or understood by the ordinary man. It is more than a court. Under our Government it is clothed with the highest and most extraordinary powers of any body or any functionary or any agency of our Federal Government. Your powers here invoked are political in their nature. Mr. Bayard announced that doctrine in the first impeachment case, that of Blount. Every commentator, including Story and all the rest, has quoted it with approval, and should any man deny it he would at once confess himself ignorant of the history and the law of impeachments.

Mr. Manager Clayton quoted from Article III of the Constitution and continued:

So we form a correct conception of what this tribunal is, its purposes and its powers. Again, if it be necessary, let me ask from what power did this judge derive that trust which he has violated? Did he derive it from the judicial power? No. It was derived from the exercise of a political power. The President, exercising political power, nominated him for this office, and the Senate of the United States, with its power of disapproval, with its vitalizing power of confirmation, before he could become a public officer exercised not a legislative function, not a judicial function, but brought into operation a power which in its very nature and in any just conception you can take of it was a political power.

Now, Mr. President, I say this because I want to get away from the murky and unhealthful atmosphere of a police court, and I want to try on a higher plane this great cause, involving the rights—the civil rights—the power, and the majesty of the American people on the one side and on the other the puny privilege of an unfaithful judge, to desecrate his official position. It is political. Why? Because under representative institutions that is the only way under our Constitution that the political power exercised in the creation of a Federal judge can be performed. Under the State constitutions, or most of them, that political power is exercised by the people in their primary capacity when they select by ballot their judges to preside over them and administer public justice.

Mr. Manager Clayton then read citations from the following authorities: The Works of Charles Summer, Vol. XII, E. 415, 6th S., 93, p. 321; Samuel J. Tilden, Public Writings and Speeches, vol. 1, p. 474; Rawle, on the Constitution, p. 211.

[1] Record, p. 1345.

Chapter CXCVI.[1]

PROCEDURE OF THE SENATE IN IMPEACHMENT.

472. The hour of adjournment of the Senate, sitting for an impeachment trial, being fixed, a motion to adjourn at another time is not in order.

On December 5, 1912[2] the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, agreed to this order:

Ordered, That the daily sessions of the Senate, sitting in the trial of impeachment of Robert W. Archbald, shall, until otherwise ordered, commence at 1 o'clock and 30 minutes in the afternoon and continue until 6 o'clock in the afternoon of each day.

On the following day[3] Mr. Jacob H. Gallinger, of New Hampshire, moved that the Senate, sitting in the trial of articles of impeachment, adjourn at another hour than that previously ordered.

The President pro tempore held that the hour for ending the daily session, having been fixed by order of the Senate, could be altered only by unanimous consent or by order formally passed by a majority of the Senate, and the motion of the Senator from New Hampshire was not in order.

473. The Senate elected a presiding officer for the Archbald trial, who thereupon exercised the powers of the President of the Senate in signing orders, writs, etc.

On December 16[4] the term for which Mr. Augustus O. Bacon, of Georgia, was chosen President pro tempore of the Senate, having expired, Mr. Jacob H. Gallinger, of New Hampshire, was elected President pro tempore of the Senate, and thereupon requested that he be relieved from the duty of presiding over the Senate sitting as a court in the impeachment of Robert W. Archbald.

Whereupon Mr. Lodge submitted the following resolution, which was unanimously agreed to:

Resolved, That the Hon. Augustus O. Bacon, a Senator from the State of Georgia, be, and he is hereby, appointed to preside during the trial of the impeachment of Robert W. Archbald, circuit judge of the United States.

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[1] Supplementary to Chapter LXVI.

[2] Third session Sixty-second Congress, Record, p. 170.

[3] Record, p. 230.

[4] Third session Sixty-second Congress, Record, p. 696.

474. Argument on incidental questions arising during the trial of an impeachment is properly confined to an opening, a reply, and a conclusion.

On December 4, 1912,[1] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, at the conclusion of a colloquy between managers and counsel for the respondent, the President pro tempore said:

The Chair desires, in the interest of expedition and orderly procedure, to suggest to both the managers on the part of the House and counsel for the respondent that hereafter when incidental questions are to be discussed they be confined to an opening and a reply and a conclusion. The Chair will not rule that arbitrarily or positively, but trusts that counsel will act upon its suggestion.

475. In impeachment trials all orders and decisions of the Senate, with specified exceptions, are by the yeas and nays, but the yeas and nays may be waived by unanimous consent.

On December 4, 1912,[1] in the Senate, sitting for the trial of the impeachment of Judge Robert W. Archbald, the question of the admission of a certain exhibit offered by the managers being submitted to the Senate, Mr. Moses E. Clapp, of Minnesota, asked if the requirement under the rule for a yea-and-nay vote could be waived.

The President pro tempore replied:

If it is unanimous, the Chair is of the opinion that a yea-and-nay vote is not required, because it is the same as if every Senator voted.

Upon the suggestion of Mr. Clapp, the President pro tempore put the question:

Is there objection by any Senator to the admissibility of the paper in evidence?

Whereupon Mr. Clarence D. Clark, of Wyoming, objected, and the roll was called.

476. Managers on the part of the House having verbally notified the Senate of the impeachment of Judge Archbald, formal reading of articles of impeachment was delayed for proclamation by the Sergeant at Arms.

On July 13, 1912,[2] (legislative day of July 6), in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, after Mr. Manager Clayton had read the resolution adopted by the House, informing the Senate that the House had impeached Judge Archbald, he proposed to read the articles of impeachment, when Mr. Henry Cabot Lodge, of Massachusetts, interposed and said:

Mr. President, before the presentation by the managers on the part of the House of the articles of impeachment, section 2 of the Rules of Procedure and Practice in the Senate when sitting on impeachment trials requires that the Sergeant at Arms shall make proclamation as therein prescribed.

Thereupon, by direction of the President pro tempore, the Sergeant at Arms made proclamation, at the conclusion of which Mr. Manager Clayton read the articles of impeachment drawn by the House.

477. After trial of impeachment had proceeded for several days, the formality of announcement by the Doorkeeper of appearance in the

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[1] Third session Sixty-second Congress, Record, p. 107.

[2] Second session, Sixty-second Congress, Senate Journal, p. 625; Record, p. 8989.

Chamber of the managers and the respondent was by consent dispensed with.

On July 29, 1912,[1] in the Senate, at the opening of the trial of the impeachment of Robert W. Archbald, the Doorkeeper of the Senate announced formally the appearance of the respondent and the managers on the part of the House of Representatives.

This ceremony continued to be observed each day until December 3, 1912[2] when Mr. Henry D. Clayton, of the managers on the part of the House of Representatives, suggested:

Mr. President, if it is agreeable to the Senate sitting as a Court of Impeachment, hereafter the managers on the part of the House of Representatives will appear without the formality of an announcement.

To which Mr. Worthington, of counsel, on behalf of the respondent, added:

I presume that might apply, Mr. President, to the counsel for the respondent and to the respondent himself.

The President pro tempore said:

The Chair will give proper direction in that regard.
Proper order will be given in the premises.

The appearance of the managers and the respondent was not thereafter announced.

478. The expenses of the Archbald trial were defrayed from the Treasury.

On July 16, 1912,[3] the Senate, in legislative session, agreed to the following resolution:

Resolved, etc., That there be appropriated from any money in the Treasury not otherwise appropriated the sum of $10,000, or so much thereof as may be necessary, to defray the expenses of the Senate in the impeachment trial of Robert W. Archbald.

This resolution was agreed to by the House on July 27, without amendment and was approved by the President on July 31.

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[1] Second session Sixty-second Congress, Record, p. 9795.

[2] Third session Sixty-second Congress, Record, p. 20.

[3] Second session Sixty-second Congress, Senate Journal, p. 460; Record, p. 9118.

Chapter CXCVII.[1]

CONDUCT OF IMPEACHMENT TRIALS.

479. The writ of summons issued for the appearance of Judge Archbald to answer articles of impeachment does not appear in the Journal.

Form of return appended to the writ of summons served by the Sergeant at Arms on the respondent.

On July 16, 1912,[2] the Senate, sitting for the trial of the impeachment of Robert W. Archbald, agreed to an order directing that a summons be issued as required by the rules of procedure and practice, returnable on Friday, the 19th.

The text of this writ does not appear either in the Record or in the Journal.

On July 19,[3] however, immediately after the approval of the Journal, the Secretary, by direction of the President pro tempore, read the return appended to the writ of summons as follows:

SENATE OF THE UNITED STATES,
OFFICE OF THE SERGEANT AT ARMS.

The foregoing writ of summons, addressed to Robert W. Archbald, and the foregoing precept, addressed to me, were duly served upon the said Robert W. Archbald, by delivery to and leaving with him true and attested copies of the same at 236 Monroe Avenue, Scranton, Pa., the residence of Robert W. Archbald, on Wednesday, the 17th day of July, 1912, at 11 o'clock and 30 minutes in the afternoon of that day.

DANIEL M. RANSDELL,
Sergeant at Arms United States Senate.

480. In the trial of the impeachment of Judge Robert W. Archbald the procedure of former trials of impeachment was observed, in that briefs were not submitted until after managers and counsel for respondent had made opening statements and introduced witnesses.

Form of order providing for filing and printing of briefs by managers and respondent in trial of impeachment.

On December 4, 1912,[4] in the Senate, sitting for the trial of Robert W. Archbald, Mr. William E. Borah, of Idaho, sent to the desk a question, in writing, addressed to the managers on the part of the House of Representatives.

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[1] Supplementary to Chapter LXVII.

[2] Second session Sixty-second Congress, Senate Journal, p. 629; Record, p. 9124.

[3] Record, p. 9275; Senate Journal, p. 629.

[4] Third session Sixty-second Congress, Record, p. 97.

The President pro tempore said:

The Senator from Idaho propounds, in writing, the following inquiry for the consideration of the managers, and the Secretary will read it.

The Secretary read as follows:

Are the managers prepared at this time to present their brief as to our power to impeach for offenses or acts which were not committed or done during the term of the office which the party charged now holds?

In reply to this inquiry Mr. Henry D. Clayton, of Alabama, for the managers, submitted:

Mr. President, on behalf of the managers, in reply to the suggestion, I beg to say that that question has been thoroughly considered by the managers, and they have no doubt that this judge can be impeached for a misbehavior of a grave character that he may have committed while he held the office of district judge, his tenure of the one having dovetailed into the tenure of the present office.

We have gathered as best we could the authorities to sustain that position. We have made a brief, and we are prepared to make the argument on that proposition.

But, Mr. President, the managers have not up to this time deemed it proper or, I might say, advisable to bring that question to the attention of the court, for the reason that we are pursuing in this case the practice which was pursued in other cases, notably the practice in the Swayne case. After the statement of facts in that case, as the present occupant of the chair knows, immediately the managers began the introduction of their witnesses, and neither the law nor the facts bearing upon any phase of the different controversies involved in that case were argued until the respondent had also made his opening statement and introduced his witnesses; and after all the witnesses had been examined, then the case was opened for discussion both upon the law and the facts.

So, Mr. President, the managers have followed what they deemed the practice to be in like cases.

On the following day,[1] on motion of Mr. John D. Works, of California, it was

Ordered, That such briefs and citations of authorities as have already been prepared by the managers on the part of the House and counsel for the respondent be filed with the Secretary and printed in the Record for the immediate use of Senators.

Mr. Worthington, of counsel for the respondent, then said:

I can say, Mr. President, we can certainly have that done this week.

481. Correction of errors in the report of the proceedings of the Senate, sitting in trial of impeachment as reported in the Record, is properly made after the reading and approval of the Journal.

On December 4, 1912,[2] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, after the reading and approval of the Journal, Mr. Henry D. Clayton, of Alabama, of the managers on the part of the House of Representatives, called attention to inaccuracies in the report of the proceedings of the previous day as printed in the Record, and said:

Mr. President, the managers desire to call the attention of the court to a verbal inaccuracy in the proceedings of yesterday. It, perhaps, is immaterial to the statement as made on yesterday, but for the sake of better English I desire to have a correction made in the Record.

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[1] Senate Journal, p. 318.

[2] Third session Sixty-second Congress, Record, p. 96.

Mr. Manager Clayton then referred to particular pages of the record and indicated a number of corrections desired.

The President pro tempore said:

The correction will be made as desired by the manager.

482. Instance in which on motion of counsel for respondent, and over protest of managers for the House, the Senate granted the respondent 10 days in which to answer articles of impeachment.

On July 19, 1912,[1] in the Senate, sitting for the impeachment trial of Robert W. Archbald, counsel for the respondent submitted the following motion:

IN THE SENATE OF THE UNITED STATES,
SITTING AS A COURT OF IMPEACHMENT.

UNITED STATES *v.* ROBERT W. ARCHBALD.

The respondent, by his counsel, now comes and moves the court to grant him the period of—days in which to prepare and present his answer to the articles of impeachment presented against him herein.

R. W. ARCHBALD, JR.
A. S. WORTHINGTON.

JULY 19, 1912.

Thereupon Mr. Clark, of Wyoming, asked for the adoption of the following order:

Ordered, That the respondent present his answer to the articles of impeachment at 12 o'clock and 30 minutes postmeridian on the 24th day of July, 1912.

Whereupon Mr. Worthington, of counsel for the respondent, submitted:

Mr. President, I should like to state that that time seems very short to the counsel for the respondent, in view of the number of articles of impeachment which are here and the customs which have been followed heretofore in cases of this kind, and also because of certain circumstances which exist in this case, which I wish to bring to the attention of the court.

It was for that reason that in the motion which we made we left blank the number of days which we were to have, to be filled at the pleasure of the court.

I had hoped we might get 20 days for that purpose. As I calculate the time proposed to be given by the order which has just been presented by a member of the court, it would give us but 5 days, which, I think, would be entirely insufficient, in view of the fact that one of those days is dies non.

On behalf of the respondent and his counsel, I therefore respectfully ask that we be given at least 20 days for the purpose indicated.

To which Mr. Manager Clayton responded:

After a conference had this morning the managers reached the conclusion, that perhaps four or five days would be ample time to afford the accused the opportunity of fully answering all the articles of impeachment in this case.

The managers think there is nothing by way of surprise contained in the articles of impeachment. We believe Judge Archbald and his counsel are well informed as to every charge set forth in the articles of impeachment. We think five days—or four days, if one day be excluded on account of its being dies non juridicus—are quite sufficient for Judge Archbald to answer these articles of impeachment. Their nature is fully understood. The testimony which induced the House to adopt these articles is perfectly familiar to the counsel and perfectly familiar to the accused.

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[1] Second session Sixty-second Congress, Senate Journal, p. 630; Record, p. 9277.

Mr. Porter J. McCumber, of North Dakota, moved to amend the order to read:

Ordered, That the respondent present his answer to the articles of impeachment at 12 o'clock and 30 minutes postmeridian on the 31st day of July, 1912.

A suggestion by Mr. Henry Cabot Lodge, of Massachusetts, that the date proposed be amended to read "Monday, the 19th day of July," was accepted and the order with this amendment was agreed to.

483. In the Archbald trial new rules of procedure and practice of the Senate, when sitting in impeachment trials, were not adopted, the rules framed in former trials being considered as operative.

On July 15, 1912,[1] on motion of Mr. Clarence D. Clark, of Wyoming, extracts from the Journals of the Senate containing the record of former impeachment trials were ordered printed. No further preliminary action with reference to procedure in the pending trial of the impeachment of Judge Archbald appears, and the "Rules of procedure and practice of the Senate when sitting in impeachment trials" observed in former trials, and to all intents identical with those revised and adopted in 1868[2] for the Johnson trial, and followed in the Belknap and Swayne trials, were treated as existing rules.

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[1] Second session Sixty-second Congress, Senate Journal, p. 454.

[2] Second session Fortieth Congress, Senate Journal, pp. 794, 870, 878, 937; Senate Report No. 59.

Chapter CXCVIII.[1]

PRESENTATION OF TESTIMONY IN AN IMPEACHMENT TRIAL.

1. Attendence of witnesses. Sections 484–486.
2. Examination of witnesses. Sections 487–489.
3. Rulings of presiding officer as to evidence. Sections 490, 491.
4. Cross-examination, rebuttal evidence, etc. Section 492.

484. Lists of witnesses to be subpoenaed in a trial of impeachment are supplied by the managers and respondent respectively to the Sergeant at Arms of the Senate.

After the filing of lists of witnesses to be subpoenaed in a trial of impeachment, further witnesses may be subpoenaed on application of the managers or the respondent made to the Presiding Officer.

On August 6, 1912,[2] in the Senate, sitting for the impeachment trial of Robert W. Archbald, Mr. Henry D. Clayton, of Alabama, chairman of the managers for the House of Representatives, said:

On behalf of the managers of the House, I desire to say that the managers will furnish—I presume that it ought to be furnished to the Secretary of the Senate—a list of the witnesses whom the managers desire to have subpoenaed on behalf of the prosecution, if I may so term the side which is occupied by the managers on the part of the House. Am I correct in the view that we shall furnish this list to the Secretary of the Senate?

The President pro tempore replied:

The Presiding Officer is not advised as to what are the precedents, but as the Sergeant at Arms is to execute the order, the Chair will suggest that the Sergeant at Arms is the proper person to whom the list should be supplied.

Mr. Manager Clayton inquired:

Then Mr. President, under the intimation of the Chair, the managers beg to say at this time that they will in due time furnish the Sergeant at Arms a list of the witnesses they desire subpoenaed, and they expect to be ready, by having the witnesses here and ready otherwise to proceed with the cause, if it meets the pleasure of the Senate, on the 3rd day of December next.

Mr. Manager Clayton further inquired:

Mr. President there is one other thing that the managers desire to know. There is no settled practice, it appears from my rather imperfect examination of the precedents in the case, but I have reached the conclusion from such examination as I have been able to make that after this list is furnished by the managers and the list furnished on behalf of the respondent by the

[1] Supplementary to Chapter LXVIII.

[2] Second session Sixty second Congress, Record, p, 10139.

respondent that then it is the practice or the usage of the Senate, under, I suppose, certain discretion vested in the Presiding Officer, to entertain and to direct the issuance of subpoenas for other witnesses whose names may not appear on the list which is furnished in the first instance; and believing that to be the practice and believing that the managers should have that right, I shall not insist upon the proposition which I offered in the beginning of the cause to-day; that is, to provide that these additional witnesses might be subpoenaed on application made by the managers or the respondent, as the case might be, but that the application should be made to the Presiding Officer, the Presiding Officer having the discretion and presumably the authority to grant a request for additional Witnesses.

Putting that interpretation upon the matter, Mr. President, we shall not ask any amendment of the order at this time, for it is presumed that this court, like any court that wants to do justice in the premises, would, notwithstanding any rule to the contrary, or because of the absence of any positive rule making provision for such an emergency, direct the subpoena of witnesses if, in the judgment of the court, it ought to be done to meet the manifest ends of justice.

The President pro tempore said:

The Chair will state that the manager has stated the practice as it is understood and contemplated by the Senate in that regard.

485. Under a rule of the Senate subpoenas or other writs are signed by the Presiding Officer, whether the Vice President or President pro tempore, during session of the Senate sitting in trial of impeachment or in vacation.

On August 3, 1912,[1] in the Senate, sitting for trial of the impeachment of Robert W. Archbald, Mr. William J. Stone, of Missouri, propounded the following inquiry:

Mr. President, I should like to propound an inquiry. The Presiding Officer, in other words, the Senator who shall preside, I presume is to attach his signature to the subpoenas for witnesses Is that correct?

On response, the President pro tempore directed the Secretary to read the following rule of the Senate:

V. The Presiding Officer shall have power to make and issue, by himself or by the Secretary of the Senate, all orders, mandates, writs, and precepts authorized by these rules, or by the Senate and to make and enforce such other regulations and orders in the premises as the Senate may authorize or provide.

Mr. Stone then inquired:

Then under the rule the Vice President will be the Presiding Officer who would sign all writs.

Would the present occupant of the chair be clothed with that power during the vacation? Application for the issue of subpoenas for witnesses will be made during the vacation of the Senate, in all probability; probably in November. It puzzles me a little bit to know who would sign those writs.

The President pro tempore said:

The Chair does not think there is any trouble at all about it. Whoever is the presiding officer at the time the writ is required would, in the opinion of the present occupant of the chair, be clothed with that power. The Vice President, of course, will be during the vacation the presiding officer of the Senate, and if the Senate should indicate anyone else to be President pro tempore during that time, the power would be exercised in the first instance by the Vice President, or, if he should be under disability, by the President pro tempore, whoever he might be.

[1] Second session Sixty-sixth Congress, Record, p. 10140.

486. The Senate, sitting for the Archbald trial, ordered process to compel the attendance of a witness who had disregarded a subpoena duly served by the Sergeant at Arms.

Form of order for attachment of delinquent witness.

A dilatory witness who failed to appear until after attachment had been ordered was admonished by the President pro tempore.

On December 5, 1912,[1] in the Senate, sitting for trial of the impeachment of Judge Robert W. Archbald, Mr. Henry D. Clayton, of Alabama, of the managers on the part of the House of Representatives, said:

Mr. President, at the session held by the managers this morning, it was called to our attention that a certain witness who has been subpoenaed announced that he did not intend to come here unless brought on process issued by the Senate. It appeared yesterday, Mr. President, from reading the returns of the Sergeant at Arms, that Mr. J. H. Rittenhouse, an important witness in this case, had been regularly subpoenaed to attend and was required to be here yesterday. He was not here yesterday. He is not here to-day. He is the witness, who we are informed, said he would not come unless brought here by process of the Senate.

Therefore, Mr. President, I ask to have called the officer who served the subpoena upon the witness and prove the service. Then I shall ask for an attachment to bring him here.

Mr. James K. Julian, being called and sworn, testified, that as an employee in the office of the Sergeant at Arms, he had served J. H. Rittenhouse personally with a subpoena. The Sergeant at Arms was then directed to call the said James H. Rittenhouse, and on his failure to respond, Mr. Manager Clayton moved for an attachment, which was unanimously ordered, as follows:

Ordered, That an attachment do issue in accordance with the rules of the Senate of the United States for one J. H. Rittenhouse, a witness heretofore duly subpoenaed in this proceeding on behalf of the managers of the House of Representatives.

Later on the same day Mr. Manager Clayton stated that the witness, James H. Rittenhouse, had appeared and was now in the corridor and asked that he be admonished to be present until discharged.

The PRESIDENT PRO TEMPORE. The witness will be brought into the presence of the Senate.

James H. Rittenhouse appeared in the Chamber.

The PRESIDENT PRO TEMPORE. Mr. Witness, you are brought before the Senate to be admonished that you must scrupulously obey the orders you have received in the summons to appear here and not to absent yourself without leave of the Senate. You may now retire.

Thereupon Mr. Rittenhouse retired from the Chamber.

The PRESIDENT PRO TEMPORE. Does the manager on the part of the House desire that the order for attachment be vacated?

Mr. Manager CLAYTON. I ask that that be the course pursued.

The order for the attachment was then vacated.

487. The posture and position of managers and counsel in trials of impeachment has been left to their own judgment and preference.

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[1] Third session Sixty-second Congress, Senate Journal, p. 318; Record, p. 152.

On December 4, 1912,[2] in the Senate, sitting for the trial of the impeachment of Robert W. Archbald, Mr. Worthington, of counsel for the respondent, inquired:

Mr. President, may I ask a question? The practice differs. In some courts it is required that counsel examining a witness shall stand; but it is not customary where I have been; and I presume it is a matter about which the examining counsel or manager may use his judgment.

The PRESIDENT PRO TEMPORE. Absolutely, on both sides. The managers and counsel may assume such posture as they prefer.

On the following day,[1] in concluding the examination of a witness, Mr. Edwin Yates Webb, of North Carolina, of the managers on the part of the House of Representatives, said:

It has been suggested that the few remaining questions which I am to ask this witness may be heard more distinctly by standing at this point in the Chamber.

Mr. Webb then concluded the examination standing in the central aisle.

488. Witnesses in an impeachment trial were required to stand when necessary in order to be better heard.

Witnesses whose testimony was audible when seated were permitted to testify from a seat at the Secretary's desk.

On December 4, 1912,[2] in the Senate during the examination of a witness, in the impeachment trial of Judge Robert W. Archbald, Mr. Edwin Yates Webb, of North Carolina, of the managers on the part of the House of Representatives, inquired:

Mr. President, is it desired that the witness shall sit or stand?

The President pro tempore said:

The present position of the witness is probably the one from which he can be best heard by the Senate.

Mr. Miles Poindexter, of Washington, also inquired:

Mr. President, is it required that the witness should remain standing while he is giving his testimony?

The President pro tempore said:

The Chair directed that he should, because he did not think that if the witness took his seat he could be heard on the other side of the Chamber.

It is for that purpose that it was directed that the witness should stand; otherwise, of course, he would be permitted to sit.

As the trial progressed, however, it appears that witnesses whose testimony was audible were provided with a seat at the desk of the Secretary.[3]

489. Discussion of the order in which witnesses should be sworn in trial of impeachment.

Procedure to be followed in the swearing of witnesses having been left to managers and counsel, witnesses were sworn as produced.

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[1] Record, p. 152.

[2] Third session Sixty-second Congress, Record, p. 98.

[3] Record, p. 152.

On December 4, 1912,[1] in the Senate, preliminary to the presentation of evidence in the impeachment trial of Judge Robert W. Archbald, Mr. Henry D. Clayton, of Alabama, of the managers on the part of the House of Representatives, said:

We ask at this time that the Secretary read the whole list of witnesses on behalf of the managers on the part of the House of Representatives, and then after that list is read I will do as the Chair may suggest, either have all the witnesses sworn en bloc or have each one sworn separately as we produce him to testify. If the Chair would prefer that each witness be sworn separately as he is produced, that course will be followed.

The PRESIDENT PRO TEMPORE. The presumption is that the Senate will allow the managers to pursue their own course in that matter.

Mr. Manager CLAYTON. I would therefore ask that the witnesses be called, and all of them required to enter the Chamber who are present to-day and that the oath be administered to them.

The PRESIDENT PRO TEMPORE. The Secretary will call the names of those who are here.

The Secretary read the list of witnesses for the managers on whom service had been made.

Mr. Manager CLAYTON. I suppose, Mr. President, that it would be a difficult matter for the Secretary to call the names of witnesses.

The PRESIDENT PRO TEMPORE. Are the managers prepared to furnish the names of those whom they now wish to be sworn? If so, they will be called into the Chamber.

Mr. Manager CLAYTON. We will proceed to swear each witness as we produce him.

The PRESIDENT PRO TEMPORE. Very well; that course is preferred.

490. In the Archbald trial the Senate declined to admit and reserve decision on the admissibility of evidence to the admission of which an objection was pending.

Questions as to admissibility of evidence in impeachment trials are not debatable.

On December 4, 1912,[1] in the Senate sitting for the impeachment trial of Judge Robert W. Archbald, a question as to the admissibility of certain evidence having arisen, Mr. Miles Poindexter, of Washington, inquired:

Mr. President, I should like to inquire if it be within the rules of the Senate sitting as a court of impeachment to receive this evidence and to reserve a decision as to its admissibility? That practice is common in the courts. If we undertake to vote upon each objection to the testimony, or at least each important objection to the testimony of witnesses——

The President pro tempore answered:

The Senator has no right under the rule to discuss the question. The Senator has the right, if he so desires, to submit an order to the Senate, which would cover the point that he wishes to make.

Thereupon Mr. Poindexter submitted the following order:

Ordered, That the evidence be received and the decision as to its admissibility be reserved.

Mr. Poindexter proposed to debate the question, when the President pro tempore ruled:

The Senator has not the right to discuss it.

Mr. POINDEXTER. Have I no right to make an explanation?

The PRESIDENT PRO TEMPORE. No.

The question being submitted to the Senate, it was decided in the negative, yeas 3, nays 57, so the order was not adopted.

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[1] Third session Sixty-second Congress, Record, p. 97.

[2] Third session Sixty-second Congress, Record, p. 106.

491. Questions as to admissibility of evidence in a trial of impeachment are by long-established custom, submitted by the Presiding Officer to the Senate for decision.

On December 4, 1912,[1] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, Mr. Edwin Yates Webb, of North Carolina, of the managers on the part of the House of Representatives, offered in evidence a copy of an assignment of two options covering a culm bank, executed on September 5, 1911, to which Mr. A. S. Worthington, of counsel for the respondent, interposed an objection. After argument on the admissibility of the exhibit, the President pro tempore said:

Before taking action in regard to this question the Chair desires to make a statement to the Senate. Anticipating that questions of the admissibility of evidence would arise, the present occupant of the chair has examined former impeachment cases in order to ascertain what was the practice of Presiding Officers themselves in regard to deciding questions of this character or of submitting them to the Senate. Upon examination it is found in former impeachment cases that very liberally, to say the least, the Presiding Officer had availed himself of the privilege of submitting the matter to the Senate. In the Andrew Johnson impeachment case in particular, which was presided over by the highest judicial officer in the land, Chief Justice Chase, almost invariably every question as to the admissibility of evidence was submitted by him to the Senate for its determination. While the present occupant of the chair is not averse to taking responsibility in a matter that is alleged by the counsel to be peculiarly vital to the case, he feels that the matter should be submitted to the Senate. He is more inclined to that course by the fact that if one single Senator differed from the conclusion of the Chair he would have the right to have the vote taken by the Senate. Therefore, in this case the present occupant of the chair will submit to the Senate the question as to the admissibility of the evidence.

492. The President pro tempore ruled, in the Archbald trial, that counsel in examination might confine a witness within the limits of his interrogation, but witness should have opportunity either in direct examination or under cross-examination, to explain fully any answer made.

On December 6, 1912,[2] in the Senate sitting for trial of the Archbald impeachment, during the examination of a witness on behalf of the managers, Mr. Alexander Simpson, of counsel for the respondent, submitted an objection, saying:

I submit, Mr. President, when a witness is answering a question he has a right to complete his answer so as to make it clear to the Senate what his answer is, and the manager has no right to interrupt him in making a clear statement as to what his answer is. If the witness gets beyond that point, of course the manager has the right to interrupt him.

The President pro tempore ruled:

The Chair will rule that the manager has the right to conduct his examination in his own way and confine it within the limits of his questions, if he desires to do so, and that then the witness shall, before he leaves the stand, have full opportunity to explain any answer he has made. The manager in examining a witness has the right to confine him within the limits of the interrogation which he desires to submit, but the witness certainly must have the opportunity, either before the direct examination concludes or under cross-examination, to explain fully any answer which he may make.

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[1] Third session Sixty-second Congress, Record, p. 106.

[2] Third session Sixty-second Congress, Record, p. 224.

Chapter CXCIX.[1]

RULES OF EVIDENCE IN AN IMPEACHMENT TRIAL.

1. Strict rules of the courts followed. Sections 403, 494.
2. As to opinions of witnesses. Section 495.
3. General decisions as to evidence. Sections 496, 497.

493. Under recognized rules of evidence, leading questions were ruled out in a trial of impeachment and witnesses were admonished to observe established procedure.

On December 4, 1912,[2] in the Senate, sitting for the trial of the impeachment of Judge Robert W. Archbald, during the direct examination of a witness on behalf of the House of Representatives, Mr. Worthington, of counsel for the respondent, objected to a question propounded by Mr. Manager Edwin Yates Webb, of North Carolina, and said:

One moment, please. I submit, Mr. President, we had as well try this case with some appearance of conformity to the rules of a court. That was a leading question, which ought never to have been asked and should not be allowed to be answered.

The President pro tempore ruled:

Counsel, as far as possible, will avoid leading questions.

During the examination of the same witness by Mr. Manager Webb, Mr. Worthington objected to a question asked the witness by Mr. Manager Webb as a leading question. The witness, however, answered the question and Mr.Worthington said:

As the witness has already answered the question, for the present purposes it is futile to proceed. I think the witness should be cautioned, when objection is made, not to answer a question until the Presiding Officer or the Senate has ruled upon it.

The PRESIDENT PRO TEMPORE. That is a very proper suggestion. The witness will be governed by that. Hereafter when there is an objection to testimony the witness will not reply until after the matter has been pawed upon.

494. Evidence may be introduced by counsel to contradict testimony in chief given by their own witness only upon statement that such testimony is at variance with that expected and that relying on evidence previously given by the witness, they have been surprised and entrapped.

Instance wherein the President pro tempore ruled on the admission of evidence in the trial of an impeachment.

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[1] Supplementary to Chapter LXIX.

[2] Third session Sixty-second Congress, Record, p. 98.

On December 6, 1912,[1] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, Mr. John A. Sterling, of Illinois, of the managers on the part of the House of Representatives, offered testimony in the following words:

Mr. President, we offer Exhibit 7, the examination of Edward J. Williams at Scranton, Pa., March 16 and March 17 of this year, made by Mr. Wrisley Brown, representing the Department of Justice, who was sent there by the Attorney General to investigate this case.

Objection to admission of the deposition was made by Mr. A. S. Worthington, of counsel for the respondent.

After extended argument by managers and counsel, the President pro tempore ruled:

If the proposition be simply to disprove the statement of the witness as to the number of questions which had been asked by Mr. Boland, the Chair would undoubtedly rule that only the questions themselves could be put in evidence for the purpose of contradicting him to that extent. But the Chair thinks it is a well-recognized rule, which is found in every jurisdiction, that where a witness is put up by a party and where the party who offers him as a witness has had previous information from him as to what his testimony would be, and upon his examination he gives testimony contrary to that former testimony, the party offering that witness can prove the former statements of the witness if he will state in his place that he has been entrapped by him; that relying upon the evidence that he had given and that he would again testify as he had previously done, they have put him up and they have been entrapped and surprised by the fact that he then testified to matters in conflict to what he had previously testified.

The Chair thinks that is a well-recognized rule of law. It is not for the purpose of impeaching the witness, though it might be called one class of impeachment. It is for the purpose of negativing testimony which he had given and which the counsel otherwise would be bound by, they themselves having put him up.

The Chair will add, so far as the bulk of this testimony is concerned, unless it is in the main, generally as well as specifically upon the particular points in which the counsel have been entrapped, that only such parts of it as do relate to than contradiction in his testimony would be admissible, but on the statement of the counsel that they have been thus entrapped the Chair is of the opinion that to that extent it is admissible .

The President pro tempore further held:

Counsel for the respondent will, of course, have the right to recall the witness and require him to make such explanation of the apparent conflict as is proper and consistent with his information; he is not debarred from that privilege, but the purpose of that rule is not to impeach a witness and establish the fact that he is not to be believed on oath, because of that were the case a party could never put up an adverse witness. He is entitled to the testimony of this witness, and he is entitled to have the truth ascertained from the testimony of the witness and from his conflicting statements. The Chair thinks that is a correct rule of law, and that is the principle upon which it is based.

495. In the Archbald trial it was held that while witnesses might testify as to the general reputation of the respondent, and as to his reputation for judicial integrity in particular, it was not competent to introduce evidence as to his reputation for ability and industry; and in no event was the personal opinion of a witness on questions of character or reputation admissible.

On December 17, 1912,[1] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, this question was asked by Mr. A. S. Worthington, of

[1] Third session Sixty-second Congress, Record, p. 222.

counsel for respondent, on the direct examination of Everett Warren, a witness subpoenaed on behalf of the respondent.

Now, Major Warren, I want to ask you to tell us from your long acquaintance with Judge Archbald and your observation of him as a judge what were his principal characteristics as a judge, as to integrity, ability, and industry.

Mr. Manager Norris objected, saying:

Mr. President, I object to the question as immaterial and irrelevant. The counsel has a right to ask the witness as to reputation, but I do not believe he can go beyond that.

Mr. Worthington argued:

I ask you to remember, Mr. President, that we are not trying this case before a jury. We are trying this case before a tribunal which is the judge of the law and the judge of the facts, and the tribunal which is to inflict the sentence as well.

The question which the Senate is to determine at the end of this case is not the mere question whether this or that thing is proved, but whether upon the whole, taking into consideration the character of the man, the good that he has done, the kind of judge that he is, what the people in and about Scranton think of him and know of him, he shall be deprived of office, and be held forever incapable of showing his head as a reputable man, because of the contention that has been made here that he is not fit to hold any office of any kind under the Government of the United States.

Now, one thing more, it seems to me, takes this entirely out of the considerations which are invoked in ordinary courts of justice when a similar question arises. When our forefathers framed this Constitution of ours, they put into it the provision that the trial of persons accused of crime shall take place in the districts where the crime was committed.

Now, Mr. President, in this case the trial has to be here in the Senate Chamber. This defendant can not have the benefit of being tried by his neighbors, the people who know him and know the witnesses against him.

We can not take the Senate to Scranton, but we do want to bring to this trial the atmosphere of Scranton so far as relates to Judge Archbald's reputation, and, as far as we can, give him the benefit of that which the meanest criminal throughout the Union has—to be tried in the place where the crime was committed and among people who know him and who know those who testify against him. We can not go there; where the witnesses generally know the man. We want Senators to know what the men who have spent their lives in and around Scranton practicing before Judge Archbald—his neighbors and friends—think of him and what his reputation is throughout the whole State of Pennsylvania.

Mr. Manager Clayton argued:

Mr. President, it is perhaps unnecessary for me to state the general rules governing the admission of character testimony, and perhaps it is also unnecessary for me to state the questions which have generally been propounded in such matters of inquiry and recognized as proper in places where character is put in issue.

I may say, Mr. President, in the beginning that we have not controverted the good character of Judge Archbald. Perhaps if we had controverted that a larger range would be permissible for the respondent in reply to that controversy raised by the managers. But the managers have not raised that question.

So, Mr. President, I take it that the rules of evidence are to be applied by the Senate in this case, first, for the purpose of doing justice both to the managers who represent the accusation, the House of Representatives, and of also doing justice to this respondent. Secondarily, and perhaps just as important, these rules are for the expeditious disposition of the cause. It is not to militate against the doing of justice in this case that we raise this question. We say that justice can be done within the rules which permit ordinary questions which are asked in ordinary cases about character, and the answers thereto. There is enough latitude in that to do justice

[1] Third session Sixty-second Congress, Record, p. 772.

to both sides in this controversy, especially to the respondent, where the managers have not assailed his character by introducing evidence for that specific purpose.

Mr. President, the next reason, to which I have adverted, is for the dispatch of his case. Any rule looking to the speedy termination of this case ought to be enforced unless its relaxation would favor the doing of more ample justice to all parties concerned. In this case I take it that the Senate will consider the respondent as having gotten all he is entitled to when he proves by those who know him the fact that they know him; the fact that they know his general reputation, and that his general reputation and his character, predicated upon that general reputation, is good. We have not controverted that, and therefore it does not seem to me that there is any necessity here for the enlargement of the rule.

The Presiding Officer said:

The Chair thinks there is, of course, basis for the contention that rules should be liberal in practice in certain circumstances. Nevertheless, generally, the rules of law must be applied. The Chair thinks that the rule, generally, as to proof of character is, first, that anyone who is accused of misconduct may put in issue his general character, irrespective of what the charge is, because general character always is involved in any question of violation of law or misbehavior. Further, he may put in evidence his character as to the particular quality or characteristic which will elucidate the particular charge. With that view, the Chair thinks it is perfectly competent for the counsel to prove the general reputation of the respondent, as to whether or not he bears a good character, in the broadest sense of that term, and also that he may prove his general reputation as to the particular matter involved in issue.

Now, as the Chair understands, the particular matter involved here is a question of judicial integrity. So the Chair would not, if the Senate approves the opinion of the Chair, limit the counsel to proof of reputation for general good character, but would recognize the right of the respondent also to prove his general reputation for judicial integrity. But the Chair knows of no rule of law which permits a witness to give his individual opinion of the character of an accused. If there is any such case, the Chair has failed absolutely to learn of it in such experience as he has been fortunate enough to have.

This particular question is as to the opinion of the witness himself. If the counsel would limit his question to the witness's knowledge of the general character of the respondent for judicial integrity, the Chair would think that was competent; but this question not only asks the individual opinion of the witness, leaving aside the question of general reputation, but it goes further and asks for the opinion of the witness, not only as to integrity, but as to ability and industry, none of which characteristics or features are involved, as the Chair understands, in any issue before the Senate at this time. The Chair is therefore obliged to sustain the objection to this particular question, but will recognize the right of the respondent to proceed along the lines indicated, with every disposition to be as liberal as the rule will possibly permit.

496. Decision by the President pro tempore in the impeachment trial of Judge Archbald, on the latitude of counsel in cross-examination of witness relative to testimony previously given by the witness before a committee of the House.

On December 6, 1912,[1] in the Senate sitting for the impeachment trial of Judge Robert W. Archbald, during the cross-examination of W. A. May, a witness on behalf of the managers, by Mr. A. S. Worthington, of counsel for the respondent, Mr. Manager George W. Norris, of Nebraska, objected, saying:

Mr. President, before the witness answers the question, I desire to object to this form of interrogation of the witness. As I understand, we would not be allowed to call his attention to the testimony unless we had first asked him about the same matter and he had testified differently. Counsel has been asking questions of this witness, reading evidence that was taken before the

[1] Third session, Sixty-second Congress, Record, p. 217.

Judiciary Committee, without any intimation that there is anything different in his testimony now. He reads a lot of testimony and asks the witness if that was true. It seems to me that that is not a proper examination of the witness.

The President pro tempore said:

The previous testimony of this witness can be read to him for two purposes. As the Chair recollects the rule, it can be read for the purpose of contradicting him or for the purpose of refreshing his memory. If counsel examine the witness as to a matter and his testimony is not clear on the subject, the Chair would hold that then, after having attempted to elicit testimony in the usual way without success, he could go further and call attention to the witness to what he had previously testified to by way of refreshing his memory. The Chair thinks that is the correct rule of law.

The Chair would suggest to counsel for the respondent that it is perfectly competent for him to put questions as to the particular matters that he desires to have testimony upon without reading from the questions and answers; but in either case the Chair would rule that counsel has the right to bring out the testimony if it is either for the purpose of calling attention to the fact that the witness had previously made conflicting statements, or for the purpose of refreshing his memory upon some things in regard to which he is not now clear.

497. A contract having been admitted as evidence in an impeachment trial, it was held competent to show the intention of the parties thereto.

Instance of a ruling by the President pro tempore on a question of evidence in an impeachment trial.

On December 6, 1912,[1] in the Senate, sitting in trial of the impeachment of Judge Robert W. Archbald, one of the managers called William L. Pryor, a witness to prove the charge that the respondent had been a silent party to a written contract previously admitted in evidence by vote of the Senate.

Mr. A. S. Worthington, counsel for the respondent, objected to questions propounded and submitted:

Mr. President, it was held by the Senate, by the vote on the first day of our taking testimony here, that this silent-party paper was admissible in evidence, or at least should be introduced here, although no evidence was offered tending to show Judge Archbald knew of it or authorized it. But I do not understand that that ruling went so far as to hold that the parties who may have made statements about Judge Archbald would be competent witnesses against him, or that any statement made against Judge Archbald by Pryor, or perhaps other persons who were in Boland's office, would be competent and proper evidence in this matter.

The President pro tempore ruled:

The paper has been admitted as a legitimate piece of evidence. The Chair is of the opinion that everything that is necessary for a proper explanation of the meaning of that paper is competent. What effect it would have upon the respondent is a question of law that would afterwards be determined. But as to the question of the admissibility of the evidence, the Chair is of opinion that whenever there is an ambiguity in an instrument which itself is admitted in evidence it is competent to show what those who made the paper intended. How far that would be binding upon the respondent is an altogether different question, and the Chair does not mean in the ruling to rule on that point. That would be a question for the Senate to determine when it comes to consider the weight of the evidence. As to whether or not a partnership has been proven and whether the respondent should be bound by statements made by one who is alleged to be his partner, is a question to be determined by the Senate sitting as a court.

Upon the naked question as to whether or not the paper which is proven to have been executed, and which the Senate has decided to be proper evidence, shall have any ambiguous term explained by showing what the parties to it said it meant, the Chair is not in any doubt whatever.

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[1] Third session Sixty-second Congress, Record, p. 226.

Chapter CC.

THE IMPEACHMENT AND TRIAL OF ROBERT W. ARCHBALD.

498. The impeachment and trial of Robert W. Archbald, United States circuit judge, designated as a member of the Commerce Court.

In response to a resolution of the House, the President transmitted to the Judiciary Committee of the House charges filed against Judge Archbald and all papers relating thereto with a message suggesting that they be not laid before the House until examined by the committee.

Form of resolution instructing the Judiciary Committee to examine the charges against Judge Archbald.

In investigating the conduct of Judge Archbald, the Judiciary Committee, by resolution, extended to the accused permission to be present with counsel and cross-examine witness.

On April 23, 1912,[1] Mr. George W. Norris, of Nebraska, introduced, by delivery to the Clerk, the following resolution:

"Resolved, That the President of the United States be, and he is hereby, requested, if not incompatible with the public interest, to transmit to the House of Representatives a copy of any charger, filed against Robert W. Archbald, associate judge of the United States Commerce Court, together with the report of any special attorney or agent appointed by the Department of Justice to investigate such charges, and a copy of any and all affidavits, photographs, and evidence filed in the Department of Justice in relation to said charges, together with a statement of the action of the Department of Justice, if any, taken upon said charges and report."

[1] Second session Sixty-second Congress, Record, p. 5242.

The resolution was referred, under the rule, to the Committee on the Judiciary. On April 25,[1] Mr. Henry D. Clayton, of Alabama, from that committee, submitted the report of the committee, with favorable recommendation, and the resolution was unanimously agreed to.

A message from the President in response to this request was laid before the House by the Speaker on May 4,[2] in part as follows:

In reply, I have to state that, in February last, certain charges of improper conduct by the Hon. Robert W. Archbald, formerly district judge of the United States Court for the Middle District of Pennsylvania, and now judge of the Commerce Court, were brought to my attention by Commissioner Meyer of the Interstate Commerce Commission. I transmitted these charges to the Attorney General, by letter dated February 13, instructing him to invesitgate the matter, confer fully with Commissioner Meyer, and have his agents make as full report upon the subject as might be necessary, and, should the charges be established sufficiently to justify proceeding on them, bring the matter before the Judiciary Committee of the House of Representatives.

The Attorney General has made a careful investigation of the charges, and as a result of that investigation has advised me that, in his opinion, the papers should be transmitted to the Committee on the Judiciary of the House to be used by them as a basis for an investigation into the facts involved in the charges. I have, therefore, directed him to transmit all of the papers to the Committee on the Judiciary; but in my opinion—and I think it will prove in the opinion of the committee—it is not compatible with the public interests to lay all these papers before the House of Representatives until the Committee on the Judiciary shall have sifted them out and determined the extent to which they deem it essential to the thoroughness of their investigation not to make the same public at the present time. But all of the papers are in the hands of the committee and, therefore, within the control of the House.

The message was read and, with the accompanying papers, was referred to the Committee on the Judiciary. On the same day Mr. Clayton, from that committee, reported the following resolution, which was agreed to by the House.

Resolved, That the Committee on the Judiciary be, and is hereby, authorized to inquire into and concerning the official conduct of Honorable Robert W. Archbald, formerly district judge of the United States Court for the Middle District of Pennsylvania, and now a judge of the Commerce Court, touching his conduct in regard to the matters and things mentioned in House Resolution numbered five hundred and eleven, and especially whether said judge has been guilty of an impeachable offense, and to report to the House the conclusions of the committee in respect thereto, with appropriate recommendation;

And resolved further, That the Committee on the Judiciary shall have power to send for persons and papers, and to subpoena witnesses and to administer oaths to such witnesses; and for the purpose of making this investigation said committee is authorized to sit during the sessions of this House; and the Speaker shall have authority to sign and the Clerk to attest subpoenas for any witness or witnesses.

Preliminary to the investigation thus authorized the committee agreed upon the following program of procedure:[3]

That for the present the committee will hold public hearings, under the authority given by House resolution 524, for the purpose of examining the witnesses in regard to the matters and things mentioned in House resolution 511, which involve the conduct of Hon. Robert W. Archbald, and that in these public hearings where witnesses are examined Judge Archbald may be represented by counsel, if he desires, and that after the chairman of the committee shall have conducted the principal examination of witnesses and asked the members of the committee to ask such questions

[1] Record, p. 5346.

[2] Record, p. 5896.

[3] Record, p. 8907.

as their judgment may dictate to be proper, then, with the permission of the committee, counsel for Judge Archbald, if Judge Archbald is desirous to have counsel present, may ask such questions of the witnesses as the committee may deem proper to be asked of the witnesses in such investigation.

Pursuant to this determination, Judge Archbald attended and was represented by counsel, who cross-examined witnesses and submitted briefs, which were considered by the committee.

499. The Archbald impeachment continued.

The committee, empowered to investigate, reported simultaneously resolutions impeaching Judge Archbald and articles of impeachment.

On July 8, 1912, Mr. Clayton, from the Committee on the Judiciary, presented as privileged a unanimous report, which was referred to the House Calendar.[1]

The report, which incorporates findings of fact and conclusions reached by the committee as well as a discussion of the law, nature, and function of impeachment, with citations of authorities relating thereto, concludes:

Your committee reports herewith the accompanying resolution and articles of impeachment against Judge Robert W. Archbald, and recommends that they be adopted by the House and that they be presented to the Senate with a demand for the conviction and removal from office of said Robert W. Archbald, United States circuit judge designated as a member of the Commerce Court:

"Resolved, That Robert W. Archbald, additional circuit judge of the United States from the third judicial circuit, appointed pursuant to the act of June 18, 1910 (U. S. Stat. L., vol. 36, 540), and having duly qualified and having been duly commissioned and designated on the 31st day of January, 1911, to serve for four years in the Commerce Court, be impeached for misbehavior and for high crimes and misdemeanors; and that the evidence heretofore taken by the Committee on the Judiciary under House resolution 524 sustains 13 articles of impeachment which are hereinafter set out; and that said articles be, and they are hereby, adopted by the House of Representatives, and that the same shall be exhibited to the Senate in the following words and figures, to wit:

(Then follow 13 articles of impeachment setting forth the charges in detail.)

500. The Archbald impeachment, continued.

Form of resolution designating managers on the part of the House to conduct the impeachment trial and instructing them to carry the impeachment to the Senate.

The managers elected to conduct the Archbald trial on behalf of the House of Representatives consisted of seven members of the Judiciary Committee and represented both the majority and minority parties in the House.

Form of resolution authorizing the managers to incur necessary expenses in the conduct of the Archbald case.

The report[2] was debated in the House on July 11.[3] At the conclusion of the reading of the report by the Clerk, Mr. James R. Mann, of Illinois, said:

Mr. Speaker, when the report was made by the gentleman from Alabama [Mr. Clayton it was stated by him, and properly so, that the resolution would be printed separately as any other resolution. The Clerk has read the resolution from the report. The resolution was not printed separately, through some misunderstanding, probably, on the part of the clerk in charge,

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[1] Record, p. 8705.

[2] Second session Sixty-second Congress, House Report No. 946.

[3] Record, p. 3004.

and I ask unanimous consent that the resolution may be numbered and printed and reported from the committee as of July 8, 1912, in the ordinary form. It seems to me that that is due to the proper procedure in the House.

There was no objection, and the resolution was ordered printed separately, as of July 8, and numbered H. Res. 622.

After extended debate, the resolution, with the accompanying articles of impeachment, was agreed to, yeas 223, nays 1.

Thereupon, it was:

Resolved, That Henry D. Clayton, of Alabama; Edwin Y. Webb, of North Carolina; John C. Floyd, of Arkansas; John W. Davis, of West Virginia; John A. Sterling, of Illinois; Paul Howland, of Ohio; and George W. Norris, of Nebraska, Members of this House, be, and they are hereby, appointed managers to conduct the impeachment against Robert W. Archbald, circuit judge of the United States and designated as a judge of the United States Commerce Court; that said managers are hereby instructed to appear before the Senate of the United States and at the bar thereof in the name of the House of Representatives and of all the people of the United States to impeach the said Robert W. Archbald of high crimes and misdemeanors in office and to exhibit to the Senate of the United States the articles of impeachment against said judge which have been agreed upon by this House; and that the said managers do demand that the Senate take order for the appearance of said Robert W. Archbald to answer said impeachment, and demand his impeachment, conviction, and removal from office.

It was also:

Resolved, That the managers on the part of the House in the matter of the impeachment of Robert W. Archbald, circuit judge of the United States and designated as a judge of the United States Commerce Court, be, and they are hereby, authorized to employ legal, clerical, and other necessary assistants and to incur such expenses as may be necessary in the preparation and conduct of the case, to be paid out of the contingent fund of the House on vouchers approved by the managers, and the managers have power to send for persons and papers.

It was further:

Resolved, That a message be sent to the Senate to inform them that this House has impeached for high crimes and misdemeanors Robert W. Archbald, circuit judge of the United States and designated as a judge of the United States Commerce Court, and that the House adopted articles of impeachment against said Robert W. Archbald, judge as aforesaid, which the managers on the part of the House have been directed to carry to the Senate, and that Henry D. Clayton, of Alabama; Edwin Y. Webb, of North Carolina; John C. Floyd, of Arkansas; John W. Davis, of West Virginia; John A. Sterling, of Illinois; Paul Howland, of Ohio; and George W. Norris, of Nebraska, Members of this House, have been appointed such managers.

The Members so elected were members of the Committee on the Judiciary and represented both the majority and minority parties in the House.

501. The Archbald impeachment, continued.

A message was sent to inform the Senate that the managers on the part of the House of Representatives would present the impeachment of Judge Archbald, and the Senate transmitted a message in reply informing the House that the Senate was ready to receive them.

Forms and ceremonies of presenting the Archbald impeachment at the bar of the Senate.

The articles of impeachment, signed by the Speaker and attested by the Clerk, after being read by the chairman of the managers, were handed to the Secretary of the Senate.

Having carried to the Senate the articles impeaching Judge Archbald, the managers returned and reported verbally in the House.

On July 13[1] (legislative day of July 6), in the Senate, a message was received from the House of Representatives, delivered by its Chief Clerk, announcing that the House had passed the following resolution:

Resolved, That a message be sent to the Senate to inform them that this House has impeached for high crimes and misdemeanors, Robert W. Archbald, circuit judge of the United States and designated as a judge of the United States Commerce Court, and that the House adopted articles of impeachment against said Robert W. Archbald, judge as aforesaid, which the managers on the part of the House have been directed to carry to the Senate; and that Henry D. Clayton, of Alabama; Edwin Y. Webb, of North Carolina; John C. Floyd, of Arkansas; John W. Davis, of West Virginia; John A. Sterling, of Illinois; Paul Howland, of Ohio; and George W. Norris, of Nebraska, Members of this House, have been appointed such managers.

On motion of Mr. Augustus O. Bacon, of Georgia, it was:

Ordered, That the Secretary inform the House of Representatives that the Senate is ready to receive the managers appointed by the House for the purpose of exhibiting articles of impeachment against Robert W. Archbald, circuit judge of the United States and designated as a judge of the United States Commerce Court, agreeably to the notice communicated to the Senate.

On July 15,[2] at 12 o'clock and 15 minutes p. m., the Assistant Doorkeeper of the Senate announced:

I have the honor to announce the managers on the part of the House of Representatives to conduct the proceedings in the impeachment of Robert W. Archbald, judge of the circuit court and designated a judge of the Commerce Court of the United States.

The President pro tempore said:

The managers on the part of the House will be received, and the Sergeant at Arms will assign them their seats.

The committee from the House of Representatives were escorted by the Sergeant at Arms to seats assigned them in the area in front of the Chair, and Mr. Manager Clayton, its chairman, said:

Mr. President, the managers on the part of the House of Representatives are here present and ready to present the articles of impeachment which have been preferred by the House of Representatives against Robert W. Archbald, a circuit judge of the United States and designated a judge of the Commerce Court of the United States. The House adopted the following resolution, which I will read to the Senate:

By direction of the President pro tempore, the Sergeant at Arms made proclamation as follows:

Hear ye! Hear ye! Hear ye! All persons are commanded to keep silence, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against Robert W. Archbald, circuit judge of the United States and designated a judge of the United States Commerce Court.

Mr. Manager Clayton then read the articles of impeachment, and continued:

And, Mr. President, the House of Representatives by protestation, saving to themselves the liberty of exhibiting at any time hereafter any further articles of accusation or impeachment against the said Robert W. Archbald, a circuit judge of the United States and designated as a judge of the

[1] Second session Sixty-second Congress, Record, p. 8989.

[2] Record, p. 9051.

United States Commerce Court, and also of replying to his answers which he shall make unto the articles preferred against him, and of offering proof to the same and every part thereof, and to all and every other article of accusation or impeachment which shall be exhibited by them as the case shall require, do demand that the said Robert W. Archbald may be put to answer the high crimes and misdemeanors in office which have been charged against him in the articles which have been exhibited to the Senate, and that such proceedings, examinations, trials, and judgments may be thereupon had and given as may be agreeable to law and justice.

Mr. President, the managers on the part of the House of Representatives, in pursuance of the action of the House of Representatives by the adoption of the resolutions and articles of impeachment which have just been read to the Senate, do now demand that the Senate take order for the appearance of said Robert W. Archbald to answer said impeachment, and do now demand his impeachment, conviction, and removal from office.

The articles of impeachment signed by the Speaker and attested by the Clerk, were handed to the Secretary of the Senate,[1] and the President pro tempore said:

Mr. Chairman and gentlemen of the committee of the House of Representatives, the Chair begs to assure you that the Senate will take order in the matter of the impeachment of Judge Archbald and communicate its action to the House of Representatives.

Mr. Manager Clayton replied:

Mr. President, in behalf of the House of Representatives the managers of the House beg to thank the Presiding Officer and the Senate for the courtesy extended to the managers upon the part of the House of Representatives.

The committee of the House of Representatives then retired from the Chamber.

The committee of the House of Representatives having returned to the Hall of the House, Mr. Clayton submitted as privileged:

Mr. Speaker, as one of the managers, and in behalf of all the managers on the part of the House of the impeachment proceedings, I beg to report to the House that the articles of impeachment prepared by the House of Representatives and preferred against Robert W. Archbald, a United States circuit judge and designated as a judge of the Commerce Court of the United States, have been exhibited and read to the Senate; that the Presiding Officer of that body stated to the managers that the Senate would take order in the premises, and that due notice of the same would be given to the House of Representatives.

502. The Archbald impeachment continued.

The articles of impeachment in the Archbald trial were ordered printed by the Senate and referred to a special committee appointed by the President pro tempore.

In the organization of the Senate for the Archbald trial the oath was administered to the President pro tempore by a Senator designated by order of the Senate for that purpose.

The President pro tempore, after being sworn, administered the oath to the Senators sitting for the trial of Judge Archbald.

The Senate notified the House by message that it was organized for the trial of the Archbald impeachment.

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[1] These articles of impeachment appear in full in the Journals of both the House and Senate, in the House Journal on July 11, (p. 854), the day of their adoption, and in the Senate Journal on July 15, (p. 454), the day they were presented and read.

The hour prescribed by the rule having arrived, the President pro tempore declared legislative business suspended and the Senate in order to proceed for the impeachment trial.

Whereupon [1] Mr. George Sutherland, of Utah, offered the following order, which was agreed to:

Ordered, That the articles of impeachment presented against Robert W. Archbald be printed for use of the Senate.

The following resolution offered by Mr. Clarence D. Clark, of Wyoming, was also agreed to:

Resolved, That the message of the House of Representatives, relating to the impeachment of Robert W. Archbald be referred to a select committee to consist of five Senators to be appointed by the President pro tempore.

The President pro tempore appointed Messrs. Clarence D. Clark, of Wyoming; Knute Nelson, of Minnesota; William P. Dillingham, of Vermont; Augustus O. Bacon, of Georgia; and Charles A. Culbertson, of Texas, as members of this select committee.

On July 16 [2] at 1 o'clock p. m., the President pro tempore of the Senate announced:

The hour of 1 o'clock has arrived, and in accordance with the rule the legislative business will be suspended, and the Senate will proceed upon the impeachment of Robert W. Archbald.

On motion of Mr. Reed Smoot, of Utah, by unanimous consent, Mr. Shelby M. Cullom, of Illinois, was designated to administer the constitutional oath.

Mr. Cullom administered the oath to the President pro tempore:

You do solemnly swear that in all things appertaining to the trial of the impeachment of Robert W. Archbald, additional circuit judge of the United States for the third judicial district, designated a judge of the Commerce Court, now pending, you will do impartial justice according to the Constitution and laws. So help you God.

The President pro tempore said:

Without objection, the Chair will suggest that the Secretary will call the roll, calling 10 Senators at a time, and that as their names are called the Senators advance to the desk to have the oath of office administered to them.

Accordingly the roll was called and those Senators present advanced to the desk in groups of 10 and the oath was administered by the President pro tempore to the several groups as called.

The oath having been administered to those present, the names of the absentees were again called, and Senators who had entered the Chamber since the first call advanced to the desk and were sworn.

The President pro tempore announced:

Senators, the Senate is now sitting for the trial of the impeachment of Robert W. Archbald additional circuit judge of the United States for the third judicial district, designated a judge of the United States Commerce Court.

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[1] Second session Sixty-second Congress, Senate Journal, p. 628.

[2] Record, p. 9117.

On motion of Mr. Clark, the following resolution was agreed to:

Ordered, That the Secretary notify the House of Representatives that the Senate is now organized for the trial of articles of impeachment against Robert W. Archbald, United States circuit judge, and is ready to receive the managers on the part of the House at its bar.

A message announcing the passage of this order was delivered in the House by Mr. Crockett, one of the clerks of the Senate.

Mr. Lodge then submitted:

I am about to make a motion that the Senate, sitting as a court of impeachment, take a recess until 3 o'clock in order to give the managers on the part of the House time to assemble and appear here. Before making the motion, however, I call attention to the fact that the Senate, sitting as a court, when it takes a recess brings the Senate back into legislative session where it was. I now make the motion that the Senate, sitting as a court of impeachment, take a recess until 3 o'clock.

The motion was agreed to, and at 1 o'clock and 45 minutes, p. m., the Senate, sitting as a court of impeachment, took a recess until 3 o'clock p.m., and a message notifying the House of this recess was transmitted [1] to the House.

503. The Archbald impeachment, continued.

The ceremony of formal demand by the managers that process issue in the trial of the Archbald impeachment.

On demand of the managers, the Senate ordered summons to be issued for the appearance of Judge Archbald, fixing the day and hour of return.

The proceedings of the Senate, sitting in the impeachment trial of Judge Archbald, were recorded in a separate journal.

In the meanwhile [2] the resolution notifying the House that the Senate was now organized for the trial was delivered in the House, and, at 3 o'clock and 1 minute p.m., the managers of the impeachment on the part of the House of Representatives appeared at the bar and their presence was announced by the Sergeant at Arms.

The PRESIDENT PRO TEMPORE. The Sergeant at Arms will conduct the managers to the seats provided for them within the bar of the Senate.

The managers were conducted to the seats assigned them within the space in front of the Secretary's desk.

The PRESIDENT PRO TEMPORE. Gentlemen managers, the Senate is now organized for the trial of the impeachment of Robert W. Archbald, additional circuit judge of the United States for the third judicial circuit, designated a judge of the Commerce Court.

Whereupon Mr. Manager Clayton, chairman of the managers on the part of the House, rose and said:

Mr. President, we, as managers on the part of the House of Representatives, are directed by the House of Representatives to appear at the bar of the Senate, which we now do, and demand that process be issued to Robert W. Archbald, additional circuit judge of the United States for the third judicial circuit, designated a judge of the Commerce Court, and that he be required to answer at the bar of the Senate the said articles of impeachment.

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[1] Record, p. 9145.

[2] Second session Sixty-second Congress, Record, p. 9123.

Thereupon Mr. Clark offered the following, which was agreed to by the Senate:

Ordered, That a summons be issued, as required by the Rules of Procedure and Practice in the Senate when sitting for the trial of the impeachment of Robert W. Archbald, returnable on Friday, the 19th day of the present month, at 12.30 o'clock in the afternoon.

Mr. Manager Clayton said:

Mr. President, I beg to say on behalf of the managers on the part of the House of Representatives that they will await the further pleasure of the Senate.

And then, at 3 o'clock and 5 minutes p. m., the managers on the part of the House retired from the Chamber.

On motion of Mr. Clark, the Senate, sitting for the trial of the impeachment, adjourned until Friday, July 19, at 12.30 o'clock in the afternoon. A message advising the House of this action on the part of the Senate was transmitted to the House.

The proceedings of the court of impeachment do not appear in the daily Journal of the Senate but are recorded in a separate journal appended thereto and entitled "Proceedings of the Senate on the Trial of Robert W. Archbald, etc."

The daily Journal of the Senate merely records the announcement of the session of the Senate sitting on the trial, and in each instance concludes:

After proceedings had therein as stated in the record, the Senate resumed its legislative business.

504. The Archbald impeachment trial.

Form of oath of the Sergeant at Arms and form of proclamation opening sessions of the Senate sitting in the impeachment trial of Judge Archbald.

In response to the writ of summons, Judge Archbald appeared in person attended by counsel to answer the articles of impeachment.

In the Archbald trial the Senate adopted orders supplementing the rules of procedure and practice for the Senate when sitting in impeachment trials.

Order of the Senate prescribing method of submitting requests, applications, or objections, and regulating colloquys and questions.

In response to a motion by respondent's counsel that time be allowed to present the answer, the Senate granted 10 days.

On July 19,[1] in the Senate, the following appears:

The PRESIDENT PRO TEMPORE. The hour of 12.30 o'clock, to which the Senate sitting as a court in the impeachment of Judge Robert W. Archbald adjourned, has arrived. The Sergeant at Arms will make the opening proclamation.

The SERGEANT AT ARMS. Hear ye! Hear ye! Hear ye! All persons are commanded to keep silence on pain of imprisonment while the Senate of the United States is sitting for the trial of the articles of impeachment exhibited by the House of Representatives against Robert W. Archbald, additional circuit judge of the United States for the third judicial circuit, designated a judge of the United States Commerce Court.

By direction of the President pro tempore, the names of those Senators who had not been sworn were called. There were no responses.

[1] Second session Sixty-second Congress, Record, p. 9275; Senate Journal, p. 629.

Mr. Clark offered this resolution, which was agreed to:

Ordered, That the Secretary inform the House of Representatives that the Senate is sitting in its Chamber and ready to proceed with the trial of the impeachment of Robert W. Archbald.

On motion of Mr. Clark, it was:

Ordered, That the Presiding Officer on the trial of the impeachment of Robert W. Archbald, circuit judge of the United States, be, and is hereby, authorized to sign all orders, mandates, writs, and precepts authorized by the Rules of Procedure and Practice in the Senate when sitting on impeachment trials and by the Senate.

At 12 o'clock and 37 minutes p. m. the Assistant Doorkeeper announced the managers on the part of the House, who were conducted to the seats assigned to them in the area in front of the Secretary's desk, on the left of the Chair.

At 12 o'clock and 39 minutes p. m. the respondent, Robert W. Archbald, and his counsel, A. S. Worthington and Robert W. Archbald, jr., entered the Chamber and were conducted to seats assigned them in the space in front of the Secretary's desk on the right of the Chair.

The PRESIDENT PRO TEMPORE. The Secretary will read the Journal of the proceedings of the last session of the Senate while sitting in the trial of the impeachment of Robert W. Archbald.

The Secretary read the Journal of proceedings of the Senate sitting for the trial of the impeachment of Tuesday, July 16, 1912.

By direction of the President pro tempore, the Secretary read the following return appended to the writ of summons and administered the following oath to the Sergeant at Arms:

"I, Daniel M. Ransdell, Sergeant at Arms of the Senate of the United States, do solemnly swear that the return made by me upon the process issued on the 16th day of July, 1912, by the Senate of the United States, against Robert W. Archbald, additonal circuit judge of the United States for the third judicial circuit and designated a judge in the Commerce Court, is truly made, and that I have performed such service therein described. So help me, God."

Whereupon the Sergeant at Arms made proclamation:

Robert W. Archbald! Robert W. Archbald! Robert W. Archbald, circuit judge of the United States and designated as a judge of the United States Commerce Court: Appear and answer to the articles of impeachment exhibited by the House of Representatives against you.

The President pro tempore announced:

Counsel for the respondent are informed that the Senate is now sitting for the trial of Robert W. Archbald, additional circuit judge of the United States for the third judicial circuit and designated a judge of the Commerce Court, upon articles of impeachment exhibited by the House of Representatives, and will hear his answer thereto.

Mr. Worthington, of counsel for the respondent, entered formal appearance, which was read by the Secretary and ordered placed on file.

Mr. Worthington then submitted a motion on behalf of the respondent praying that time be granted in which to prepare an answer to the articles of impeachment.

On motion of Mr. Clark, of Wyoming, amended by motion of Mr. Porter J. McCumber, of North Dakota, and further modified on suggestion of Mr. Henry Cabot Lodge, of Massachusetts, it was:

Ordered, That the respondent present the answer to the articles of impeachment at 12 o'clock and 30 minutes post meridian on Monday, the 29th day of July, 1912.

The following orders were then severally agreed to:

Ordered, That the managers on the part of the House be allowed until the 1st day of August, 1912, at 1 o'clock in the afternoon, to present a replication, or other pleading, of the House of Representatives to the answer of the respondent. That any subsequent pleadings, either on the part of the managers or of the respondent, shall be filed with the Secretary of the Senate, of which notice shall be given to the House of Representatives and the respondent, respectively, so that all pleadings shall be closed on or before the 4th day of August, 1912.

Ordered, That in all matters relating to the procedure of the Senate, sitting in the trial of the impeachment of Robert W. Archbald, circuit judge of the United States, whether as to form or otherwise, the managers on the part of the House or the counsel representing the respondent may submit a request or application orally to the Presiding Officer, or, if required by him or requested by any Senator, shall submit the same in writing.

In all matters relating immediately to the trial, such as the admission, rejection, or striking out of evidence, or other questions usually arising in the trial of causes in courts of justice, if the managers or counsel for the respondent desire to make any application, request or objection, the same shall be addressed directly to the Presiding Officer, and not otherwise.

It shall not be in order for any Senator to engage in colloquy or to address questions either to the managers on the part of the House or the counsel for the respondent, nor shall it be in order for Senators to address each other, but they shall address their remarks directly to the Presiding Officer.

Ordered, That the proceedings of the Senate sitting in the trial of impeachment of Robert W. Archbald be printed daily for the use of the Senate as a separate document.

And then, at 1 o'clock and 19 minutes p. m., the Senate, sitting for the trial of the impeachment, adjourned, and the managers on the part of the House and the respondent and his counsel withdrew from the Chamber.

505. The Archbald impeachment continued.

The answer of Judge Archbald to the articles of impeachment was signed by himself and his counsel.

The answer in the Archbald case was read by the Secretary of the Senate.

The answer of Judge Archbald demurred severally to all the articles of impeachment, alleging that no impeachable offense had been charged and then replying in detail to the charges set forth in each article.

The managers were not supplied with a copy of the answer of Judge Archbald at the time of filing.

On July 29 [1] the Senate, at the appointed hour, discontinued its legislative business, and the session for the impeachment proceedings was opened with the usual proclamation by the Sergeant at Arms.

The oath was administered to certain Senators not previously sworn.

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[1] Second session Sixty-second Congress, Senate Journal, p. 630; Record, p. 9795

The managers, and the respondent with his counsel, having attended, the President pro tempore directed the Journal of the last session's proceedings to be read. The Journal having been approved, Mr. Worthington presented the respondent's answer, consisting of a separate demurrer and answer to each of the 13 articles of impeachment, which was read by the Secretary.

This answer of respondent appears in full in the Journal.[1]

At the conclusion of the reading Mr. Manager Clayton inquired if the counsel could furnish the managers on the part of the House of Representatives with a copy of this answer by the respondent to the articles of impeachment.

Mr. Worthington, of counsel for the respondent, replied:

> Mr. President, I regret to say that we had obtained a copy for that purpose, but different newspapers and press associations exhausted the copies, even our own office copy. Otherwise we should be very happy to hand a copy to the managers.

And then, on motion of Mr. Lodge, at 2 o'clock and 5 minutes p.m., the Senate, sitting on the trial of impeachment, adjourned until Thursday, August 1, 1912, at 1 o'clock, p.m.

506. The Archbald impeachment continued.

An attested copy of Judge Archbald's answer, having been messaged to the House by the Senate, was referred to the managers.

The managers having prepared a replication to the answer of Judge Archbald, submitted it to the House for approval and adoption.

The House notified the Senate by message that it had adopted a replication in the Archbald trial and had authorized its managers to file with the Secretary of the Senate any further pleading deemed necessary.

On July 31,[2] in the House, the Speaker announced the reference to the managers on the part of the House of Representatives of an attested copy of the answer of Robert W. Archbald to the articles of impeachment messaged to the House from the Senate on the previous day.

Mr. Manager Clayton said:

> Mr. Speaker, I am directed by my associate managers on the part of the House to say that the managers were furnished on yesterday with a certified copy of the answer of Judge Archbald, additional circuit judge for the first judicial circuit, designated a judge in the Commerce Court.
>
> And I am further directed to say that the managers have considered the answer in the matter of the impeachment proceedings against Judge Archbald and have directed me to present to the House, and ask its adoption, the replication[3] to such answer, and I ask that the Clerk read the replication, which I send to the desk.

The Clerk read the replication. On motion of Mr. Manager Clayton, the replication was unanimously adopted.

Mr. Manager Clayton then offered the following resolution, which was agreed to:

> *Resolved,* That a message be sent to the Senate by the Clerk of the House informing the Senate that the House of Representatives has adopted a replication to the answer of Robert W.

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[1] Senate Journal, pp. 630–639.

[2] Second session Sixty-second Congress, House Journal, p. 910; Record, p. 9954.

[3] House Report No. 1119.

Archbald, additional circuit judge of the United States for the third judicial circuit, and designated a judge of the United States Commerce Court, to the articles of impeachment exhibited against him, and that the same will be presented to the Senate by the managers on the part of the House; and also that the managers have authority to file with the Secretary of the Senate, on the part of the House of Representatives, any subsequent pleadings which they shall deem necessary.

507. The Archbald impeachment, continued.

The replication in the Archbald trial was presented by the managers and read by the Secretary of the Senate.

The replication of the House to the answer of Judge Archbald was submitted without signature.

The replication of the House consisted of a general denial of all allegations set forth in Judge Archbald's answer and an averment that the charges contained in the articles of impeachment set forth impeachable offenses.

On August 1[1] the Senate went into session for the trial in the usual form.

The President pro tempore laid before the Senate a message received from the House of Representatives, which was read by the Secretary, as follows:

Resolved, That a message be sent to the Senate by the Clerk of the House informing the Senate that the House of Representatives has adopted a replication to the answer of Robert W. Archbald, additional circuit judge of the United States for the third judicial circuit and designated a judge of the United States Commerce Court, to the articles of impeachment exhibited against him, and that the same will be presented to the Senate by the managers on the part of the House; and also that the managers have authority to file with the Secretary of the Senate, on the part of the House of Representatives, any subsequent pleadings which they shall deem necessary.

Mr. Manager Clayton said:

Mr. President, on behalf of the House of Representatives and on behalf of the managers of the House of Representatives I now present the replication of the House of Representatives to the answers made by Robert W. Archbald, United States circuit judge for the third judicial circuit and designated a judge of the United States Commerce Court. The replication is to the answer of the respondent. I ask that it be read by the Secretary.

The replication was read by the Secretary and ordered to be printed.

Mr. Manager Clayton then submitted the following order for adoption by the Senate:

Ordered, That lists of witnesses be furnished the Sergeant at Arms by the managers and the respondent, who shall be subpoenaed by him to appear at 12 o'clock and 30 minutes postmeridian on the 7th day of August, 1912.

Ordered, That the cause shall be opened and the trial proceeded with at 12 o'clock and 30 minutes postmeridian on the 7th day of August, 1912.

Mr. Worthington, of counsel for the respondent, objected:

Mr. President, as far as I know, it is unprecedented to ask the court to fix a time for the trial of a case until it is at issue. By an order which has heretofore been made by the Senate it is provided that after this replication shall have been filed further pleadings on either side may be filed with the Secretary of the Senate, the pleadings to be closed by next Saturday. Having heard the replication read, I am quite clear that it will be necessary to file a further pleading on

[1] Second session Sixty-second Congress, Senate Journal, p. 638; Record, p. 9983.

behalf of the respondent in order to have this case in such shape that it can be legally determined. So far as we are concerned, I think that further pleading may in all probability be filed certainly by 12 o'clock to-morrow.

I would respectfully suggest that it is not in order to fix a time for the trial until what is to be tried is fixed by the pleadings in the case.

Upon further argument by Mr. Manager Clayton and Mr. Worthington—

The PRESIDENT PRO TEMPORE. The Chair will be glad to submit any motion which counsel for the respondent may make.

Mr. WORTHINGTON. The rule which you have adopted would permit counsel for the respondent or the managers to make orally any request for an order, but it must be reduced to writing if required.

I make orally the motion that the question of fixing a date for the trial be postponed until the court convenes on Saturday next.

After further discussion, Mr. Thomas S. Martin, of Virginia, suggested that the managers on the part of the House permit consideration of their motion to go over until Saturday, August 1.

The President pro tempore submitted:

Counsel on the part of the respondent asks that the consideration of the question as to when the trial shall be proceeded with be postponed for determination until Saturday. Is there objection? If not, by unanimous consent it is so ordered. Is there any other matter the managers on the part of the House desire to present?

Mr. Manager CLAYTON. There is nothing else, Mr. President, and having no other business before the Senate, we beg leave at this time to retire.

Thereupon the managers and respondent, with his counsel, withdrew and adjournment was taken until August 3, at 2 o'clock p.m.

508. The Archbald impeachment, continued.

Counsel for Judge Archbald having elected not to plead further notified the managers by letter of that decision.

In response to an objection by the managers to the designation "board of" managers, contained in a communication incorporated in the record of proceedings, the Secretary of the Senate was authorized to correct the designation.

In the Archbald trial the Senate provided that lists of witnesses to be subpoenaed should be furnished by managers or counsel to the Sergeant at Arms and that additional witnesses desired later should be subpoenaed on application to the Presiding Officer.

The Senate considered in secret session a motion by the managers fixing the date on which the Archbald trial should be opened.

The Senate declined to grant the motion of the managers, submitted August 3, that the trial of Judge Archbald begin August 7, and, on motion of a Senator, set the opening of the trial for December 3.

On August 3 [1] a letter addressed to Mr. Manager Clayton by Mr. Worthington, of counsel for the respondent, was, by request of Mr. Worthington, seconded by Mr., Manager Clayton, read and incorporated in the record as follows:

WASHINGTON, D. C., *August 2, 1912.*

Hon. HENRY D. CLAYTON,
Chairman Board of Managers in the matter of
the impeachment of Robert W. Archbald.

DEAR SIR: Inasmuch as counsel for Judge Archbald have decided not to file any further pleadings in his case, it is due to the board of managers that I should notify them of that fact and inform them why counsel have changed their minds on this subject since the argument in the Senate yesterday.

In the respondent's first answer to each of the articles of impeachment he avers in substance that the article does not set forth an impeachable offense. In the first paragraph of the replication filed on behalf of the House of Representatives issue was joined on these answers. But as to whole of the sixth article and as to part of the thirteenth article the respondent pleads in substance that even if the article sets forth an impeachable offense it sets it forth in such general and indefinite terms that the respondent should not be called upon to answer it. And as to the thirteenth article, the plea is made that it is bad because it undertakes to charge in one article two separate and distinct offenses.

We do not find in the replication any distinct reference to either of these two last-mentioned defenses, relating one to both the sixth and the thirteenth articles and the other to the thirteenth article alone. It was our impression yesterday that for this reason some further pleading would be necessary on our part as to these two matters. However, as you stated in the Senate yesterday that it is the understanding of the board of managers that their replication is a denial of all of our allegations as to the insufficiency of the articles of impeachment, whether on one ground or another, counsel for tale respondent have decided that they will accept this construction of the replication made by the board of managers. This being so, no further pleading seems to be necessary, and we will be ready, when the Senate meets to-morrow, to take up the question of the date of trial.

Yours, very truly,

A. S. WORTHINGTON
Of Counsel for Respondent.

Thereupon Mr. Manager Clayton said:

Mr. President, I do not desire to be hypercritical of the language employed by the counsel, but so far as my investigation goes, I am led to understand that the managers of the House have never before been spoken of as a board of managers. I therefore ask the counsel to strike from his letter the words "board of" wherever they occur. We are not a board of managers. We are managers on the part of the House of Representatives; and while not a purist, not a hairsplitting dealer in technicalities, I think it is proper that in papers of this character and of this solemnity the usual forms be followed.

The PRESIDENT PRO TEMPORE. The Secretary will make the correction.

On request of Mr. Manager Clayton, the order pending before the Senate at adjournment was reported. On motion of Mr. Manager Clayton, the order was amended to read as follows:

Ordered, That lists of witnesses be furnished the Sergeant at Arms by the managers and the respondent, who shall be subpoenaed by him to appear at 12 o'clock and 30 minutes postmeridian on the 7th day of August, 1912.

And further ordered, That in case hereafter the managers or the respondent may desire the attendance of additional witnesses, in such case the managers or the respondent may have the

[1] Second session Sixty-second Congress, Senate Journal, p. 638; Record, p. 10132.

witness or witnesses desired subpoenaed, in accordance with the practice and usage of the Senate, upon application in such form as may be approved by the Presiding Officer.

Ordered, That the cause shall be opened and the trial proceeded with at 12 o'clock and 30 minutes postmeridian on the 7th day of August, 1912.

The PRESIDENT PRO TEMPORE. The Presiding Officer would inquire whether the counsel for the respondent desires to submit any order.

Mr. WORTHINGTON, No, Mr. President.

After argument by Mr. Manager Clayton and Mr. Worthington on the adoption of the order as amended, Mr. Clark, of Wyoming, submitted:

Mr. President, anticipating that the decision of this matter will lead to some debate, and as under the rules it must be considered behind closed doors, I move that the doors be closed for the purpose of deliberation.

The motion was agreed to, and the President pro tempore directed the Sergeant at Arms to clear the galleries and close the doors. The managers and the respondent, with his counsel, withdrew, and at 4 o'clock and 30 minutes p. m., the doors were closed until 5 o'clock and 32 minutes p. m., when the doors were reopened.

The managers on the part of the House and the respondent, accompanied by counsel, entered the Chamber and took the seats assigned them.

Mr. Jacob H. Gallinger, of New Hampshire, offered the following order:

Ordered, That lists of witnesses be furnished the Sergeant at Arms by the managers and the respondent, who shall be subpoenaed by him to appear at 12 o'clock and 30 minutes postmeridian on the 3d day of December, 1912.

Ordered, That the cause shall be opened and the trial proceeded with at 12 o'clock and 30 minutes postmeridian on the 3d day of December, 1912.

Mr. Henry L. Meyers, of Montana, offered the following as a substitute for the order submitted by Mr. Gallinger:

Ordered, That the trial of the accused under these impeachment proceedings and charges be, and is hereby, set for the 15th day of August, 1912, at 12:30 p. m., and that orders for witnesses be filed on or before August 10, 1912, and thereafter as the Senate may order.

The order submitted by the managers on the part of the House of Representatives was also read. The pending question was then put by the President pro tempore, as follows:

The several orders are before the Senate for consideration. Under the view taken by the Presiding Officer, the question should first be put on the order fixing the most distant time. That is in accordance with parliamentary procedure and also in accordance with such procedure as might be considered proper in a court. The order proposed by the Senator from New Hampshire, Mr. Gallinger, is the one which fixes the longest period, and the vote will first be taken upon that. The rule [1] of the Senate requires that the vote shall be taken by yeas and nays. It is therefore not necessary that the yeas and nays should be ordered as in other instances. As Senators' names are called, those who favor the date fixed by the order proposed by the Senator from New Hampshire will vote "yea." Those who are opposed to that date and favor other dates will as their names are called, vote "nay." The Secretary will call the roll.

The roll being called, it was decided in the affirmative, yeas 44, nays 19, and the order submitted by Mr. Gallinger was agreed to.

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[1] Standing Rules of the Senate, Rule V, p. 174.

The managers on the part of the House thereupon retired from the Chamber.

The Senate sitting for the trial of the impeachment continued in session and considered briefly a matter of procedure [2] relating to the trial.

Following the disposition of the question of procedure, the respondent retired from the Chamber, and the Senate, sitting for the trial of the impeachment, adjourned until Tuesday, December 3, at 12:30 o'clock p. m.

509. The Archbald impeachment, continued.

The opening addresses in the Archbald trial were regulated by order of the Senate.

Managers and counsel made extended opening statements in the Archbald trial, the managers outlining charges which they proposed to establish and counsel for the respondent setting forth the contention that impeachment could be sustained only on conviction of offenses punishable in criminal court and controverting charges preferred in the articles of impeachment.

On December 3, 1912,[1] Mr. Worthington introduced Mr. Alexander Simpson, Jr., of the Philadelphia bar, as associate counsel for the respondent.

The following orders were severally agreed to:

Ordered, That the daily sessions of the Senate sitting in the trial of impeachment of Robert W. Archbald, additional circuit judge of the United States, shall, unless otherwise ordered, commence at 2 o'clock in the afternoon.

Ordered, That the opening statement on behalf of the managers shall be made by one person, to be immediately followed by one person who shall make the opening statement on behalf of the respondent.

Upon suggestion of Mr. Manager Clayton and Mr. Worthington, respectively, it was agreed that the managers on the part of the House of Representatives and the respondent and his counsel should, during the remainder of the proceedings, appear without the formality of an announcement.

Mr. Manager Clayton opened the case for the House of Representatives as follows:

Mr. President, as I understand the action of the Senate, it contemplated that at this time the managers should proceed to make a statement embodying the facts upon which the articles of impeachment are predicated in this case.

Mr. Manager Clayton then proceeded with a statement of what the managers proposed to prove.

He was followed by Mr. Worthington, who said:

Mr. President and Senators, for the first time in an impeachment trial in this tribunal the opening statement for the respondent is to be made at the beginning of the case instead of at the close of the testimony on behalf of the managers. We have desired to do this and are doing it with the acquiescence of the honorable managers for two reasons. One is that the Members of the Senate may know when the introduction of testimony is going on what are the questions of fact in dispute. The other is that Senators may know from the beginning what we rely upon as the law of the case.

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[1] Third session Sixty-second Congress, Senate Journal, p. 317; Record, p. 21.

[2] See section 7714, Chapter CXCI in this volume.

Mr. Worthington then stated the contention of counsel on behalf of the respondent, that Judge Archbald could be properly convicted in impeachment proceedings only when convicted of an offense punishable in a criminal court, and controverted and discussed in detail allegations contained in the charges preferred in the articles of impeachment.

In reply to an allusion made by Mr. Worthington in discussing the theory that impeachment could be only for indictable offenses, Mr. Manager Clayton said by way of rebuttal:

Mr. President, in reply to the complaint which has been made by the honorable gentleman who represents the respondent that we did not go into the discussion of the law in the preliminary statement which the managers had the honor to submit this afternoon, I beg to say that we followed what we believed to be the practice in such cases. I have before me the record in the case of Judge Swayne. I observe that Judge Palmer, who was then the manager speaking for all the managers, after he concluded his statement of facts, winding up, with a condensed summary of all the statements which he had made at length, ended the preliminary statement of facts which is required according to the rules and practice of the Senate. He did not at that time present any brief or any argument or any views on the law of impeachment. The managers, Mr. President, have already prepared in a formal way a brief, and can present that brief, and in argument fully cover their views as to the law of impeachment; but we thought that this brief and what the managers said last summer, which is in the Record and to which I have referred, would amply apprise the honorable counsel for the respondent of the line of argument on the law in this case that the managers would pursue.

On December 5,[1] on motion of Mr. John D. Works, of California, it was—

Ordered, That such briefs and citations of authorities as have already been prepared by the managers on the part of the House and counsel for the respondent be filed with the Secretary and printed in the Record for the immediate use of Senators.

510. The Archbald impeachment, continued.

The presentation of evidence in the Archbald trial.

Instances wherein the Senate by order restricted the number of character witnesses which might be called to testify.

An instance in which the Senate by order disregarded an established rule of evidence.

On December 4,[2] following the reading and approval of the Journal, the names of witnesses on behalf of the managers were read to ascertain their presence, and the introduction of testimony on behalf of the managers began.

This presentation of testimony continued on December 5, 6, 7, 9, 10, 11, 12, and was concluded on December 14, when Mr. Manager Clayton announced that examination in chief had been concluded.

The introduction of testimony on behalf of the respondent was begun on December 16 and continued until December 19, when adjournment was taken until January 3, 1913.

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[1] Record, p. 151.

[2] Third session Sixty-second Congress, Record, p. 98.

On December 17,[3] following the introduction of a number of witnesses called by counsel on behalf of the respondent to testify as to respondent's character, Mr. Manager Clayton said:

Mr. President, the managers have offered no character witnesses anywhere in these proceedings; it is not their purpose to offer any character witnesses. Ten character witnesses have been examined. The rule adopted, or the practice I may say, to be more accurate, in all the courts of justice so far as I know is that the court has the discretionary power to limit the number of witnesses as to character. I take it that that power is an inseparable incident of the court to regulate its proceedings and for the purpose, among others, of bringing the trial to an end.

In so far as I know, all courts permit a reasonable number of witnesses to be examined on character; but where the testimony of the character of the party is not controverted, the court has always, after a reasonable number of witnesses have been examined, held that no more should be examined on that particular matter. Some of the courts of the Union hold that four character witnesses are sufficient where the testimony of those witnesses is not controverted.

So, Mr. President, I respectfully submit to you and to the Senate that after these gentlemen have examined 10 witnesses on character and when the testimony of those character witnesses is not disputed—is not controverted—and when the managers tell the Senate it will not be controverted, it seems to me that the further examination of character witnesses might well be dispensed with.

The Presiding Officer said:

The Chair recognizes, of course, that the practice is such as the manager has indicated, and the necessity of it is apparent. Otherwise the time of a court might be indefinitely taken up through the introduction of innumerable witnesses. At the same time the Chair recognized that in this case the character of the respondent is necessarily in issue, and on account of the gravity of the case and the peculiar position which the Presiding Officer holds, simply as the mouthpiece of the Senate, the Chair does not feel authorized to take the responsibility of shutting off the respondent in the proof which he seeks to make upon this line. The Senate has full control over the matter whenever it sees proper to exercise it.

Thereupon, on motion of Mr. James A. Reed, of Missouri, it was—

Ordered, That the number of character witnesses shall be limited to 15.

On December 18,[1] on cross-examination, Mr. Manager Webb proposed to interrogate Miss Mary F. Boland, a witness called in behalf of the respondent, about certain matters relative to a conversation which had not been referred to in the examination in chief. Objection by counsel for the respondent was sustained by the presiding officer.

The PRESIDING OFFICER. The rule is plain that the counsel can only cross-examine the witness about matters upon which the witness has been interrogated on direct examination.

Whereupon, on motion of Mr. James A. Reed, of Missouri, it was—

Ordered, That the witness now on the stand, Miss Mary F. Boland, be at this time interrogated by the managers relative to that part of the conversation sought to be elicited.

511. The Archbald impeachment, continued.

In the impeachment trial of Judge Archbald the respondent took the stand and testified in his own behalf.

No rebuttal evidence was offered by the managers in the Archbald trial.

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[1] Third session Sixty-second Congress, Senate Journal, p. 322; Record, p. 841.

[2] Record, p. 774.

The Senate limited the time of the final arguments in the impeachment trial of Judge Archbald.

The order in which closing arguments in the Archbald trial should be made was arranged by stipulation between managers and counsel.

The Senate permitted argument in manuscript to be filed with the reporter and included in the printed report of the proceeding.

Counsel having withheld remarks from the record in violation of the rule, the managers called attention to the infraction and asked that the rule be enforced.

The Senate fixed the time at which a final vote should be taken on the articles of impeachment presented against Judge Archbald and notified the House by message.

The voting on the articles in the Archbald impeachment was without debate but each Senator was permitted to file an opinion to be published in the printed proceedings.

The presentation of testimony on behalf of the respondent was resumed on January 3, 1913, and continued on January 4 and January 6, and concluded on January 7. On the last two days the respondent was called to the stand in person by counsel and testified in his own behalf,[1] being cross-examined by the managers and answering numerous questions propounded by Senators in writing. No rebuttal evidence was presented by the managers.

The taking of evidence having been concluded on both sides, on suggestion of the managers, all witnesses summoned on behalf of either side were finally discharged.

On motion of Mr. Reed Smoot, of Utah, it was:

Ordered, That hereafter the daily sessions of the Senate sitting in the trial of impeachment of Robert W. Archbald, additional circuit judge of the United States, shall commence at 1 o'clock in the afternoon and shall continue until 6 o'clock p. m.; that the time for final argument of the case shall be limited to three days from and including January 8, 1913, and shall be divided equally between the managers on the part of the House of Representatives and the counsel for the respondent, the time thus assigned to each side to be divided as each side may for itself determine.

On January 8[2] agreement between managers and counsel for the respondent as to order in which argument should be made was indicated by Mr. Worthington, as follows:

Mr. President, I may say it is entirely agreeable to counsel for the respondent. We have had some conference with the managers about it, and we understand that all the managers who are to speak, except the one who is to make the closing argument, will speak before we begin.

The following orders were severally agreed to:

Ordered, That the time for final arguments in the trial of impeachment of Robert W. Archbald, additional circuit judge of the United States, shall be limited to three days from and including January 8, 1913, and shall be divided equally between the managers on the part of the House of Representatives and the counsel for the respondent, the time thus assigned to each side to be divided as each side may for itself determine.

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[1] This is apparently the only instance in which a respondent in an impeachment case before the Senate has taken the stand in his own behalf.

[2] Third session Sixty-second Congress, Senate Journal, p. 325; Record, p. 1208.

Ordered, That any of the managers or counsel for the respondent having all or any portion of his argument in manuscript may deliver a copy of the same to the Reporter or any portion thereof, which for lack of time or to save the time of the Senate the managers or counsel shall omit to deliver or read, and the same shall be incorporated by the Reporter as a part of the argument delivered, and any manager or counsel who does not address the court may file and have printed as a part of the proceedings an argument before the close of the discussion.

Mr. Manager Sterling, on behalf of the managers, began the argument in support of the articles of impeachment, and was followed by Messrs. Manager Webb and Manager Floyd. Mr. Manager Howland also addressed the Senate and had not concluded at adjournment. On January 9[3] Mr. Manager Howland concluded his argument, and Messrs. Manager Norris and Manager Davis continued for the managers.

Mr. Simpson then opened the argument on behalf of the respondent, and was followed by Mr. Worthington, who concluded his argument on January 10.[4] Mr. Worthington was followed by Mr. Manager Clayton, who closed the argument on behalf of the managers.

At the conclusion of the argument, Mr. Reed, proposed to submit to the respondent for answer the following question which he sent to the desk in writing:

You have testified that you were in doubt with reference to the proper construction to be placed upon the testimony of Mr. Compton, and that thereupon you wrote a letter to Helm Bruce, the attorney, asking him for his construction of the evidence and you have further stated that you attached the reply written by Helm Bruce to the record. It appears in the original record that in the sentence which appears in typewriting, "We did apply it there," an alteration is made by pen and ink, a caret being inserted between the words "did" and "apply," and a line is drawn from the caret to the margin, and the word "not" written. Did you make this alteration?

On motion of Mr. Clark, of Wyoming, the doors were closed for deliberation. After one hour and four minutes the doors were reopened, and the President pro tempore announced that the Senate in private conference had determined that the question should not be asked. Mr. Reed withdrew the request.

On January 11,[5] upon the approval of the minutes, Mr. Clark, of Wyoming, moved that the doors be closed for deliberation on the part of the Senators, and the question was put, when Mr. Manager Clayton said:

Before the motion is announced as having been carried, I will state that I submitted a communication to the President of the Senate this morning directing attention to what I think is an infraction of the rules of the Senate on the part of Mr. Worthington, of counsel for the respondent, who has withheld his remarks from the Record.

Mr. President, everyone else printed his remarks when those remarks were completed without withholding them, and I know of no rule of any court which permits this to be done. Against that, Mr. President, I desire to say that I think it is improper. I have called the attention of the Presiding Officer to that fact, and I hope that the order made in this case will be observed.

Mr. Worthington said:

I have only to say, Mr. President, that after the late hour when we adjourned here last night, as soon as possible I got to work at the manuscript which had been forwarded to me and continued to work on it until midnight. I was then told that it was too late to get it in the Record of to-day.

I was not aware of any rule of the Senate which prevented this from being done, and I observed I think that the remarks of one of the managers, Mr. Manager Howland, had been withheld.

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[3] Record, p. 1258.

[4] Record, p. 1329.

[5] Record, p. 1385.

To which Mr. Manager Clayton rejoined:

Mr. President, may I not make, with the permission of the Senator, another suggestion? The manager who is now addressing you remained at his office last night until the hour of 12:30 in order to read the manuscript of the report of his remarks made here yesterday, made after the gentleman who has just addressed you made his. And it will be borne in mind that Mr. Worthington made part of his argument day before yesterday.

Mr. President, it seems to me that in all fairness and due observance of this rule his remarks should have been in the Record this morning. This manager, who labored under greater disadvantage than he did, has put his in the Record this morning.

Mr. Frank B. Brandegee, of Connecticut, having made the point of order that made the motion to close the doors is not debatable, the President pro tempore said:

The Chair withheld the announcement of the vote out of courtesy to the manager on the part of the House of Representatives, which the Chair supposed would meet with the acquiescence and approval of the Senate. Strictly, of course, the order to close the doors ought to have been made, but this was the only opportunity, and the manager on the part of the House of Representatives, in the opinion of the Chair, was entitled to that courtesy. The Chair will now, however, declare that the motion of the Senator from Wyoming is carried, and the Sergeant at Arms is directed to clear the galleries and close the doors.

The doors having been reopened, on motion of Mr. Clark of Wyoming, it was severally:

Ordered, That on Monday, January 13, 1913, at the hour of 1 o'clock p.m., a final vote be taken on the articles of impeachment presented by the House of Representatives against Robert W. Archbald, additional circuit judge of the United States.

Ordered, That the Secretary of the Senate do acquaint the House of Representatives that the Senate sitting as a High Court of Impeachment will on Monday, the 13th day of January instant, at the hour of 1 o'clock, p.m., proceed to pronounce judgment on the articles of impeachment exhibited by the House of Representatives against Robert W. Archbald.

Mr. Elihu Root of New York then submitted the following:

Ordered, That upon the final vote in the pending case each Senator may, in giving his vote, state his reasons therefor, occupying not more than one minute, which reason shall be entered in the Journal in connection with his vote; and each Senator may, within two days after the final vote, file his opinion, in writing, to be published in the printed proceedings in the case.

Mr. MCCUMBER. I move to amend the proposed order by striking out the first of it, relating to the one-minute explanation of a vote, so that the latter portion may still stand.

The amendment was agreed to, yeas 40, nays 31, and the order as amended was unanimously adopted.

512. The Archbald impeachment, continued.

Forms of voting on the articles and declaring the result in the Archbald impeachment.

The Presiding Officer announced the result of the vote on each article of the Archbald impeachment and the conviction or acquittal of respondent on each.

The respondent, who had attended throughout the Archbald trial, was represented by counsel, but was not present at the time of rendering judgment.

Having found Judge Archbald guilty, the Senate proceeded to pronounce judgment of removal and disqualification.

The Presiding Officer held that the question on removal and disqualification was divisible.

Form of judgment pronounced by the Presiding Officer in the Archbald case.

The Archbald trial being concluded, the Senate, on motion, adjourned without day.

No report, on the conclusion of the Archbald trial, was made to the House by the managers, but the Senate, by message, announced the judgment.

On January 13[1] the President pro tempore announced that the time had arrived for the consideration of the impeachment. Mr. Worthington, Mr. Robert W. Archbald, jr., and Mr. Martin, of counsel for the respondent, and the managers on the part of the House of Representatives appeared in the seats provided for them.

The Sergeant at Arms made the usual proclamation and the Journal was read and approved.

On motion of Mr. Root, it was:

Ordered, That upon the final vote in the pending impeachment the Secretary shall read the articles of impeachment successively, and when the reading of each article is concluded the Presiding Officer shall state the question thereon as follows:

"Senators, How say you? Is the respondent, Robert W. Archbald, guilty or not guilty as charged in this article?"

Thereupon the roll of the Senate shall be called, and each Senator as his name is called shall arise in his place and answer "guilty" or "not guilty."

Several Senators were by unanimous consent excused from voting on plea of having been unavoidably detained from the Senate during a portion of the trial or having come into the Senate since the beginning of the trial. Other Senators were excused from voting on those articles specifying offenses occurring prior to appointment of the respondent as circuit judge, expressing themselves as entertaining doubts as to his impeachability for offenses committed in an office other than that he held at time of impeachment. Mr. Benjamin R. Tillman, of South Carolina, was excused from voting on all save the first count. The Speaker pro tempore, as presiding officer, was also excused from voting except in the case of an article where his vote would affect the result.

By direction of the President pro tempore, the first article of impeachment was read.

The PRESIDENT PRO TEMPORE.

The Chair now submits article 1 to the judgment of the Senate.

Senators, how say you? Is the respondent, Robert W. Archbald, guilty or not guilty as charged in this article? The Secretary will call the roll of the Senate for the separate response of each Senator.

[1] Third session Sixty-second Congress, Senate Journal, p. 326; Record, p. 1438.

The roll was called and the President pro tempore announced:

It appears from the responses given by Senators that 68 Senators have voted guilty and 5 Senators have voted not guilty. More than two-thirds of the Senators having voted guilty, the Senate adjudges the respondent, Robert W. Archbald, guilty as charged in the first article of impeachment.

The Secretary proceeded to read the second article, when Mr. Hoke Smith, of Georgia, moved that the Senate close the doors and go into secret session.

Mr. CULBERSON. Mr. President, a point of order. The Senate has already decided to vote at this hour on the articles of impeachment.

The President pro tempore said:

That is true; and in the absence of any order to the contrary, that order would undoubtedly be carried out. It is, however, for the Senate to determine whether it will at any time suspend that order. It is not a matter of unanimous consent, but it is an order which can be changed or not changed, as the Senate may see proper to do.

Pending the vote, Mr. Worthington inquired:

Mr. President, before the question is put, I ask, if the motion be carried, whether it will result in excluding counsel for the respondent from the Senate Chamber?

The PRESIDENT PRO TEMPORE. Yes; it would, while the Senate was in secret deliberation, exclude everybody except Senators and those who are privileged under such circumstances.

Mr. WORTHINGTON. I trust that nothing will be done which will exclude counsel for the respondent while the vote is being taken.

The PRESIDENT PRO TEMPORE. There will be no vote taken in secret session; there can not be. The question is on the motion of the Senator from Georgia [Mr. Smith], to now close the doors.

Thereupon Mr. Smith withdrew his motion.

The remaining articles of impeachment were read by the Secretary, and at the conclusion of the reading of each article the roll was called. After each roll call the vote was recapitulated and the President pro tempore announced the result.

The results were as follows:

	Guilty.	Not guilty.
Article I	68	5
Article 2	46	25
Article 3	60	11
Article 4	52	20
Article 5	66	6
Article 6	24	45
Article 7	29	36
Article 8	22	42
Article 9	23	39
Article 10	1	65
Article 11	11	51
Article 12	19	46
Article 13	42	20

At the conclusion of the voting Mr. James A. O'Gorman, of New York, presented the following:

Ordered, That the respondent, Robert W. Archbald, circuit judge of the United States from the third judicial circuit and designated to serve in the Commerce Court, be removed from office and be forever disqualified from holding and enjoying any office of honor, trust, or profit under the United States.

A division being demanded, the first portion of the order was agreed to.

The question being taken on the second portion of the order, it was decided in the affirmative—yeas 39, nays 35. So the order was adopted.

The President pro tempore thereupon pronounced the judgment of the Senate as follows:

The Senate therefore do order and decree, and it is hereby adjudged, that the respondent Robert W. Archbald, circuit judge of the United States from the third judicial circuit, and designated to serve in the Commerce Court, be, and he is hereby, removed from office; and that he be and is hereby forever disqualified to hold and enjoy any office of honor, trust, or profit under the United States.

On motion of Mr. Gallinger, it was:

Resolved, That the Secretary be directed to communicate to the President of the United States and to the House of Representatives the foregoing order and judgment of the Senate and transmit a certified copy of the same to each.

Whereupon, on motion of Mr. Gallinger, the Senate, sitting for the trial of the article of impeachment against Robert W. Archbald, adjourned without day.

On January 14, in the House, a message was received from the Senate, by one of its clerks, announcing that the Senate had passed the following order:

Ordered, That the respondent, Robert W. Archbald, circuit judge of the United States from the third judicial circuit, and designated to serve in the Commerce Court, be removed from office and be forever disqualified from holding and enjoying any office of honor, trust, or profit under the United States.

Resolved, That the Secretary be directed to communicate to the President of the United States and to the House of Representatives the foregoing order and judgment of the Senate and transmit a certified copy of the same to each.

No report was made by the managers to the House.

Chapter CCI.

THE IMPEACHMENT AND TRIAL OF HAROLD LOUDERBACK.

513. The impeachment and trial of Harold Louderback, Judge of the Northern District of California.

Instance wherein the local bar association initiated proceedings by recommending impeachment.

The impeachment proceedings were set in motion through a resolution introduced by delivery to the Clerk and referred to the Committee on the Judiciary.

Form of resolution authorizing investigation with a view to impeachment.

On May 26, 1932,[1] Mr. Fiorello H. LaGuardia, of New York, introduced, by delivery at the Clerk's desk, the following resolution (H. Res. 329):

Resolved, That a special committee of five Members of the House of Representatives who are members of the Committee on the Judiciary of the House, the same to be designated by the chairman of said committee, be, and is hereby, authorized and directed to inquire into the official conduct of Harold Louderback, a district judge of the United States District Court for the Northern District of California, and to report to the Committee on the Judiciary of the House whether in their opinion the said Harold Louderback has been guilty of any acts which in contemplation of the Constitution are high crimes or misdemeanors requiring the interposition of the constitutional powers of the House; and that the said special committee have power to hold meetings in the city of Washington, D. C., and elsewhere, and to send for persons and papers, to administer the customary oaths to witnesses, all process to be signed by the Clerk of the House of Representatives under its seal and be served by the Sergeant at Arms of the House or his special messenger; to sit during the session of the House and until adjournment of the first session of the Seventy-second Congress and thereafter until said inquiry is completed, and report to the Committee on the Judiciary of the House; and be it further

[1] First session Seventy-second Congress, Record, p. 11358.

Resolved, That said special committee be, and the same is hereby, authorized to employ such stenographic, clerical, and other assistance as they may deem necessary; and all expenses incurred by said special committee, including the expenses of such committee when sitting in or outside the District of Columbia, shall be paid out of the contingent fund of the House of Representatives on vouchers ordered by said committee, signed by the chairman of said committee: *Provided, however,* That the total expenditures authorized by this resolution shall not exceed the sum of $5,000.

The resolution was referred to the Committee on the Judiciary, which reported it back on May 31 [1] with the conclusion that—

the committee feels that under the circumstances the matter of Judge Louderback's conduct should be investigated.

On June 9,[2] on motion of Mr. Hatton W. Sumners, of Texas, from the Committee on the Judiciary, by unanimous consent, the House proceeded to the consideration of the resolution and after brief debate agreed to it without division.

Mr. Sumners included as a part of his remarks a letter from the Bar Association of San Francisco reciting certain occurrences leading up to the proposal of impeachment as follows:

SAN FRANCISCO, CALIF., *May 24,1932.*

JUDICIARY COMMITTEE,

House of Representatives, Washington, D. C.

SIRS: Under date of May 2, 1932, the Bar Association of San Francisco addressed a communication to His Excellency Herbert Hoover, President of the United States, with reference to certain matters published in the press of San Francisco concerning Hon. Harold C. Louderback, judge of the United States district court at San Francisco, Calif., accompanying said communication with clippings from San Francisco newspapers.

Under date of May 9, 1932, we received an acknowledgment of said communication from Mr. Lawrence Richey, Secretary to the President, stating that the matter "is being referred for consideration of the Attorney General," and thereafter we received a letter dated May 12, 1932, from Mr. Charles P. Sisson, Assistant Attorney General, stating in effect that our letter addressed to the President had been referred to the Department of Justice for consideration, and further stating "that the Department of Justice has no jurisdiction whatsoever over the United States judges. Criticisms of Federal judges are ordinarily addressed to the Judiciary Committee of the House of Representatives."

Pursuant to the suggestion contained in the letter from the Assistant Attorney General, we are hereby addressing your honorable committee and forwarding copies of the above-mentioned correspondence, together with duplicate press clippings, for such action as your committee may deem proper.

We feel certain that you will readily realize that the interest of the Bar Association of San Francisco in this matter is solely a public one and that it is concerned only in preserving the integrity of the bench, public confidence in, and respect for, the courts and the due administration of justice. We believe that no department of the Government should occupy a higher position in the public mind, or performs a more important function, than that of the courts, and that it is of the utmost importance they shall be maintained on a plane of the strictest honesty and efficiency and shall be above suspicion. Charges against a court or judge, especially when publicly made, require thorough investigation, not only in the interest of the public and respect for our judicial system but also in the interest of the incumbent.

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[1] House report No. 1461.

[2] Record, p. 12470.

If your committee should undertake an investigation of the matters in question, our association will cheerfully render such assistance as is within its power, in the hope that whatever the outcome may be the result will contribute to the maintenance of public confidence in our courts. Respectfully submitted.

BAR ASSOCIATION OF SAN FRANCISCO,
BY RANDOLPH V. WHITING, *President.*

514. The special committee authorized to conduct the investigation held hearings at which Judge Louderback appeared in person and by counsel.

A resolution proposing abatement of impeachment proceedings was held to be of high privilege.

The member reporting a bill from a committee is entitled to recognition when the bill is taken up for consideration in the House.

The House, disregarding the majority report of the committee, adopted the minority recommendation and passed articles of impeachment.

The House by resolution elected five managers, chosen from the Committee on the Judiciary and from both parties, to carry the impeachment of Judge Louderback to the Senate.

Pursuant to the terms of the resolution, a special committee was appointed by the Chairman of the Committee on the Judiciary, from the membership of the committee, consisting of Mr. Sumners, Mr. Tom D. McKeown, of Oklahoma, Mr. Gordon Browning, of Tennessee, Mr. Leonidas C. Dyer, of Missouri, and Mr. LaGuardia.

The special committee held hearings in San Francisco the week of September 6, 1932, at which Judge Louderback was represented by counsel, and in Washington, January 16 and 17, at which he appeared in person.

The special committee then submitted a divided report to the Committee on the Judiciary.

On February 17, 1933,[1] Mr. McKeown, by direction of the Committee on the Judiciary, presented a report to the effect that the special committee authorized to conduct the investigation had transmitted its conclusions to the Committee on the Judiciary, and that after consideration of the findings—

The committee censures the judge for conduct prejudicial to the dignity of the judiciary in appointing incompetent receivers, for the method of selecting receivers, for allowing fees that seem excessive, and for a high degree of indifference to the interest of litigants in receiverships.

The committee, however, did not consider the circumstances sufficiently flagrant to warrant impeachment and recommended the adoption of this resolution:

Resolved, That the evidence submitted on the charges against Honorable Harold Louderback, district judge for the northern district of California, does not warrant the interposition of the constitutional powers of impeachment of the House.

The minority dissented from the majority recommendation and, after summarizing the several charges of misconduct involved, proposed articles of impeachment.

On February 24, 1933,[2] Mr. Sumners, who had submitted minority views, rising in the House, asked whether he as Chairman of the Committee on the Judiciary or the Member reporting the resolution by direction of the committee, was entitled to recognition to debate it.

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[1] H. Rept. No. 2065.

[2] Second session Seventy-second Congress, Record, p. 4913.

The Speaker [1] replied:

The usual custom is that the Member who has been directed by the committee to report the bill and who reports the legislation coming before the House is the one the Chair recognizes.

Whereupon, the Speaker recognized Mr. McKeown, who called up the resolution reported by the committee.

Mr. Bertrand H. Snell, of New York, inquired whether a resolution of this character could be considered as privileged.

The Speaker replied that, inasmuch as it related to the abatement of impeachment proceedings, it was of the highest privilege.

In the course of the debate on the resolution, Mr. LaGuardia offered the following as a substitute:

Resolved, That Harold Louderback, who is a United States district judge of the northern district of California, be impeached of misdemeanors in office; and that the evidence heretofore taken by the special committee of the House of Representatives under House Resolution 239 sustains five articles of impeachment, which are hereinafter set out; and that the said articles be, and they are hereby, adopted by the House of Representatives, and that the same shall be exhibited to the Senate in the following words and figures, to wit:

Articles of impeachment of the House of Representatives of the United States of America in the name of themselves and of all of the people of the United States of America against Harold Louderback, who was appointed, duly qualified, and commissioned to serve during good behavior in office as United States district judge for the northern district of California on April 17, 1928.

(The substitute then set forth the articles of impeachment proposed by the minority.)

After extended debate, the substitute was agreed to on a yea and nay vote, and on February 27,[2] on motion of Mr. Sumners, it was—further:

Resolved, That Hatton W. Sumners, Gordon Browning, Malcolm C. Tarver, Fiorello H. LaGuardia, and Charles I. Sparks, Members of this House, be, and they are hereby, appointed managers to conduct the impeachment against Harold Louderback, United States district judge for the northern district of California; and said managers are hereby instructed to appear before the Senate of the United States and at the bar thereof in the name of the House of Representatives and of all the people of the United States to impeach the said Harold Louderback of misdemeanors in office and to exhibit to the Senate of the United States the articles of impeachment against said judge which have been agreed upon by the House; and that the said managers do demand the Senate take order for The appearance of said Harold Louderback to answer said impeachment, and demand his impeachment, conviction, and removal from office.

Of the five managers thus selected to conduct the impeachment proceedings on behalf of the House, three were of the majority party, two were of the minority, and all were members of the Committee on the Judiciary.

515. The ceremonies of presenting to the Senate the articles of impeachment.

The impeachment proceedings having been presented in the Senate during the closing days of the Seventy-second Congress, were made the special order for the first day of the first session of the succeeding Congress.

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[1] John N. Garner, of Texas, Speaker.

[2] Second session Seventy-second Congress, Record, p. 5177.

A decision holding that a motion relating to a question of the Senate sitting as a court of impeachment is not debatable.

The Senate having been informed, on February 28,[1] by message, of the action[2] of the House of Representatives, transmitted to the House on the same day[3] a message announcing its readiness to receive the managers appointed by the House for the purpose of exhibiting the articles of impeachment.

On March 3,[4] the managers on the part of the House appeared before the Senate and were received with the formalities customarily observed on such occasions.

Mr. Manager Sumners read the resolution[5] agreed to by the House appointing its managers, and yielded to Mr. Manager Browning, who read the articles of impeachment, as follows:

ARTICLES OF IMPEACHMENT AGAINST HAROLD LOUDERBACK

CONGRESS OF THE UNITED STATES OF AMERICA,
IN THE HOUSE OF REPRESENTATIVE,
February 24, 1933.

Resolution

Resolved, That Harold Louderback, who is a United States district judge of the northern district of California, be impeached of misdemeanors in office; and that the evidence heretofore taken by the special committee of the House of Representatives under House Resolution 239, sustains five articles of impeachment, which are hereinafter set out; and that the said articles be, and they are hereby, adopted by the House of Representatives, and that the same shall be exhibited to the Senate in the following words and figures, to wit:

Articles of impeachment of the House of Representatives of the United States of America in the name of themselves and of all of the people of the United States of America against Harold Louderback, who was appointed, duly qualified, and commissioned to serve during good behavior in office, as United States district judge for the northern district of California, on April 17, 1928.

ARTICLE I

That the said Harold Louderback, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned and while acting as a district judge for the northern district of California did on divers and various occasions so abuse the power of his high office, that he is hereby charged with tyranny and oppression, favoritism and conspiracy, whereby he has brought the administration of justice in said district in the court of which he is a judge into disrepute, and by his conduct is guilty of misbehavior, falling under the constitutional provision as ground for impeachment and removal from office.

In that the said Harold Louderback on or about the 13th day of March, 1930, at his chambers and in his capacity as judge aforesaid, did willfully, tyrannically, and oppressively discharge one Addison G. Strong, whom he had on the 11th day of March, 1930, appointed as equity receiver in the matter of Olmsted against Russell-Colvin Co. after having attempted to force and coerce the said Strong to appoint one Douglas Short as attorney for the receiver in said case.

In that the said Harold Louderback improperly did attempt to cause the said Addison G. Strong to appoint the said Douglas Short as attorney for the receiver by promises of allowance of large fees and by threats of reduced fees did he refuse to appoint said Douglas Short.

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[1] H. Res. 403, Record, p. 5178.

[2] Record, p. 5193.

[3] Record, p. 5195.

[4] Record, p. 5473.

[5] H. Res. 402, Record, p. 5177.

In that the said Harold Louderback improperly did use his office and power of district judge in his own personal interest by causing the appointment of the said Douglas Short as attorney for the receiver, at the instance, suggestion, or demand of one Sam Leake, to whom the said Harold Louderback was under personal obligation, the said Sam Leake having entered into a certain arrangement and conspiracy with the said Harold Louderback to provide him, the said Harold Louderback, with a room at the Fairmont Hotel in the city of San Francisco, Calif., and made arrangements for registering said room in his, Sam Leake's name and paying all bills therefor in cash under an arrangement with the said Harold Louderback, to be reimbursed in full or in part in order that the said Harold Louderback might continue to actually reside in the city and county of San Francisco after having improperly and unlawfully established a fictitious residence in Contra Costa County for the sole purpose of improperly removing for trial to said Contra Costa, County a cause of action which the said Harold Louderback expected to be filed against him; and that the said Douglas Short did receive large and exorbitant fees for his services as attorney for the receiver in said action, and the said Sam Leake did receive certain fees, gratuities, and loans directly or indirectly from the said Douglas Short amounting approximately to $1,200.

In that the said Harold Louderback entered into a conspiracy with the said Sam Leake to violate the provisions of the California Political Code in establishing a residence in the county of Contra Costa when the said Harold Louderback in fact did not reside in said county and could not have established a residence without the concealment of his actual residence in the county of San Francisco, covered and concealed by means of the said conspiracy with the said Sam Leake, all in violation of the law of the State of California.

In that the said Harold Louderback, in order to give color to his fictitious residence in the county of Contra Costa, all for the purpose of preparing and falsely creating proof necessary to establish himself as a resident of Contra Costa County in anticipation of an action he expected to be brought against him, for the sole purpose of meeting the requirements of the Code of Civil Procedure of the State of California providing that all causes of action must be tried in the county in which the defendant resides at the commencement of the action, did in accordance with the conspiracy entered into with the said Sam Leake unlawfully register as a voter in said Contra Costa County, when in law and in fact he did not reside in said county and could not so register, and that the said acts of Harold Louderback constitute a felony defined by section 42 of the Penal Code of California.

Wherefore the said Harold Louderback was and is guilty of a course of conduct improper, oppressive, and unlawful and is guilty of misbehavior in office as such judge and was and is guilty of a misdemeanor in office.

ARTICLE II

That Harold Louderback, judge as aforesaid, was guilty of a course of improper and unlawful conduct as a judge, filled with partiality and favoritism in improperly granting excessive, exorbitant, and unreasonable allowances as disbursements to one Marshall Woodward and to one Samuel Shortridge, jr., as receiver and attorney, respectively, in the matter of the Lumbermen's Reciprocal Association.

And in that the said Harold Louderback, judge as aforesaid, having improperly acquired jurisdiction of the case of the Lumbermen's Reciprocal Association contrary to the law of the United States and the rules of the court did, on or about the 29th day of July, 1930, appoint one Marshall Woodward and one Samuel Shortridge, jr., receiver and attorney, respectively, in said case, and after an appeal was taken from the order and other acts of the judge in said case to the United States Circuit Court of Appeals for the Ninth Circuit and the said order and acts of the said Harold Louderback having been reversed by said United States Circuit Court of Appeals and the mandate of said circuit court of appeals directed the court to cause the said receiver to turn over all of the assets of said association in his possession as receiver to the commissioner of insurance of the State of California, the said Harold Louderback unlawfully, improperly, and oppressively did sign and enter an order so directing the receiver to turn over said property to said State commissioner of insurance but improperly and unlawfully made such order conditional that the said State commissioner of insurance and any other party in interest would not take an

appeal from the allowance of fees and disbursements granted by the said Harold Louderback to the said Marshall Woodward and Samuel Shortridge, jr., receiver and attorney, respectively, thereby improperly using his said office as a district judge to favor and enrich his personal and political friends and associates to the detriment and loss of litigants in his, said judge's court, and forcing said State commissioner of insurance and parties in interest in said action unnecessary delay, labor, and expense in protecting the rights of all parties against such arbitrary, improper, and unlawful order of said judge; and that the said Harold Louderback did improperly and unlawfully seek to coerce said State commissioner of insurance and parties in interest in said action to accept and acquiesce in the excessive fees and the exorbitant and unreasonable disbursements granted by him to said Marshall Woodward and Samuel Shortridge, jr., receiver and attorney, respectively, and did improperly and unlawfully force and coerce the said parties to enter into a stipulation modifying said improper and unlawful order and did thereby make it necessary for the State commissioner of insurance to take another appeal from the said arbitrary, improper, and unlawful action of the said Harold Louderback.

In that the said Harold Louderback did not give his fair, impartial, and judicial consideration to the objections of the said State commissioner of insurance against the allowance of excessive fees and unreasonable disbursements to the said Marshall Woodward and Samuel Shortridge, jr., receiver and attorney, respectively, in the case of the Lumbermen's Reciprocal Association, in order to favor and enrich his friends at the expense of the litigants and parties in interest in said matter, and did thereby cause said State commissioner of insurance and the parties in interest additional delay, expense, and labor in taking an appeal to the United States Circuit Court of Appeals in order to protect their rights and property in the matter against the partial, oppressive, and unjudicial conduct of said Harold Louderback.

Wherefore, said Harold Louderback was and is guilty of a course of conduct oppressive and unjudicial and is guilty of misbehavior in office as such judge and was and is guilty of a misdemeanor in office.

ARTICLE III

The said Harold Louderback, judge aforesaid, was guilty of misbehavior in office resulting in expense, disadvantage, annoyance, and hindrance to litigants in his court in the case of the Fageol Motor Co., for which he appointed one Guy H. Gilbert receiver, knowing that the said Gilbert was incompetent, unqualified, and inexperienced to act as such receiver in said case.

In that the said Harold Louderback, judge as aforesaid, oppressively and in disregard of the rights and interests of litigants in his court did appoint one Guy H. Gilbert as receiver for the Fageol Motor Co., knowing the said Guy H. Gilbert to be incompetent, unfit, and inexperienced for such duties, and did refuse to grant a hearing to the plaintiff, defendant, creditors, and parties in interest in the matter of the Fageol Motor Co. on the appointment of said receiver, and the said Harold Louderback did cause sad litigants and parties in interest in said matter to be misinformed of his action while said Guy H. Gilbert took steps necessary to qualify as receiver, thereby depriving said litigants and parties in interest of presenting the facts, circumstances, and conditions of the said equity receivership, the nature of the business and the type of person necessary to operate said business in order to protect creditors, litigants, and all parties in interest, and thereby depriving said parties in interest of the opportunity of protesting against the appointment of an incompetent receiver.

Wherefore the said Harold Louderback was and is guilty of a course of conduct constituting misbehavior as said judge and that said Harold Louderback was and is guilty of a misdemeanor in office.

ARTICLE IV

That the said Harold Louderback, judge aforesaid, was guilty of misbehavior in office, filled with partiality and favoritism, in improperly, willfully, and unlawfully granting on insufficient and improper papers an application for the appointment of a receiver in the Prudential Holding Co. case for the sole purpose of benefiting and enriching his personal friends and associates.

In that the said Harold Louderback did on or about the 15th day of August, 1931, on insufficient and improper application, appoint one Guy H. Gilbert receiver for the Prudential

Holding Co. case when as a matter of fact and law and under conditions then existing no receiver should have been appointed, but the said Harold Louderback did accept a petition verified on information and belief by an attorney in the case and without notice to the said Prudential Holding Co. did so appoint Guy H. Gilbert the receiver and the firm of Dinkelspiel and Dinkelspiel attorneys for the receiver; that the said Harold Louderback in an attempt to benefit and enrich the said Guy H. Gilbert and his attorneys, Dinkelspiel and Dinkelspiel, failed to give his fair, impartial, and judicial consideration to the application of the said Prudential Holding Co. for a dismissal of the petition and a discharge of the receiver, although the said Prudential Holding Co. was in law entitled to such dismissal of the petition and discharge of the receiver; that during the pendency of the application for the dismissal of the petition and for the discharge of the receiver a petition in bankruptcy was filed against the said Prudential Holding Co. based entirely and solely on an allegation that a receiver in equity had been appointed for the said Prudential Holding Co., and the said Harold Louderback then and there willfully, improperly, and unlawfully, sitting in a part of the court to which he had not been assigned at the time, took jurisdiction of the case in bankruptcy and though knowing the facts in the case and of the application then pending before him for the dismissal of the petition and the discharge of the equity receiver, granted the petition in bankruptcy and did on the 2d day of October, 1930, appoint the same Guy H. Gilbert receiver in bankruptcy and the said Dinkelspiel and Dinkelspiel attorneys for the receiver, knowing all of the time that the said Prudential Holding Co. was entitled as a matter of law to have the said petition in equity dismissed; in that through the oppressive, deliberate, and willful action of the said Harold Louderback acting in his capacity as a judge and misusing the powers of his judicial office for the sole purpose of benefiting and enriching said Guy H. Gilbert and Dinkelspiel and Dinkelspiel, did cause the said Prudential Holding Co. to be put to unnecessary delay, expense, and labor and did deprive them of a fair, impartial, and judicial consideration of their rights and the protection of their property, to which they were entitled.

Wherefore the said Harold Louderback was, and is, guilty of a course of conduct constituting misbehavior as said judge and that said Harold Louderback was, and is, guilty of a misdemeanor in office.

ARTICLE V

That Harold Louderback, on the 17th day of April, 1928, was duly appointed United States district judge for the northern district of California, and has held such office to the present day.

That the said Harold Louderback as judge aforesaid, during his said term of office, at divers times and places when acting as such judge, did so conduct himself in his said court and in his capacity as judge in making decisions and orders in actions pending in his said court and before him as said judge, and in the method of appointing receivers and attorneys for receivers, in appointing incompetent receivers, and in displaying a high degree of indifference to the litigants in equity receiverships, as to excite fear and distrust and to inspire a widespread belief in and beyond said northern district of California that causes were not decided in said court according to their merits, but were decided with partiality and with prejudice and favoritism to certain individuals, particularly to receivers and attorneys for receivers by him so appointed, all of which is prejudicial to the dignity of the judiciary.

All to the scandal and disrepute of said court and the administration of justice therein.

Wherefore the said Harold Louderback was, and is, guilty of misbehavior as such judge and of a misdemeanor in office.

[SEAL.]

JNO. N. GARNER,
Speaker of the House of Representatives.

Attest:

SOUTH TRIMBLE, *Clerk.*

Mr. Manager Sumners then entered a reservation of the right to exhibit at any time thereafter any further articles of accusation or impeachment, and made formal announcement that the managers on the part of the House of Representatives—

do now demand that the Senate take order for the appearance of said Harold Louderback to answer said impeachment, and do now demand his impeachment, conviction, and removal from office.

The Vice President responded:

The Chair will state to the managers on the part of the House that the Senate will take proper order on the subject of impeachment, of which due notice shall be given to the House of Representatives.

On motion of Mr. George W. Norris, of Nebraska, the articles of impeachment were ordered printed for the use of the Senate.

Mr. Norris further submitted:

Mr. President, under the Rules of the Senate governing impeachment trials, it would be the duty of the Senate tomorrow at 1 o'clock to organize itself into a court and take the necessary oath, and then proceed with the trial.

It is evident that we shall not be able to comply with the rules now, because this session of Congress will adjourn at 12 o'clock to-morrow, and therefore I ask unanimous consent that the further consideration of the impeachment charges presented by the managers on the part of the House of Representatives be deferred until 2 o'clock on the first day of the first session of the Seventy-third Congress.

The Vice President submitted the request to the Senate, when Mr. Huey P. Long, of Louisiana, objected.

Thereupon, Mr. Norris moved that the impeachment proceedings be made the special order for 2 o'clock on the first day of the first session of the Seventy-third Congress.

Mr. Henry F. Ashurst, of Arizona, addressed the Chair and asked for recognition to debate the motion.

The Vice President held that inasmuch as the motion related to a question of the Senate sitting as a Court of Impeachment, it was not debatable, and recognized all who addressed themselves to the question by unanimous consent only.

Discussion by consent having been concluded, the motion was agreed to; the managers on the part of the House withdrew; and the Senate proceeded to its legislative business.

516. The organization of the Senate for the impeachment trial of Judge Louderback.

A Senator was designated by resolution to administer the oath to the Presiding Officer, who in turn administered the oath simultaneously to all Senators standing in their places.

Certain Senators on their statements were excused from participation in the impeachment proceedings.

Various Senators were excused from voting on a part or all of the articles of impeachment.

On March 9, 1933,[1] the Senate, sitting as a Court of Impeachment, met at 2 o'clock p.m. under its previous order.

On motion of Mr. Norris, Mr. William F. Borah, of Idaho, was designated by the Senate to administer the oath to the presiding officer of the Court of Impeachment.

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[1] First session, Seventy-third Congress, Record, p. 47.

Mr. Borah administered the oath to the Vice President as follows:

You do solemnly swear that in all things appertaining to the trial of the impeachment of Harold Louderback, a district judge for the northern district of California, now pending, you will do impartial justice according to the Constitution and laws. So help you God.

Mr. Borah then announced:

Mr. President, I want to make a personal statement before the oath is taken. I feel that I ought not to sit in this matter by reason of some things which transpired at the time of the appointment of Judge Louderback. The question which I wish to submit now is, Should I make that excuse definite at this time or will it be proper after the oath is taken?

Mr. Ashurst suggested:

In my judgment, such statement should be made after Senators shall have taken the oath as members of the court; only the court should excuse Senators from duties to be performed in the court. Care should be taken as to establishing precedents. In strict practice, under the English procedure and under the American procedure, there is no such thing as an impeachment juror or Senator escaping from his responsibility to compose the court. Indeed, in the Andrew Johnson impeachment case, Senator Ben. F. Wade, then the President pro tempore, who would have become President had the impeachment succeeded, was asked to stand aside, but it was determined that there was no way by which he, Senator Wade, could be disqualified and thus made to stand aside. But I am sure, if a Senator should declare that he is disqualified, he could not and should not be required to hear evidence or to render a verdict.

Mr. Hiram W. Johnson, of California, dissented and said:

Mr. President, in order that the matter may be brought to a head, I ask unanimous consent of those who sit here as a court of impeachment or are about to take the oath as jurors or Senators in the court of impeachment, that I be permitted to stand aside in this trial. There are certain incidents which have occurred which, in my opinion, render it improper that I should sit as a judge in this case. I do not wish to detail them, of course, because I feel that in the detailing of them I might do or say something which ought not to be done or said. But while certain of myself, Mr. President, perhaps feeling that I might lean backward one way or the other in a case of this sort, I do not think that I ought to sit in the case, and I ask unanimous consent of the Senate that I may stand aside in the trial of Harold Louderback about to begin.

The question being put, there was no objection and the Vice President announced that the Senator from California was excused.

A similar request by Mr. Borah was agreed to.

Subsequently,[1] Mr. John H. Overton, of Louisiana, requested:

Mr. President, I wish to make a statement. I was a Member of the House of Representatives at the time the articles of impeachment were preferred against Judge Louderback. I voted against the impeachment. I thought that matter should be tendered to the Chair and Members of the Senate before the court convened; but other Senators occupy the same position that I occupy and I wished to consult with them before making the statement. After consulting with them and consulting with some senior Senators who are experienced in such matters, I have come to the conclusion that under all the circumstances it would be proper that I ask to be excused from sitting as a member of the court which I accordingly do.

[1] First session, Seventy-third Congress, Record, p. 49.

The request was granted.

Requests by Mr. Augustine Lonergan,[1] of Connecticut, and Mr. William H. Dieterich,[2] of Illinois, to be excused for the same reason were likewise agreed to.

Thereupon the Vice President said:

Will members of the court permit the Chair to make a statement? The Chair presided in the House at the time impeachment proceedings were considered by that body. The Chair did not have occasion to vote or in any way express himself concerning the merits of the case. The Chair thought that members of the court ought to know the situation so that if they have any doubt as to the qualifications of the Chair to act as the presiding officer of the court, they may act accordingly.

There was no response.

On May 23,[3] at the conclusion of the testimony in the trial, Mr. Royal S. Copeland, of New York, submitted:

Mr. President, on account of illness, I have been away from the Chamber for a number of days. I have heard none of the testimony, and feel myself incompetent either to vote or to continue as a member of the court. Therefore I ask unanimous consent that I may be excused from further attendance and from voting in the Impeachment Court.

The request being submitted to the Senate by the Presiding Officer, there was no objection, and Mr. Copeland was excused.

On the succeeding day[4] and following the deliberative session of the Senate immediately preceding the vote on the articles of impeachment, Mr. Carter Glass, of Virginia, requested:

Mr. President, on the advice of the distinguished chairman of the Judiciary Committee, the Senator from Arizona, Mr. Ashurst, I am taking the first and last opportunity to say that I shall ask the Senate to excuse me from voting on these various articles of impeachment, for the reason that other public duties have made it impossible for me to be present and hear more than fragments of the testimony adduced in this proceeding and none, of the arguments presented. Therefore I feel that under my oath I am not so advised as to be able to render a verdict as a juror, and I shall ask the Senate to excuse me from voting.

There being no objection, the Senator was excused from voting on the impeachment.

At this stage of the proceedings, by unanimous consent, Mr. Thomas P. Gore, of Oklahoma, was also excused from voting, on account of unavoidable absence, and Mr. Henrik Shipstead, of Minnesota, and Mr. Edward P. Costigan, of Colorado, were excused from voting on the first four articles.

On motion of Mr. Joseph T. Robinson, of Arkansas, by unanimous consent, the oath was administered simultaneously to all the Senators present as follows:

You do each solemnly swear that in all things appertaining to the trial of the impeachment of Harold Louderback, United States district judge for the northern district of California, now pending, you will do impartial justice according to the Constitution and laws. So help you God.

On motion of Mr. Norris it was—

Ordered, That the Secretary notify the House of Representatives that the Senate is now organized for the trial of articles of impeachment against Harold Louderback, United States

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[1] Record, p. 49.

[2] Record, p. 1469.

[3] Record, p. 3994.

[4] Record, p. 4082.

district judge for the northern district of California, and is ready to receive the managers on the part of the House at its bar.

On March 13, 1933,[1] at the hour previously designated for the court to assemble, the Senate sitting as a Court of Impeachment convened; by unanimous consent, the journal of the court was considered as read and approved; the managers of the impeachment on the part of the House of Representatives appeared, were announced, and conducted to the seats assigned them; and proclamation of the sitting of the court was made by the Sergeant at Arms.

Mr. Ashurst announced that if it met with the approval of the managers on the part of the House he proposed to submit the following:

Ordered, That a summons be issued as required by the rules of procedure and practice in the Senate, when sitting for the trial of the impeachment against Harold Louderback, United States district judge for the northern district of California, returnable on Tuesday, the 11th day of April, 1933, at 12.30 o'clock in the afternoon.

Mr. Manager Sumners, speaking for the managers, approved the form of the order and it was agreed to.

517. Managers of an impeachment being no longer Members of the House by reason of the expiration of their terms, successors were elected.

Discussion of the power of the House to appoint managers to continue in office in that capacity after the expiration of the term for which they were elected to the House.

A resolution providing for the selection of managers of an impeachment was admitted as a matter of privilege.

Instance wherein the number of managers of an impeachment was increased after the institution of proceedings in the Senate.

On March 22,[2] Mr. Manager Sumners rising in the House, offered this resolution:

Whereas in the Seventy-second Congress, on the 27th day of February, 1933, Hatton W. Sumners, Gordon Browning, Malcolm C. Tarver, Fiorello H. LaGuardia, and Charles 1. Sparks, Members of the House of Representatives, were appointed managers on the part of the House of Representatives to conduct the impeachment against Harold Louderback, a United States district judge for the northern district of California; and

Whereas the said LaGuardia and Sparks are no longer Members of the House of Representatives:

Resolved, That Randolph Perkins and U. S. Guyer, Members of the House of Representatives, be, and they are hereby, appointed to serve with the said Hatton W. Sumners,- Gordon Browning, and Malcolm C. Tarver as the managers on the part of the House of Representatives to conduct the impeachment pending in the United States Senate against Harold Louderback, a United States district judge for the northern district of California.

Mr. Edward W. Goss, of Connecticut, submitted a parliamentary inquiry as to the privilege of the resolution.

The Speaker held it to be privileged.

Mr. Robert Luce, of Massachusetts, raised a question as to the power of the House to appoint managers beyond the term of their office as Representatives.

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[1] Record, p. 260.

[2] Record, p. 768.

In reply, Mr. Sumners said:

My judgment, after careful examination, is that the House of Representatives may appoint managers who can continue after the expiration of the term for which that House has been elected.

I want to be very candid with the House. I am anxious to go as far as we may safely go toward establishing a precedent in that direction. We find upon examination of the Constitution that there lie between the provisions of the Constitution spaces that have to be filled in either by judicial construction or by precedent. Only precedent can occupy the space, for instance, which lies between the provision granting to the House—not as a part of the Congress, however—the power to originate and prosecute impeachments and that great constitutional guaranty of a speedy trial. Judicial construction may not enter there. We barely escaped a very difficult situation in this case. As the Members of the House here present who were Members of the preceding House will remember, this impeachment was sent to the Senate near the expiration of the Seventy-second Congress. If the Congress had not been called into extraordinary session, in the absence of any recognized right on the part of a House to empower managers to proceed after the expiration of that House, this judge would have rested under impeachment for a year, without possibility of trial, notwithstanding the general principles which run through our whole system of giving the right of speedy trial. Not only is the duty to make effective to the individual a great constitutional right but there is involved a great public interest. Precedents are not unakin to legislative enactments. When established they come to have the force of law. It is as much a duty to set helpful and proper precedents as it is to make wise and helpful laws. I am anxious to go as far in this instance as we may safely go in establishing a proper and helpful precedent.

Mr. Bertrand H. Snell, of New York, questioned the right of the House to extend the powers or privileges of such managers, or other appointees, beyond the life of the House itself, and after debate, Mr. Sumners withdrew the resolution and reintroduced it in this form:

Whereas in the Seventy-second Congress on the 27th day of February, 1933, Hatton W. Sumners, Gordon Browning, Malcolm C. Tarver, Fiorello H. LaGuardia, and Charles I. Sparks, Members of the House of Representatives, were appointed managers on the part of the House of Representatives to conduct the impeachment against Harold Louderback, a United States district judge for the northern district of California; and

Whereas the said LaGuardia and Sparks are no longer Members of the House of Representatives:

Resolved, That Randolph Perkins and U. S. Guyer, Members of the House of Representatives, be, and they are hereby, appointed in lieu of the said LaGuardia and Sparks to serve with the said Hatton W. Sumners, Gordon Browning, and Malcolm C. Tarver as the managers on the part of the House of Representatives to conduct the impeachment pending in the United States Senate against Harold Louderback, a United States district judge for the northern district of California.

The resolution as revised was agreed to; the Clerk was directed to notify the Senate; and on the motion of Mr. Sumners, it was further—

Resolved, That the managers on the part of the House in the matter of the impeachment of Harold Louderback, United States district judge for the northern district of California, be, and they are hereby, authorized to employ legal, clerical, and other necessary assistants and to incur such expenses as may be necessary in the preparation and conduct of the case, to be paid out of the contingent fund of the House on vouchers approved by the managers; and the managers have power to send for persons and papers, and also that the managers have authority to file with the Secretary of the Senate, on the part of the House of Representatives, any subsequent pleadings which they shall deem necessary: *Provided,* That the total expenditures authorized by this resolution shall not exceed $3,230.25, being the amount of the unexpended balance of $5,000 authorized to be expended by the special committee designated under authority of House Resolution 239, Seventy-second Congress, first session, approved June 9, 1932, to inquire into the official conduct of said Harold Louderback.

On March 27,[1] the Chair laid before the House the following communication:

HOUSE OF REPRESENTATIVES,
Washington, D. C., March 27, 1933.

Hon. HENRY T. RAINEY,
Speaker of the House of Representatives, Washington, D.C.

DEAR MR. RAINEY: I hereby submit my resignation as one of the managers on the part of the House in the pending impeachment proceedings against Harold Louderback, a United States judge for the northern district of California.

Yours truly,

M. C. TARVER.

The resignation was accepted, and on April 3,[2] a resolution offered by Mr. Sumners, as privileged, was agreed to and messaged to the Senate as follows:

Whereas Malcolm C. Tarver, on the 27th day of March, 1933, submitted to the House of Representatives his resignation as a manager on the part of the House in the pending impeachment against Harold Louderback, a district judge of the United States for the northern district of California, which resignation on said date was accepted by the House of Representatives,

Resolved, That J. Earl Major and Lawrence Lewis, Members of the House of Representatives, be, and they are hereby, appointed managers on the part of the House of Representatives, with the managers on the part of the House heretofore appointed and acting, to conduct the impeachment pending in the United States Senate against Harold Louderback, a district judge of the United States for the northern district of California.

518. The respondent having waived personal service, the oath was not administered to the Sergeant at Arms on the return of the writ.

Form of proclamation by the Sergeant at Arms calling. Judge Louderback to appear and answer the articles of impeachment.

Judge Louderback appeared in person, attended by counsel, to answer the articles.

The answer of Judge Louderback to the articles of impeachment.

A motion entered by respondent to make more definite and certain an article of the articles of impeachment was agreed to by the managers on the part of the House without action by the Senate.

Allowance of time in which to file pleadings.

On April 11,[3] the managers on the part of the House were received in the Senate with the usual formalities and the respondent, Harold Louderback, and his counsel, James M. Hanley, Esq., and Walter H. Linforth, Esq., appeared and were conducted to the seats assigned to them in the space in front of the Secretary's desk on the right of the Chair.

Mr. Ashurst offered the following resolution:

IN THE SENATE OF THE UNITED STATES,
SITTING AS A COURT OF IMPEACHMENT.

Whereas on March 13, 1933, John N. Garner, Vice President and President of the Senate, acting under authority of the Senate, sitting as a Court of Impeachment, and in accordance with the Rules for Impeachment Trials, issued a writ of summons to Harold Louderback, United States district judge for the northern district of California, commanding him to appear before the Senate of the United States of America at their Chamber in the city of Washington on the 11th

[1] Record, p. 876.
[2] Record, p. 1155.
[3] Record, p. 1462.

day of April, 1933, at 12:30 o'clock afternoon, to answer to articles of impeachment exhibited against him by the House of Representatives of the United States of America, and addressed to Chesley W. Jurney, Sergeant at Arms of the Senate, a precept commanding him to serve true and attested copies of said writ of summons and precept upon the said Harold Louderback personally or by leaving same at his usual place of abode or at his usual place of business; and

Whereas since the recess of the Senate, sitting as a Court of Impeachment, the said Chesley W. Jurney, as Sergeant at Arms, acting upon a suggestion of the Committee on the Judiciary of the Senate, with a view to securing a waiver of personal service of said writ of summons as required by the precept, communicated by telegraph with the said Harold Louderback, who consented to such waiver, and who subsequently forwarded to said Chesley W. Jurney, as Sergeant at Arms, a waiver, in writing, of personal service of said writ of summons, signed by him and witnessed on the 28th day of March, 1933, agreeing voluntarily to appear in person before the Senate of the United States at the time and place specified in said writ of summons and acknowledging receipt of true and attested copies of said writ of summons and precept, transmitted to him by the said Chesley W. Jurney, Sergeant at Arms: Now, therefore, be it

Resolved, That the action of the said Chesley W. Jurney, Sergeant at Arms of the Senate, in securing waiver of personal service of said writ of summons upon the said Harold Louderback be, and the same is hereby, ratified and approved; that the delivery, by registered mail, of true and attested copies of the said writ of summons and precept to the said Harold Louderback, and his acceptance thereof, be deemed and taken to have been a satisfactory and sufficient compliance by the said Chesley W. Jurney, Sergeant at Arms, with the said precept, and that the said Chesley W. Jurney, as Sergeant at Arms, be, and he is hereby, authorized to make return of said writ of summons and precept accordingly.

The resolution having been agreed to, the Secretary, by direction of the Vice President, read the return of the Sergeant at Arms to the summons as follows:

SENATE OF THE UNITED STATES.
OFFICE OF THE SERGEANT AT ARMS.

The foregoing writ of summons, addressed to Harold Louderback, and the foregoing precept, addressed to me, were duly served upon the said Harold Louderback by the transmittal, by registered mail, to the said Harold Louderback of true and attested copies of the same, and by his receipt thereof, as shown in the attached waiver by the said Harold Louderback of personal service of summons, said waiver being made a part of this return.

CHESLEY W. JURNEY,
Sergeant at Arms, United States Senate.

IN THE SENATE OF THE UNITED STATES, SITTING AS A COURT OF IMPEACHMENT IN THE CASE OF HAROLD LOUDERBACK, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF CALIFORNIA

Waiver of personal service of Harold Louderback, United States district judge for the northern district of California.

I, Harold Louderback, United States district judge for the northern district of California, do hereby waive personal service of summons issued on the 13th day of March, 1933, by Hon. John N. Garner, Vice President and President of the Senate, which commands me to appear before the Senate of the United States on April 11, 1933, at 12.30 p. m., to answer specific articles of impeachment exhibited to the Senate by the House of Representatives, and agree to voluntarily appear in person before the Senate of the United States at the aforesaid time.

I acknowledge receipt of a true and attested copy of the writ of summons issued in this case, together with a like copy of the precept.

Witness my signature this 28th day of March, 1933, at the city of San Francisco, State of California.

HAROLD LOUDERBACK,
Respondent.

Signature of witness:
JAMES M. HANLEY.

The Vice President announced that in view of the waiver of summons by the respondent, the administration of the oath to the Sergeant at Arms would be dispensed with, and directed the Sergeant at Arms to make proclamation.

The Sergeant at Arms made proclamation:

Harold Louderback! Harold Louderback! Harold Louderback, United States district judge for the northern district of California: Appear and answer to the articles of impeachment exhibited by the House of Representatives against you.

The Vice President resumed:

The Chair advises the counsel for the respondent that the Senate is now sitting for the trial of Harold Louderback, United States district judge for the northern district of California, upon the articles of impeachment exhibited by the House of Representatives, and will hear his answer thereto.

Mr. Linforth, of counsel for the respondent, announced that the respondent appeared in person and by counsel, and submitted a written appearance which he asked to have filed and which was read by the Secretary as follows:

IN THE SENATE OF THE UNITED STATES,
SITTING AS A COURT OF IMPEACHMENT.

THE UNITED STATES OF AMERICA *v.* HAROLD LOUDERBACK, APPEARANCE OF RESPONDENT.

The respondent, Harold Louderback, having been served with a summons requiring him to appear before the Senate of the United States of America at their Chamber in the city of Washington, on the 11th day of April, 1933, at 12.30 o'clock afternoon, to answer certain articles of impeachment presented against him by the House of Representatives of the United States, now appears in his proper person and also by his counsel, who are instructed by this respondent to inform the Senate that respondent is ready to file his answer to said articles of impeachment at this time.

Dated this 11th day of April, 1933.

HAROLD LOUDERBACK.

WALTER H. LINFORTH,
JAMES M. HANLEY,
Counsel for Respondent.

The Vice President directed that the appearance be placed on file, and said:

Counsel for the respondent may make a statement, or the respondent in person may do so.

Mr. Linforth then presented the answer of the respondent to the articles of impeachment which, by direction of the Vice President, was read by the Secretary as follows:

IN THE SENATE OF THE UNITED STATES,
SITTING AS A COURT OF IMPEACHMENT.

THE UNITED STATES OF AMERICA *v.* Harold Louderback, Upon Articles of Impeachment Presented by The House of Representatives of The United States of America.

Answer of respondent Harold Louderback to the articles of impeachment exhibited against him by the House of Representatives of the United States

ANSWER TO ARTICLE I

For answer to the first article the respondent says that this honorable court ought not to have or take further cognizance of the first of said articles of impeachment so exhibited and presented against him, because, he says, the facts set forth in said first article do not if true, constitute an impeachable high crime and misdemeanor as defined in the Constitution of the United

States, and that therefore the Senate, sitting as a Court of Impeachment, should not further entertain the charge contained in said first article.

And now, not waiving the foregoing plea to the jurisdiction of the honorable Senate of the United States, sitting as a Court of Impeachment, as to said first article, said respondent saving to himself all advantages of exception to said first article, for answer thereto saith:

I

Admits that he is now and was at all times mentioned in said article a duly appointed, qualified, and acting judge of the United States District Court for the Northern District of California.

II

Further answering said article, the respondent admits, denies, and alleges as follows:

Admits that on the 11th day of March, 1930, by an order duly made and entered in that certain action then pending in the United States District Court for the Northern District of California, in which Gardner M. Olmstead was plaintiff and Russell Colvin Co. was defendant, he appointed one Addison G. Strong as equity receiver.

Admits that on the 13th day of March, 1930, by an order duly made and entered in said action he revoked and set aside the order appointing said Addison G. Strong as receiver in said action.

Alleges that the facts and circumstances surrounding and leading up to the making of the said order on the 13th day of March, 1930, setting aside the appointment of the said Addison G. Strong were as follows, and not otherwise:

(The remainder of Article II and Articles III, IV, and V set forth in detail the respondent's answer to the specific charges in the articles of impeachment.)

Article V of the answer includes the following:

I

That said Article V is so uncertain and indefinite as to time, place, and proceedings that respondent can not ascertain therefrom with reasonable, or any, certainty, in what proceeding or proceedings, or at what time or times, or at what place or places, his conduct was, as set forth in said Article V, and respondent can not safely proceed to trial as to said fifth article before this honorable Senate, sitting as a Court of Impeachment, at a distance of more than 3,000 miles from where respondent has presided as such judge, as aforesaid, without being apprised in advance in the particulars aforesaid, in order to procure the attendance of such witnesses as may be necessary to meet such charge or charges.

Wherefore respondent, upon the reading and filing of this answer will move the honorable Senate of the United States, sitting as a Court of Impeachment, to require the honorable House of Representatives of the United States, within a reasonable time, to be by it specified, to make said fifth article more definite and certain in the particulars aforesaid, and failing so to do, this honorable body dismiss said Article V.

And without waiving but expressly reserving his right to make said motion and to have the same passed upon by the honorable Senate of the United States, sitting as a Court of Impeachment, respondent, answering said Article V, admits and denies as follows, to wit:

The answer concluded:

V

Respondent further denies that he ever was or now is guilty of misbehavior as such judge and/or of a misdemeanor in office.

Except as hereinbefore specifically admitted, respondent denies each and every allegation in said Article V contained.

And this respondent in submitting to this honorable court this his answer to the articles of impeachment exhibited against him, respectfully insists that he is not guilty of any of the charges contained in any of the said 5 articles of impeachment, and respectfully reserves leave to amend and add to this his said answer from time to time as may become necessary or proper and when said necessity and propriety shall appear.

Dated April 11, 1933.

HAROLD LOUDERBACK,
Respondent.
WALTER H. LINFORTH,
JAMES M. HANLEY,
Of Counsel for Respondent.

Mr. Linforth then submitted written notice of a motion to make the fifth article in the articles of impeachment more definite and certain. The notice was read by the Secretary, as follows:

IN THE SENATE OF THE UNITED STATES,
SITTING AS A COURT OF IMPEACHMENT,

THE UNITED STATES OF AMERICA V. HAROLD LOUDERBACK—MOTION TO MAKE ARTICLE V OF THE ARTICLES OF IMPEACHMENT MORE DEFINITE AND CERTAIN

The respondent, Harold Louderback, moves the honorable Senate sitting as a Court of Impeachment, for an order requiring the honorable House of Representatives of the United States, within a reasonable specified time, to make more definite and certain the charges contained in Article V of the articles of impeachment herein in the following particular or particulars, that is to say:

To specify the time and times, and the place or places, and the name or title of the proceeding or proceedings, and the circumstance or circumstances wherein in said fifth article it is claimed the said respondent was guilty of the conduct referred to and set forth therein.

Said motion is made for the reason and on the ground that it is impossible for respondent to be prepared to meet said charges and to summon witnesses in regard thereto without first being advised of the time and times, and the place and places, and the name or title of the proceeding or proceedings, and the circumstance or circumstances wherein in said fifth article it is claimed the said respondent was guilty of the conduct referred to and set forth therein.

And, in the event of the failure of said House of Representatives within the time so fixed to amend said fifth article in the particulars aforesaid, that this honorable body dismiss the charges contained in said fifth article.

Dated April 11, 1933.

WALTER H. LINFORTH,
JAMES M. HANLEY,
Counsel for Said Respondent.

In conformity with the notice, Mr. Linforth, on behalf of the respondent, moved to require the House to specify, in the particulars set forth, the fifth count of the articles of impeachment, and failing to do so within a reasonable time, that the article be dismissed.

Mr. Manager Sumners responded:

Mr. President, the managers on the part of the House, in order to comply with the suggestion of counsel for the respondent and to save the necessity of considering the motion, consent to attempt to make article 5 more specific and to procure the endorsement of the House of Representatives. It is understood that we can not of ourselves do these things. They have to be done through the House, but we will undertake to do the best we can.

Accordingly, on motion of Mr. Ashurst, it was—

Ordered. That the managers on the part of the House be allowed until the 15th day of May, 1933, at 1 o'clock in the afternoon, to present a replication or other pleading, of the House of

Representatives to the answer of the respondent. That any subsequent pleadings, either on the part of the Managers or of the respondent, shall be filed with the Secretary of the Senate, of which notice shall be given to the House of Representatives and the respondent, respectively, so that all pleadings shall be closed on or before the 15th day of May, 1933, and that the trial shall proceed on the said 15th day of May, 1933, at 1 o'clock p. m.

During the discussion occasioned by the proposed order, Mr. Long dissented and was proceeding in debate, when Mr. Sam G. Bratton, of New Mexico, made the point of order that under the rules governing impeachment trials Senators were not permitted to engage in colloquies.

The Vice President said:

The point of order is sustained.

An order having been made for printing the answer of the respondent for the use of the Senate, it was further:

Ordered, That lists of witnesses be furnished to the Sergeant at Arms by the managers and by the respondent, and said witnesses shall be subpoenaed to appear on Monday, the 15th day of May, 1933, at 1 o'clock p. m.

519. Certain rules adopted by the Senate for the trial of Judge Louderback.

Managers and counsel for respondent might submit applications orally to the Presiding Officer but if requested by any Senator should reduce them to writing.

Managers and counsel for respondent were required to address motions or objections directly to the Presiding Officer and not otherwise.

Senators might not engage in colloquies or address directly the managers, the counsel, or each other.

Stipulations in writing by parties were received by the Senate as though the facts therein agreed upon had been established by evidence.

Decisions of the Presiding Officer on questions raised by parties in the course of the trial stood as the judgment of the Senate unless a Senator made formal request for a vote thereon.

Mr. Bratton, from the Senate Committee on the Judiciary, offered the following:

Ordered, That in addition to the rules of procedure and practice in the Senate when sitting on impeachment trials, heretofore adopted, and supplementary to such rules, the following rules shall be applicable in the trial of the impeachment of Harold Louderback, United States judge for the northern district of California:

1. In all matters relating to the procedure of the Senate, whether as to form or otherwise, the managers on the part of the House or the counsel representing the respondent may submit a request or application orally to the Presiding Officer, or, if required by him or requested by any Senator, shall submit the same in writing.

2. In all matters relating immediately to the trial, such as the admission, rejection, or striking out of evidence, or other questions usually arising in the trial of causes in courts of justice, if the managers on the part of the House or counsel representing the respondent desire to make any application, request, or objection, the same shall be addressed directly to the Presiding Officer and not otherwise.

3. It shall not be in order for any Senator, except as provided in the rules of procedure and practice in the Senate when sitting on impeachment trials, to engage in colloquy or to address questions either to the managers on the part of the House or to counsel for the respondent, nor

shall it be in order for Senators to address each other; but they shall address their remarks directly to the Presiding Officer and not otherwise.

4. The parties may, by stipulation in writing filed with the Secretary of the Senate and by him laid before the Senate or presented at the trial, agree upon any facts involved in the trial; and such stipulation shall be received by the Senate for all intents and purposes as though the facts therein agreed upon had been established by legal evidence adduced at the trial.

5. The parties or their counsel may interpose objection to witnesses answering questions propounded at the request of any Senator, and the merits of any such objection may be argued by the parties or their counsel; and the Presiding Officer may rule on any such objection, which ruling shall stand as the judgment of the Senate, unless some Member of the Senate shall ask that a formal vote be taken thereon, in which case it shall be submitted to the Senate for decision; or he may, at his option, in the first instance submit any such question to a vote of the Members of the Senate. Upon all such questions the vote shall be without debate and without a division, unless the ayes and nays be demanded by one fifth of the Members present, when the same shall be taken.

The order was agreed to, and the Senate sitting as a court of impeachment stood in recess.

520. In response to respondent's motion to make more certain, the House revised an article of the articles of impeachment and transmitted it to the Senate as amended.—On April 17 [1] the Speaker laid before the House the following communication from the Senate:

I, Edwin A. Halsey, Secretary of the Senate of the United States of America, certify that the Senate, sitting for the trial of Harold Louderback, United States district judge for the northern district of California, upon articles of impeachment exhibited against him by the House of Representatives of the United States of America, did on April 11, 1933, adopt an order, of which the following is a full, true, correct, and compared copy:

"Ordered, That the Secretary of the Senate communicate to the House of Representatives an attested copy of the answer of Harold Louderback, judge of the United States district court in and for the northern district of California, to the articles of impeachment, and also a copy of the foregoing order."

I do hereby further certify that the document hereto attached, consisting of 38 sheets, is a photostatic copy of the answer of said Harold Louderback to the articles of impeachment exhibited against him by the House of Representatives, presented by said Harold Louderback to the Senate, sitting as Court of Impeachment, on April 11, 1933.

In testimony whereof I hereunto subscribe my name and affix the seal of the Senate of the United States of America this 12th day of April, A. D. 1933.

[SEAL.]

EDWIN A. HALSEY,
Secretary of the Senate of the United States.

Mr. Sumners called up as privileged a proposed amendment to article 5 of the articles of impeachment as follows:

AMENDMENT TO ARTICLE 5 OF THE ARTICLES OF IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES EXHIBITED AGAINST HAROLD LOUDERBACK, JUDGE OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Article 5 is amended to read as follows:

"Article 5.

"It is intended by article 5 to charge, and it is charged, that the reasonable and probable result of Harold Louderback's action in his capacity as judge in making decisions and orders in

[1] Record, p. 1846.

actions pending in his court and before him as said judge and by the method of appointing receivers and attorneys for receivers, by appointing incompetent receivers and attorneys, by his relationship and transactions with one Sam Leake, and by the relationship and transactions of the said Sam Leake with such appointees of the said respondent made possible and probable by the action and attitude of the said Harold Louderback, and by displaying a high degree of indifference to the interest of estates and parties in interest in receiverships before him and his court, and by displaying a high degree of interest in making it possible for certain individuals and firms to derive large fees from the funds of such estates, has been to create a general condition of wide-spread fear and distrust and disbelief in the fairness and disinterestedness of the official actions of the said Harold Louderback, and to create by his said acts, deeds, and relationships, contrary to his individual and official duty, a favorable condition and a cause for the development naturally and inevitably of rumors and suspicions destructive of public confidence in and respect for the said Harold Louderback as an individual and a judge to the scandal and disrepute of his said court and the administration of justice therein and prejudicial generally to the public respect for and public confidence in the Federal judiciary. Wherefore the said Harold Louderback was and is guilty of misbehavior as such judge and of misdemeanors in office.

"It is hereby alleged and charged that the conduct of said Harold Louderback, as alleged in articles 1, 2, 3, and 4, and as hereinafter alleged, in its general and aggregate result has been such as reasonably and probably calculated to destroy public confidence in so far as he and his court are concerned in that degree of disinterestedness and fidelity to judicial duty and responsibility which the public interest requires shall be held by the people in the Federal courts and in those who administer them, and which for a Federal judge to hurt or destroy is a crime and misdemeanor of the highest order;

"First, specifying as indicative of and disclosing the character and judicial attitude of said Harold Louderback revealed by his acts and official conduct to the people among whom he has jurisdiction, and the cause for the loss of public confidence of the bar and people of the northern district of California and particularly of the city of San Francisco, where the principal business of such court is transacted, on or about December 19, 1929, the said Harold Louderback appointed one Guy H. Gilbert receiver of the Sonora Phonograph Co., a going concern extensively engaged in the business of receiving and distributing radios and phonographs, the said Guy H. Gilbert being a personal and political friend of the said Harold Louderback, and an intimate friend and financial contributor to one Sam Leake, hereinafter referred to, the said Harold Louderback knowing at the time of such appointment that the whole training and experience of the said Guy H. Gilbert had been as operator and employee of a telegraph company, and the said Harold Louderback at the time of such appointment knowing with certainty that the said Guy H. Gilbert was without qualification to discharge the duties of such receivership, that the said Guy H. Gilbert was appointed such receiver by the said Harold Louderback without regard to the interest of such estate in receivership and in disregard thereof and of the interest of creditors and parties in interest and in violation of the official duty of the said Harold Louderback. That the said Gilbert after said appointment continued in his regular and usual duties and employment as employee of said telegraph company, drawing his accustomed salary during his employment of approximately 6 months as such receiver and received for such services from the funds of the estate of said Sonora Phonograph Co. the sum of $6,800, all of which facts became the subject of newspaper comments and matters of common knowledge throughout and beyond the northern judicial district of California, to the hurt of public confidence in the said Harold Louderback, judge of said court, and to the hurt and standing of the Federal judiciary.

The proposed amendment then recounted the appointment of Guy H. Gilbert as receiver in various other cases and charged that he was incompetent and had not in fact discharged the duties of receiver but had merely signed the papers in such

cases and accepted sums which were a small part of the compensation allowed by the respondent in his capacity as judge. The amendment concluded:

All of which facts and circumstances became published and known in said northern district of California. By such acts the said Harold Louderback exhibited himself to the public as being willing to obstruct the officials of the State of California in their effort to conserve for citizens of California the assets of said insurance company which they had impounded, willing to assert a jurisdiction which he did not possess, willing to defy a mandate of the circuit court of appeals and attach an illegal and unconscionable condition to said mandate in order to penalize and discourage the exercise of a constitutional right of appeal for the definite and obvious purpose of making sure, so far as possible by such illegal action and coercion, that the said Shortridge and his attorney would be paid from the assets of said insurance company so impounded the fees which he, the said Harold Louderback, had allowed, all to the scandal and discredit of the said Harold Louderback and his court and prejudicial to the dignity of the judiciary.

"Wherefore the said Harold Louderback has been and is guilty of high crimes and misdemeanors in office and has not conducted himself with good behavior."

After brief debate, the amendment was agreed to and on motion of Mr. Sumners it was—

Resolved, That a message be sent to the Senate by the Clerk of the House informing the Senate that the House of Representatives has adopted an amendment to article 5 of the articles of impeachment heretofore exhibited against Harold Louderback, United States district judge for the northern district of California, and that the same will be presented to the Senate by the managers on the part of the House.

And also that the managers have authority to file with the Secretary of the Senate, on the part of the House, any subsequent pleadings they shall deem necessary.

521. The amended article of impeachment when received in the Senate was filed without being read, it having previously appeared in full in the Record.

The answer of the respondent to the amended article of impeachment.

The managers were excused from attendance on the sessions of the House during the course of the trial in the Senate.

On April 18,[1] in the Senate sitting as a Court of Impeachment, on motion of Mr. Ashurst, by unanimous consent, the reading of the amendment adopted by the House to Article 5 of the articles of impeachment was dispensed with, it having appeared in full in the Record of the previous day.

The respondent, by counsel, tendered his answer to Article 5 as amended by the House and proposed to enter a motion to strike out certain portions of the amended article and asked to be heard on the motion.

The answer was received and filed without reading as follows:

ANSWER TO ARTICLE 5, AS AMENDED

For answer to Article 5, as amended, the respondent says that this honorable court ought not to have or take further cognizance of said fifth article of impeachment so exhibited and presented against him, because, he says, the facts set forth in said fifth article, as amended, do not, if true, constitute an impeachable high crime and misdemeanor as defined by the Constitution of the United States, and that therefore the Senate, sitting as a Court of Impeachment, should not further entertain the charge contained in said fifth article as so amended.

[1] Record, p. 1877.

And now, not waiving the foregoing plea to the jurisdiction of the honorable Senate of the United States, sitting as a Court of Impeachment, as to said fifth article, as amended, said respondent saving to himself all advantages of exception to said fifth article, as amended, for answer thereto saith:

Further answering said Article 5 as so amended, the respondent admits, denies, and alleges as follows:

Then follow specific admissions, denials, and allegations.
The answer concluded:

And, except as hereinbefore specifically admitted herein, respondent denies each and every allegation contained in said article 5, as so amended, relating or referring to the said *Golden State Asparagus Co. case,* so called.

Wherefore respondent having fully answered said article 5, as amended, declares that he is not guilty of any of the charges therein contained and denies that he has been or that he is guilty of high crimes and misdemeanors in office, or has been guilty of any high crime or any misdemeanor in office, and likewise denies that he has not conducted himself with good behavior.

HAROLD LOUDERBACK,
Respondent.
WALTER H. LINFORTH,
JAMES M. HANLEY,

APRIL 18, 1933.

Attorneys for Respondent.

The following motion was filed on behalf of the respondent:

MOTION TO STRIKE OUT OR MAKE MORE CERTAIN PORTIONS OF ARTICLE 5, AS AMENDED

The respondent, Harold Louderback, moves the Honorable Senate, sitting as a Court of Impeachment, for an order as follows:

1. Striking from article 5, as amended, the first paragraph thereof, constituting the entire first page; and

2. Striking therefrom the following part and portion thereof contained on pages 3 and 4 and reading as follows:

"It also became a matter of newspaper comment in connection with that receivership matter and others that theretofore, about 1925 or 1926, the said Gilbert had been appointed by the said Harold Louderback when the said Harold Louderback was a judge of the Superior Court of California, an appraiser of certain real estate, the said Harold Louderback well knowing at the time of such appointments that the said Gilbert was without any qualification to appraise the value of such real estate, and in truth the said Gilbert never saw said real estate, and that the said Gilbert did not undertake to assist in the appraisal of said real estate, only signing the report which was presented to him, for which services he was snowed the sum of $500."

The first part of said motion is based upon the ground and for the reason that it is impossible for respondent to be prepared to meet the said charge therein contained or to summons witnesses in respect thereto without being advised, first, the nature of the act or acts there attempted to be complained of; second, the time or times of said act or acts were committed by respondent; third, in what action or actions, proceeding or proceedings, such alleged acts occurred; fourth, the nature of the relationship and transactions of said Leake there attempted to be referred to and, fifth, with what appointee or appointees of respondent said "relationship and transactions" with the said Leake occurred.

And the second part of said motion is based upon the grounds that the alleged offense there referred to was not committed in the office now occupied by respondent and that this honorable Senate, sitting as a Court of Impeachment, has not jurisdiction to inquire into the transaction attempted to be complained of in said article 5, as amended, in that the act there attempted to be complained of is not and can not be the subject of this article of impeachment, and is not

and can not be a high crime or misdemeanor as defined by the Constitution of the United. States, but if true is an act committed by respondent while an officer of a State and not a Federal court.

And, in the event of the denial of said motion, or either part thereof, then and in such event, respondents moves this honorable Senate, sitting as a Court of Impeachment, to require the House of Representative of the United States within a time so to be fixed, to further amend said article 5 in the particulars and each thereof specified herein as the reason and grounds for the making of said motion to strike therefrom the portions of said article 5, as amended, above specified.

Dated: April 18, 1933.

WALTER H. LINFORTH,
JAMES M. HANLEY,
Counsel for Said Respondent.

Mr. Hanley, of counsel for the respondent, being recognized, said that an agreement had been reached with the managers on the part of the House under which the reference in paragraph 1 of the amended article 5 should refer only to matters set out in articles 1, 2, 3, and 4 and the rest of the amended article 5, and that no testimony relating to other matters would be offered.

Mr. Hanley cited a reference in paragraph 1 of the articles of impeachment referring to the conduct of the respondent while he was serving as a State judge and submitted that the conduct of the respondent as State judge was not within the jurisdiction of the Senate.

Mr. Manager Sumners, in reply, corroborated the statement of respondent's counsel with reference to the terms of the agreement between counsel for respondent and the managers on the part of the House; disclaimed any intention on the part. of the managers to impeach the respondent on the strength of his conduct as a member of the State judiciary; and justified the inclusion of the matter referred to as admissible under "at least two well-recognized rules" governing the admissibility of evidence.

In the House on May 9,[1] on motion of Mr. Sumners, by unanimous consent, the managers on the part of the House in the impeachment proceedings before the Senate were excused from attendance upon the sessions of the House until the conclusion of the trial.

522. The replication of the House to the answer of the respondent in the Louderback trial.

On motion of the managers, a clerk and additional counsel were authorized to sit with them in the conduct of the trial.

The managers announced that they had omitted the presentation of certain formal evidence, customary to impeachment proceedings, as relating to facts too obvious to require proof.

The Senate, by resolution, limited the opening statements to one person, on each side.

The Vice President was authorized to name a Senator to preside in the absence of the President pro tempore.

Questions of order raised in the course of an impeachment trial are decided without debate.

A question put by a Senator to a witness in an impeachment trial is reduced to writing and put by the Presiding Officer.

[1] Record, p. 3084.

On May 15,[1] in the Senate, sitting for the trial, Mr. Manager Sumners submitted the replication of the House of Representatives to the answer of the respondent as follows:

REPLICATION OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA TO THE ANSWER OF HAROLD LOUDERBACK, DISTRICT JUDGE OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, TO THE ARTICLES OF IMPEACHMENT, AS AMENDED, EXHIBITED AGAINST HIM BY THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA

The House of Representatives of the United States of America, having considered the several answers of Harold Louderback, district judge of the United States for the northern district of California, to the several articles of impeachment, as amended, against him by them exhibited in the name of themselves and of all the people of the United States, and reserving to themselves all advantages of exception to the insufficiency, irrelevancy, and impertinency of his answer to each and all of the several articles of impeachment, as amended, so exhibited against the said Harold Louderback, judge as aforesaid, do say:

(1) That the said articles, as amended, do severally set forth impeachable offenses, misbehaviors, and misdemeanors as defined in the Constitution of the United States, and that the same are proper to be answered unto by the Said Harold Louderback, judge as aforesaid, and sufficient to be entertained and adjudicated by the Senate sitting as a Court of Impeachment.

(2) That the said House of Representatives of the United States of America do deny each and every averment in said several answers, or either of them, which denies or traverses the acts, intents, misbehaviors, or misdemeanors charged against the said Harold Louderback in said articles of impeachment, as amended, or either of them, and for replication to said answers do say that Harold Louderback, district judge of the United States for the northern district of California, is guilty of the impeachable offenses, misbehaviors, and misdemeanors charged in said articles, as amended, and that the House of Representatives are ready to prove the same.

HATTON W. SUMNERS,
On Behalf of the Managers.

In response to the motion of the respondent that certain allegations in article 5 of the articles of impeachment be made, more certain, Mr. Sumners presented the following:

MAKING MORE SPECIFIC AN ALLEGATION CONTAINED IN ARTICLE 5, ARTICLES OF IMPEACHMENT, AS AMENDED

Whereas on April 17, 1933, the managers on the part of the House of Representatives, in the impeachment against Harold Louderback, filed an amendment to article 5 of the Articles of Impeachment, which contains the following language:

"It also became a matter of newspaper comment in connection with that receivership matter and others that theretofore, about 1925 or 1926, the said Gilbert had been appointed by the said Harold ouderback when the said Harold Louderback was a judge of the Superior Court of California, an appraiser of certain real estate, the said Harold Louderback well knowing at the time of such appointment that the said Gilbert was without any qualification to appraise the value of such real estate, and in truth the said Gilbert never saw said real estate, and that the said Gilbert did not undertake to assist in the appraisal of said real estate, only signing the report which was presented to him, for which services he was allowed the sum of $500."

And whereas said language and allegation was objected to by counsel for Harold Louderback by a motion to strike out said language on the ground that the said Harold Louderback was not advised of "the time or times (of) said acts were commited by respondent," or "in what action or actions, proceeding or proceedings such alleged acts occurred; "whereupon the managers agreed with counsel for the said Harold Louderback that they would endeavor to give to said counsel more exact information with regard to said transaction, and filing to do so by the 5th of May the said allegations would be withdrawn and no evidence offered in their support, counsel

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[1] Record, p. 3394.

for the said Harold Louderback agreeing that they would exert themselves to try to ascertain the facts with regard to the transaction referred to and advise the managers.

Since such agreement and understanding, the managers have ascertained more definite information with reference to this transaction, and now allege the facts to be that on or about April 5, 1927, in the matter of the estate of Howard Brickell, No. 46618, pending in probate that said Harold Louderback appointed the said Guy H. Gilbert an appraiser of property of said estate and also appointed with him as appraiser of said property Sam Leake, referred to in said article 5 of the Articles of Impeachment as amended; that on or about December 21, 1927, the said Harold Louderback made an order awarding to the said Guy H. Gilbert and to the said Sam Leake the sum of $500 each for their services; which information has been furnished to the said counsel for Harold Louderback.

HATTON W. SUMNERS, *Chairman,*
On Behalf of the Managers.

Mr. William H. King, of Utah, offered a resolution which was agreed to as follows:

Ordered, That the opening statement on behalf of the managers shall be made by one person, to be immediately followed by one person who shall make the opening statement on behalf of the respondent.

The managers on the part of the House requested the privilege of having with them in the trial the clerk of the House Committee on the Judiciary to assist them in handling the documents in the case; and that Mr. Bianchi, a member of the bar of San Francisco, also be permitted to sit with them.

Mr. Hanley inquired whether Mr. Bianchi was to be called as a witness, and Mr. Manager Sumners, in reply, proposed to discuss the question, when Mr. Bratton raised the question of order that under the rules of the Senate the point should be decided by the Chair without comment or debate from the floor.

The Vice President sustained the point of order.

The Vice President, having entertained the request of the managers that the clerk of the House Judiciary Committee and Mr. Bianchi be permitted to sit with them, preferred to submit it to the Senate; and the question being put, it was decided in the affirmative, and the permission was granted, as requested.

By direction of the Vice President, on request of counsel for the respondent, the Secretary of the Senate read the answer of the respondent to article 5 as last amended, as follows:

Answer of respondent to Article V as last amended.

Respondent admits that on or about the 5th day of April, 1927, while acting as judge of the Superior Court of the State of California in and for the city and county of San Francisco, in the matter of the estate of Howard Brickell, deceased, he made an order appointing Guy H. Gilbert, W. S. Leake, and R. F. Mogan appraisers; that in said matter Crocker First Federal Trust Co., of San Francisco, was special administrator of said estate; that in the first and final account of said trust company was included the sum of $500 each paid to said Gilbert and said Leake as appraisers' fees therein; that upon the hearing of the settlement of said account, an officer of said trust company testified that said account was in all respects true and correct; that the inventory on file in said estate showed its appraised value to be $1,020,804.38; that thereupon respondent, as judge of said superior court, made an order settling and allowing said account. Other than as hereinabove specifically set forth, respondent denies that he made any order awarding said Gilbert and said Leake, or either of them, $500 for their said services as such appraiser.

HAROLD LOUDERBACK,
Respondent.
WALTER H. LINFORTH,
JAMES M. HANLEY,
Attorneys for Respondent.

In his opening statement, Mr. Manager Sumners informed the Court that he would deviate from the practice usually observed in such proceedings and would not introduce the commission of the respondent or make specific reference to the preliminary action on the part of the House of Representatives, taking it for granted that the respondent was known to be a Federal judge for the northern district of California, and that it was understood that the ordinary routine has been followed in the House leading up to the proceedings in the court of impeachment.

In the course of the opening statement in behalf of the respondent, Mr. Ashurst addressed the Chair and asked recognition to offer a resolution.

The Vice President inquired:

Will counsel suspend for that purpose?

The counsel for the respondent having answered in the affirmative, the resolution was offered by Mr. Ashurst and agreed to as follows:

Ordered, That during the trial of the impeachment of Harold Louderback, United States district judge for the Northern District of California, the Vice President, in the absence of the President pro tempore, shall have the right to name in open Senate, sitting for said trial, a Senator to perform the duties of the Chair.

The President pro tempore shall likewise have the right to name in open Senate, sitting for said trial, or, if absent, in writing, a Senator to perform the duties of the Chair; but such substitution in the case of either the Vice President or the President pro tempore shall not extend beyond an adjournment or recess, except by unanimous consent.

Under the provisions of the resolution, the Vice President called Mr. Bratton to the Chair, and the counsel for the respondent resumed his statement.

During the further course of the statement Mr. Long addressed the Chair and desired to submit a question to be answered by the counsel for the respondent.

Mr. Ashurst interposed the point of order that all questions propounded by Senators should be in writing.

The Presiding Officer sustained the point of order.

523. Witnesses in an impeachment trial were required to give their testimony standing, but this requirement was held not to apply to counsel.

In the Louderback impeachment trial witnesses were sworn as called and not en banc.

In the Louderback impeachment the Senate ordered process to compel the attendance of a witness who declined to appear in response to subpoena.

Evidence relating to events occurring prior to Sudge Louderback's appointment to the Federal bench were admitted to establish matters pertinent to the impeachment proceedings.

Exhibits relating to the case at bar but also embodying extraneous and irrelevant material were admitted in full over the objection that only the pertinent matters should be read into the record.

The issuance of process for the attachment of a witness was held not to bar the admission of depositions by such witness pending his arrival.

The opening statements having been concluded, on the proposal of Mr. Ashurst it was—

Ordered, That the witnesses shall stand while giving their testimony.

In response to an inquiry by Mr. Manager Sumners, as to whether counsel should also stand while examining the witness, the Presiding Officer [1] held—

It is the judgment of the present occupant of the chair that counsel may sit or stand, according to their convenience.

Mr. Manager Sumners further inquired if each witness should be sworn as examined or if all witnesses should be called and sworn at once.

The Presiding Officer said:

The Chair thinks that the business of the court would be expedited by swearing each witness as he enters the Chamber. The oath can be administered quickly.

The introduction of testimony on behalf of the managers then began and continued through May 15,16,17, and 18. On May 18 [2] Mr. Manager Sumners announced that the managers had no further evidence to offer at that time, and the introduction of testimony on behalf of the respondent began and continued until May 23, when both parties rested.

On May 16 [3] the Vice President laid before the Senate the return of the Sergeant at Arms which was printed and noted in the Journal as follows:

SENATE OF THE UNITED STATES,
OFFICE OF THE SERGEANT AT ARMS,
Washington, DC., May 15, 1933.

Hon. JOHN N. GARNER,
Vice President and President of the Senate,
Washington, D. C.

MY DEAR MR. VICE PRESIDENT: There are attached hereto a list of witnesses for the Government submitted to me by the managers on the part of the House of Representatives, and a list of witnesses for the respondent submitted to me by his counsel, all of said witnesses to be subpaned for the trial of Harold Louderback, United States district judge for the northern district of California.

There are also attached hereto original subpoenas personally served by me on the witnesses desired by both parties, said subpoenas being duly served and return made according to law.

Respectfully,

CHESLEY W. JURNEY,
Sergeant at Arms.

(Then followed the list of witnesses for the Government and the list of witnesses for the respondent.)

On motion of Mr. Ashurst it was—

Ordered, That the daily sessions of the Senate sitting for the trial of the impeachment of Harold Louderback, United States district judge for the northern district of California, shall, unless otherwise ordered, commence at 10 o'clock in the forenoon.

Mr. Hanley, of counsel for the respondent, moved that commission issue for taking the deposition of one W. S. Leake in San Francisco, and in support of his motion read this telegram:

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[1] Sam G. Bratton, of New Mexico, Presiding Officer.

[2] Record, p. 36,33.

[3] Record, p. 3444.

HON. JOHN N. GARNER,
Vice President of United States and President of Senate,
Washington, D. C.:

Mr. Leake, under subpoena Louderback trial, quite weak physically, due age and cerebral arteriosclerosis. Been his family doctor many years. Travel to Washington impractical, but if imperative should be accompanied by a nurse. Please instruct.

RUSSEL C. RYAN, M. D.,
Fairmont Hotel.

Mr. Manager Perkins resisted the motion and submitted the following excerpt from stipulations, previously entered into by counsel for the respondent and the managers on the part of the House, relative to certain testimony elicited before the special committee of the House of Representatives in San Francisco, in September, 1932.

It is further stipulated that the testimony of W. S. Leake and Miriam McKenzie, hotel maid, taken at the hearing above referred to, may be read upon said trial by either party hereto with the same force and effect as if said witness were present and testified in person. This stipulation, however, in so far as the said W. S. Leake is concerned is without waiver by either party hereto to insist upon the attendance of said Leake before the court above referred to, and shall become operative only in the event of the nonappearance of the said Leake at Washington before the said Court of Impeachment.

Dated May 3, 1933.

GORDON BROWNING,
RANDOLPH PERKINS,
For the House Managers.
WALTER H. LINFORTH,
JAMES M. HANLEY,
Attorneys for Respondent.

The question being submitted to the court by the Vice President it was ordered, on motion of Mr. Bratton, that the Vice President be authorized to arrange for the attendance of the witness, to be accompanied by a nurse if that was deemed necessary.

Subsequently,[1] Mr. Manager Browning proposed to offer the testimony referred to in the stipulation before the arrival of the witness.

Mr. Hanley, of counsel for the respondent, objected on the ground that the witness would shortly arrive for examination in person.

The Vice President ruled:

The Chair overrules the objection. It seems to the Chair that reading the testimony, in view of the fact that Mr. Leake may be present in the Chamber, will not injure the cause of the respondent in any way.

In the course of the proceedings Mr. Manager Perkins proposed to offer in evidence certified copies of orders made by Judge Louderback appointing W. S. Leake and G. H. Gilbert appraisers in cases which had come before him in 1927 while on the State bench and prior to his appointment and confirmation by the Senate as a Federal judge.

Counsel for the respondent objected to the admission of the evidence on the ground that it related to matters occurring prior to the respondent's appointment as

[1] Record, p. 3503.

Federal judge and which for that reason were without the jurisdiction of the Court of Impeachment.

Mr. Manager Perkins rejoined that the orders were offered for the purpose of showing the long and intimate relation existing between Judge Louderback and W. S. Leake and G. H. Gilbert with whose appointment by respondent the case in trial was largely concerned.

The Presiding Officer [1] ruled:

The present occupant of the chair is very clear that it is admissible for whatever it may be worth for the purpose stated by the manager on the part of the House.

The orders being produced, respondent's counsel objected to their being admitted in full and contended that the announced purpose for which they were offered was fully served by the reading into the Record of the material parts germane to the case and that to admit them in full would admit many irrelevant matters not pertinent to the issues of the case at bar.

The Presiding Officer submitted the question of admissibility to the Court and in stating the question said:

The managers on the part of the House offered these papers for the record. Objection was made, and, after argument, the Chair held that these records were pertinent for one purpose, namely, to show the connection between the persons named in the papers and the respondent. The Inn sought to have the counsel on both sides agree that the material parts should be read into the record; but that was not satisfactory to the managers on the part of the House, who insisted that the whole records should be admitted. Counsel for the respondent objects to that because there are many things in the records themselves that are not in any sense material; and the question is whether or not the papers offered for the record shall be admitted.

The question having been taken, the Presiding Officer announced:

On this vote the yeas are 67 and the nays are 4, so the papers are admitted.

The Vice President laid before the Senate the following communication:

SENATE OF THE UNITED STATES,
OFFICE OF THE SERGEANT AT ARMS,
Washington, D. C., May 17, 1933.

Hon. JOHN N. GARNER,
Vice President and President of the Senate, Washington, D. C.

MY DEAR MR. VICE PRESIDENT: I was commanded to serve and return a subpoena issued in the impeachment trial of Harold Louderback on one W. S. Leake, of San Francisco, Calif. Said subpoena was personally served by me on the said W. S. Leake on May 2,1933, at San Francisco, and a return was duly made by me.

W. S. Leake was commanded to appear and testify on the 15th day of May, 1933, at 1 p. m., at the Senate Chamber in the city of Washington, and he has not appeared and refuses to appear and testify for the reason as stated by him to me personally on this day, that he is physically unable to do so.

This information is given to you so that the Senate of the United States may be officially informed in the matter.

Respectfully,

CHESLEY W. JURNEY,
Sergeant at Arm.

[1] Daniel O. Hastings, of Delaware, Presiding Officer.

Thereupon, a resolution presented by Mr. Ashurst was agreed to, as follows:

Whereas the Senate of the United States pursuant to House Resolution 403, Seventy-second Congress, second session, and orders of the Senate of the United States adopted in relation thereto, has authorized that witnesses be summoned as required by the rules of procedure and practice of the Senate; and

Whereas it appears from the letter of Chesley W. Jurney, Sergeant at Arms of the United States Senate, to Hon. John N. Garner, Vice President and President of the Senate, dated May 15, 1933, that one W. S. Leake, of San Francisco, Calif., was duly served with a subpoena on May 2, 1933, to appear on Monday, May 15, 1933, at 1 p. m., before the Senate of the United States at Washington, D.C., and then and there to testify his knowledge in the cause which is before the Senate in which the House of Representatives have impeached Harold Louderback, district judge of the United States for the Northern District of California; and

Whereas it appears from a letter of Chesley W. Jurney, Sergeant at Arms of the United States Senate to Hon. John N. Garner, Vice President and President of the Senate, dated May 16, 1933, that said W. S. Leake has not appeared in response to said subpoena, duly issued and served, and the said W. S. Leake has failed, in disobedience of such subpoena, so to appear and answer; and

Whereas the appearance and testimony of said W. S. Leake is material and necessary in order that the Senate of the United States may properly execute the functions imposed upon it by the Constitution of the United States, and other action as the Senate may deem necessary and proper: Therefore be it

Ordered, That the Vice President and President of the Senate issue his warrant commanding the Sergeant at Arms or his deputy, to take into custody the body of the Said W. S. Leake, where-ever found, to bring the Said W. S. Leake before the bar of the Senate, then and there to answer such questions pertinent to the matter under inquiry; and to keep the said W. S. Leake to await the further order of the Senate.

On May 22,[1] the Vice President laid before the Senate a further communication as follows:

SENATE OF THE UNITED STATES,
OFFICE OF THE SERGEANT AT ARMS,
Washington, D. C., May 20, 1933.

Hon. JOHN N. GARNER,
Vice President and President of Senate, Washington, D.C.

MY DEAR MR. VICE PRESIDENT: In pursuance of the order of the Senate dated May 17, 1933, commanding me to forthwith arrest and take into custody and bring to the bar of the Senate W. S. Leake, of San Francisco, Calif., I did, acting through my deputy, W. A. Rorer, on May 17, 1933, arrest and take Mr. Leake into custody.

The said W. S. Leake is now in my custody, and I await the further order of the Senate.

The original warrant issued in the case is attached hereto.

Respectfully yours,

CHESLEY W. JURNEY,
Sergeant at Arms.

Whereupon counsel for respondent called the witness W. S. Leake who appeared and testified.

524. The respondent in impeachment proceedings attended throughout the trial and was present when the articles were voted on and judgment rendered.

In the Louderback impeachment trial the respondent appeared and testified at length in his own behalf.

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[1] Record, p. 3844.

After testimony had been closed and the opening argument concluded in the Louderback trial, further questions were propounded in writing and were answered by the respondent.

The Senate limited the time but did not restrict the number participating in the final arguments in the Louderback impeachment.

The counsel for the respondent having touched on extraneous matters in his final argument in the Louderback trial, was admonished by the presiding officer to confine himself to the record.

In the Louderback trial the Senate deliberated behind closed doors before voting on the articles of impeachment.

Form of question prescribed for ascertaining the judgment of the court in the Louderback trial.

It was announced that pairs would not be arranged or recognized in the final vote on the articles of impeachment in the Louderback trial.

Senators were permitted to excuse themselves from voting on articles of impeachment as they were reached without having given notice of such intention prior to the vote on Article 1.

Two-thirds not having voted guilty on any article, the presiding officer declared Judge Louderback acquitted.

On May 23,[1] the respondent, Harold Louderback, was called and testified in his own behalf on direct examination by his counsel and on cross-examination by the managers. At the conclusion of his testimony, Mr. Linforth announced that the respondent rested. After brief testimony in rebuttal introduced by the managers, Mr. Manager Sumners on conference with Mr. Linforth, informed the court that all testimony had been concluded.

Whereupon, on motion of Mr. Ashurst, an order was entered finally excusing all witnesses from further attendance, and it was further—

Ordered, That the time for final argument of the case of Harold Louderback shall be limited to 4 hours, which said time shall be divided equally between the managers on the part of the House of Representatives and the counsel for the respondent, and the time thus assigned to each side shall be divided as each side for itself may determine.

On May 24,[2] Mr. Manager Browning opened the argument on behalf of the House of Representatives. At the conclusion of his remarks, Mr. Tom Connally, of Texas, addressed the Chair and asked, as a parliamentary inquiry, if it would be in order to propound further questions in writing to the respondent.

The Vice President replied:

The Chair does not think so. The case has been closed, as the Chair understands it, unless the Senate orders otherwise. If there is no objection on the part of the respondent, the Chair will admit the question.

There was no objection and Mr. Connally submitted certain questions in writing which were answered by the respondent.

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[1] Record, p. 3971.

[2] Record, p. 4064.

Mr. Linforth then argued in behalf of the respondent. In the course of Mr. Linforth's argument, Mr. Manager Sumners interposed and said:

Mr. President, I do not desire to interrupt counsel, but I give notice that if this is going to be the line of argument we shall endeavor to some degree to avail ourselves of it. We say that counsel is testifying at this time. I do not desire to object. I merely desire to serve notice now that we are going to avail ourselves of that line of argument.

The Presiding Officer admonished:

Counsel will confine themselves to the record.

Mr. Manager Sumners concluded the argument on behalf of the managers.

Thereupon, a motion presented by Mr. Ashurst that the doors of the Senate be closed for deliberation was agreed to; the managers on the part of the House and the respondent with his counsel withdrew from the Chamber; the galleries were cleared; and at 3 o'clock and 5 minutes p.m. the Senate proceeded to deliberate with closed doors.

At 4 o'clock and 45 minutes p. m. the doors were reopened, and the managers on the part of the House and respondent with his counsel appeared in the seats provided for them.

Mr. Joseph T. Robinson, of Arkansas, announced:

I have been requested to state that on these votes pairs will not be arranged or recognized.

The following order submitted by Mr. Ashurst was agreed to:

Ordered, That upon the final vote in the pending impeachment of Harold Louderback, the Secretary shall read the articles of impeachment separately and successively, and when the reading of each article shall have been concluded the Presiding Officer shall state the question thereon as follows:

"Senators, how say you? Is the respondent, Harold Louderback, guilty or not guilty as charged in this article?"

Thereupon the roll of the Senate shall be called, and each Senator, as his name is called, unless excused, shall arise in his place and answer "Guilty" or "Not guilty."

In response to a parliamentary inquiry from Mr. Alben W. Barkley, of Kentucky, as to whether a Senator could be excused from voting on any article as it was reached in its order or whether notice should be given in advance of the reading of the first article, the Vice President held:

The Chair is of opinion that a Senator can ask to be excused from voting on any article at any time.

On motion of Mr. Ashurst, it was further—

Ordered, That upon the final vote in the pending impeachment of Harold Louderback, each Senator may, within 2 days after the final vote, file his opinion in writing to be published in the printed proceedings in the case.

The Vice President directed the Secretary to read the first article of the articles of impeachment, and following the reading, put the question:

Senators, how say you? Is the respondent, Harold Louderback, guilty or not guilty as charged in this article? The secretary will proceed to call the roll, and as the name of each Senator is called, he will rise in his place and deliver his vote.

The roll having been called, the Vice President announced:

On the first article of impeachment 34 Senators have voted "guilty" and 42 Senators have voted "not guilty." Less than two-thirds having voted in favor of his guilt, the Senate adjudges that the respondent, Harold Louderback, is not guilty as charged in the article. The clerk will read the next article.

In like manner the vote was taken and announced on each of the remaining articles, with the following results:

	Guilty.	Not guilty
Article I	34	42
Article II	23	47
Article III	11	63
Article IV	30	47
Article V (as amended)	45	34

The Vice President summarized:

That completes the articles of impeachment, and, with the permission of the Senate sitting as a court, the Chair will enter in the record the following judgment, which the clerk will read.

The legislative clerk read:

JUDGMENT.

The Senate having tried Harold Louderback, judge of the District Court of the United States for the Northern District of California, upon five several articles of impeachment exhibited against him by the House of Representatives, and two-thirds of the Senators present not having found him guilty of the charges contained therein: It is therefore

Ordered and adjudged, That the said Harold Louderback be, and he is, acquitted of all the charges in said articles made and set forth.

And then,

On motion of Mr. Ashurst, at 6 o'clock and 5 minutes p.m. the Senate sitting as a court of impeachment in the case of Harold Louderback adjourned sine die.

Chapter CCII.[1]

IMPEACHMENT PROCEEDINGS NOT RESULTING IN TRIAL.

525. The inquiry into the conduct of Lebbeus R. Wilfley, Judge of United States Court for China.

A Member having risen in his place and impeached Judge Wilfley and offered a resolution providing for an investigation, the House referred the matter to the Judiciary Committee.

In the investigation into the conduct of Judge Wilfley, he appeared before the committee and testified under oath.

The report of a subcommittee was disregarded and was not included as a part of the report of the committee to the House.

The committee, after conducting an investigation, acted adversely on a proposition to impeach Judge Wilfley and the House declined to take further action.

A Member being criticized by the President for instituting impeachment proceedings, rose to a question of personal privilege.

[1] Supplementary to Chapter LXXIX.

On February 20, 1908,[1] Mr. George E. Waldo, of New York, presented as a privileged matter the following:

I desire to impeach Lebbeus R. Wilfley, of the United States court of China, of mal and corrupt conduct in office, and of high crimes and misdemeanors, and I present the following articles of impeachment and ask that they may be read at the Clerk's desk.

The Clerk read the articles of impeachment, which detailed at length the charges upon which the proposed impeachment was based.

Mr. Waldo then submitted a resolution authorizing and directing the Committee on the Judiciary to investigate the charges, and, after debate, made the following motion, which was agreed to:

I move that this resolution and the articles be referred to the Committee on the Judiciary, to report back by resolution within ten days what, if any, proceedings should be taken.

The motion was agreed to.

The investigation was delegated to a subcommittee of the Committee on the Judiciary, which reported to the committee in part as follows:

It is obviously true that an aggregation of entirely legal acts may develop into a system of tyranny and oppression; and that an inequitable exercise of judicial discretion may convert the machinery of justice into an engine of despotic and autocratic power. This may be accomplished without the taint of individual corruption and with a laudable purpose of purifying a community and of inaugurating civic reform.

Terror to evil doers if purchased at the price of judicial fairness and overstrained legal authority is achieved at too great an expense, for it defeats its own high aim and warps the very fabric of the law itself.

Such sets of legal oppression and of abuse of judicial discretion lie at the base of these charges. They are made before the House of Representatives in the form prescribed by law and custom, and are presented as a question of high privilege upon the solemn responsibility of a Member of the House. Charges so presented against this court have a peculiar and dangerous significance. In this case they are dismissed as falling short of impeachable offenses, by what we believe to be sound principles of legal construction, and Judge Wilfley is therefore denied any opportunity of defense. He can file no answer, make no denial, nor explain to the House the legality or necessity for his action.

These charges therefore stand uncontroverted, and if Judge Wilfley's judicial acts in the future are marked by the rigorous and inflexible harshness imputed to him they will hang as a portentous cloud over this new court, impairing his usefulness, impeding the administration of justice, and challenging the integrity of American institutions.

During the investigation Judge Wilfley appeared before the committee and testified under oath.

On May 8, 1908,[2] Mr. Reuben O. Moon, of Pennsylvania, from the Committee on the Judiciary, submitted the following report:

The Committee on the Judiciary, to whom was referred the articles of impeachment of Lebbeus R. Wilfley, judge of the United States court for China, in compliance with the action of the House, begs leave to report that, after investigation, it is the opinion of the committee that no proceedings should be taken on the said resolutions.

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[1] First session, Sixtieth Congress, Journal, p. 497; Record, 2262.

[2] House Report 1626.

The report was referred, under the rule, to the Committee of the Whole House.

On March 3, 1909,[1] Mr. Waldo rose to a question of personal privilege and said:

Mr. Speaker, on February 20, 1908, at the request of Hon. Lorrin Andrews, late attorney general of Hawaii, and who represented the American lawyers and other American citizens, residents of Shanghai, China, I presented to the House articles of impeachment against Lebbeus R. Wilfley, judge of the United States court for China.

These articles charged judicial outrages and gross abuse of power which, in my judgment, showed Judge Wilfley to be utterly unfit to hold judicial office.

The President, without any investigation of the facts, except to hear Judge Wilfley and his friends, sent to the subcommittee of the Judiciary Committee, which was then investigating the facts, a copy of a letter from himself to Secretary Root, in which the President used this language:

"I have received and read your report of February 29 upon the charges submitted by Lorrin Andrews, under date of November 19, 1907, against Judge Wilfley; it appearing from your report that Congressman Waldo stands sponsor for the charges."

And concluded letter as follows:

"It is not too much to say that this assault on Judge Wilfley in the interest of the vicious and criminal classes is a public scandal."

This was evidently an intentional reflection upon the uprightness of my motives and conduct and an invasion of my privileges as a Member of this House.

Mr. Sereno E. Payne, of New York, made the point of order that the gentleman was not stating a question of personal privilege.

The Speaker[2] sustained the point of order, and Mr. Waldo continued his remarks by unanimous consent.

526. The inquiry into the conduct of Judge Cornelius H. Hanford, United States circuit judge for the western district of Washington, in 1912.

A Member on his authority as a Member of the House impeached Judge Hanford and offered a resolution providing for investigation of charges.

Pending motion to refer a resolution providing for an investigation looking to impeachment the resolution is not open to amendment.

The House referred the charges made against Judge Hanford to the Judiciary Committee for investigation.

During the investigation of Judge Hanford with a view to impeachment, he was represented by counsel who cross-examined witnesses and produced evidence in his behalf.

Judge Hanford having resigned his office, the House discontinued its investigation into his conduct.

The report of the subcommittee, while recommending the discontinuance of impeachment proceedings against Judge Hanford, declared him to be disqualified for his position and recommended acceptance of his resignation.

On June 7, 1912,[3] Mr. Victor L. Berger, of Wisconsin, presented, as a matter of privilege, the following:

Mr. Speaker, I rise to a question of the highest privilege and also of the greatest importance. By virtue of my office as a Member of the House of Representatives, I impeach Cornelius H.

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[1] Second session Sixtieth Congress, Record, p. 3813.

[2] Joseph G. Cannon, of Illinois, Speaker.

[3] Second session Sixty-second Congress, Journal, p. 772; Record, p. 7799.

Hanford, judge of the western district of the State of Washington, of high crimes and misdemeanors.

I charge him with having annulled, on May 13, 1912, in violation of the Constitution and on a frivolous charge, the naturalization papers of Leonard Oleson.

I charge him with having been guilty of a long series of unlawful and corrupt decisions.

I charge him with having issued in the collusive suit of Augustus Peabody *v.* The Seattle, Renton & Southern Railway, in August, 1911, an injunction in the interests of the company and against the interests of the citizens of Seattle, flagrantly in violation of justice and law.

I charge him with being an habitual drunkard.

I charge him with being morally and temperamentally unfit to hold a judicial position.

Mr. Berger then submitted the following resolution and moved that it be referred to the Committee on the Judiciary:

Resolved, That the Committee on the Judiciary be directed to inquire and report whether the action of this House is necessary concerning the official misconduct of Cornelius H. Hanford; whether he has been in a drunken condition while presiding in court; whether he has been guilty of corrupt conduct in office; whether his administration has resulted in injury and wrong to litigants of his court and to others affected by his decisions; and whether he has been guilty of any misbehavior for which he should be impeached.

That this committee is hereby authorized and empowered to send for persons and papers, to administer oaths, to employ, if necessary, an additional clerk and stenographer, and to appoint and send a subcommittee whenever and wherever necessary to take testimony for the use of said committee.

That the subcommittee shall have the same powers in respect to obtaining testimony as are herein given to the said Committee on the Judiciary.

That the expenses incurred in this investigation shall be paid out of the contingent fund of the House.

Mr. Samuel W. McCall, of Massachusetts, proposed to amend the resolution by inserting the word "alleged" before the word "misconduct."

A point of order by Mr. James R. Mann, of Illinois, that in view of the motion to refer the resolution it was not open to amendment, was sustained.

Thereupon Mr. Berger asked unanimous consent to amend the resolution as proposed by Mr. McCall. There was no objection and the resolution was so modified. The motion to refer the amendment to the Committee on the Judiciary was then agreed to.

On June 13 [1] Mr. Henry D. Clayton, of Alabama, from the Committee on the Judiciary, presented as privileged the report of that committee, with the recommendation that the resolution be amended to read as follows:

That the Committee on the Judiciary be directed to inquire and report whether the action of this House is requisite concerning the official misconduct of Cornelius H. Hanford, United States judge for the western district of the State of Washington, and say whether said judge has been in a drunken condition while presiding in court; whether said judge has been guilty of corrupt conduct in office; whether the administration of said judge has resulted in injury and wrong to litigants in his court and others affected by his decisions; and whether said judge has been guilty of any misbehavior for which he should be impeached.

And in reference to this investigation the said committee is hereby authorized to send for persons and papers, administer oaths, take testimony, employ a clerk and stenographer, if necessary, and to appoint and send a subcommittee whenever and wherever it may be necessary to take testimony for the use of said committee. The said subcommittee while so employed shall

[1] House Report No. 880.

have the same powers in respect to obtaining testimony as are herein given to said Committee on the Judiciary, with a sergeant at arms, by himself or deputy, who shall serve the process of said committee and the process and orders of said subcommittee, and shall attend the sitting of the same as ordered and as directed thereby, and that the expense of such investigation shall be paid out of the contingent fund of the House.

The report was adopted and the resolution as amended was agreed to.

On August 6[1] Mr. Clayton, from the Committee on the Judiciary, submitted the unanimous report of the committee, incorporating the report of an investigation made by a subcommittee pursuant to the following resolution passed by the committee:

Resolved, That James M. Graham, Walter I. McCoy, and Edwin W. Higgins, members of this committee, be appointed the subcommittee by virtue of the authority given under House Resolution No. 576, passed by the House of Representatives on June 13, 1912, authorizing an inquiry into the alleged misconduct of Cornelius H. Hanford, United States judge for the western district of the State of Washington, and that the said subcommittee shall have all the powers authorized by said resolution hereinbefore named.

This report relates:

In pursuance of said resolution, the subcommittee left Washington on June 21, 1912, and reached Seattle the evening of June 25. Wednesday, June 26, was spent in making the necessary preliminary arrangements for proceeding with the hearings, and on Thursday, the 27th, the taking of testimony was begun in a court room of the Federal Building in Seattle, and was concluded on Monday, July 22, 1912. The subcommittee sat every day between those days except Sundays and the Fourth of July, making in all 21 days of actual work, including several evening sessions. Two hundred and three witnesses were examined and 3,291 typewritten pages of testimony were taken.

Immediately upon the arrival of the subcommittee in Seattle, the following Communication was addressed to Judge Hanford by Mr. Graham, chairman of the subcommittee.

SEATTLE, WASH., *June 26, 1912.*

DEAR SIR: The subcommittee on the Committee of the Judiciary of the House of Representatives, Washington, D.C., will convene to-morrow June 27, in the court room, Federal Building, in Seattle, for the purpose of taking testimony under House Resolution 576, a copy of which is attached hereto. You can, of course, be present at the session of the subcommittee, in person and by counsel, if you so desire.

JAMES M. GRAHAM, *Chairman.*

Hon. C. H. HANFORD.

The report says:

The subcommittee further reports that Judge Hanford was represented during the hearings by able and learned counsel, namely, Mr. E. C. Hughes, Mr. Harold Preston, and Mr. C. W. Dorr, and that they were given wide latitude in the examination of all the witnesses and in the production of evidence on behalf of Judge Hanford, so that the record contains such evidence in defense as counsel desired to offer, as well as the incriminating evidence.

The report continues:

The subcommittee had almost, but not quite, completed the taking of testimony when, at the morning session on Monday, July 22, counsel representing Judge Hanford asked for a conference with the members of the subcommittee, and the request was granted. They then

[1] House Report No. 1152.

informed the subcommittee that Judge Hanford had concluded to send his resignation to the President.

The subcommittee thereupon decided:

That there was no good reason why the resignation of the judge should not be accepted. And it appears to the committee that the further prosecution of the impeachment proceedings is inadvisable. Among the reasons for this conclusion may be stated in substance the reasons assigned by the subcommittee:

(1) The chief good which successful impeachment proceedings could effect would be the removal of Judge Hanford from the bench. That good his resignation accomplished.

(2) The record of the evidence shows that he is 64 years old his next birthday, and hence not entitled to retire on pay. Therefore, his resignation brings him no emolument or reward and involves no expenditure of public money.

(3) The committee do not think it necessary or advisable to pursue the impeachment further merely for the purpose of making him ineligible to hold office in the future, as his age and the circumstances disclosed by the testimony render such a contingency highly improbable.

(4) Bringing the witnesses from Seattle and vicinity to Washington, a distance of over 3,000 miles, to prosecute an impeachment proceeding before the Senate would involve an expenditure approximating $70,000. This expenditure of public money could not be justified in this case where the judge is now out of office and doubtless will never again be appointed to office.

The subcommittee further concluded:

On the whole record it clearly appears that Judge Hanford's usefulness as a Federal judge is over; that his personal and judicial conduct disqualify him for that position and that this committee recommend that his resignation be accepted.

The committee therefore recommended the following resolution:

Resolved, That the Committee on the Judiciary be discharged from further consideration of and action under House Resolution 576.

Resolved further, That the testimony taken by the subcommittee of the Committee on the Judiciary under the authority conferred by House Resolution 576 be printed as a part of this report and transmitted by the Clerk of the House of Representatives to the Attorney General for his consideration and with the recommendation that the Department of Justice take cognizance thereof, and take whatever action may be deemed advisable in case said testimony discloses or tends to disclose any infractions of the laws of the United States.

On the same day, after brief debate, Mr. Clayton moved to amend the resolution by inserting after the word "printed" the words "as a part of this report." The amendment was agreed to and the resolution as amended was adopted without division.

527. The investigation into the conduct of Judge Emory Speer.

A resolution proposing investigation with a view to impeachment was referred, under the rule, to the appropriate committee.

A resolution proposing investigation with a view to impeachment was considered by unanimous consent.

A subcommittee, with power to send for persons and papers, was sent to Georgia to investigate the conduct of Judge Speer.

During the investigation of Judge Speer, looking to impeachment, he attended each session, accompanied by counsel, and cross-examined witnesses.

The most liberal latitude was allowed in the examination of witnesses before the committee which investigated Judge Speer.

While declining to recommend acquittal, and declaring Judge Speer's acts merited condemnation, the Judiciary Committee reported satisfactory evidence was not obtainable and recommended that no further proceedings be had in the matter.

On August 26, 1913,[1] Mr. Henry D. Clayton, of Alabama, asked unanimous consent for the consideration of the following resolution:

Whereas on the 16th day of August, 1913, the Attorney General of the United States transmitted to the Committee on the Judiciary of the House of Representatives a report of a special examiner duly designated by the Attorney General to investigate various charges of alleged misconduct of Emory Speer, a United States district judge for the southern district of Georgia, which charges had been brought to the attention of the Department of Justice; and

Whereas the charges embodied in said report are accompanied by exhibits and affidavits and are of such grave nature as to warrant further investigation: Therefore be it

Resolved, That the Committee on the Judiciary be, and it is hereby authorized to inquire into and concerning the official conduct of Emory Speer, United States district judge for the southern district of Georgia, touching his conduct in regard to the matters and things set forth in said report; and further to inquire whether said judge has been guilty of any misbehavior for which he should be impeached and report to the House of Representatives the conclusions of the committee in respect thereto, with appropriate recommendations; and said committee is hereby authorized to send for persons and papers, administer oaths, take testimony, employ a clerk and stenographer if necessary, and to appoint and send a subcommittee whenever and wherever it may be necessary to take testimony for the use of said committee; the said subcommittee, while so employed, shall have the same powers in respect to obtaining testimony as are herein given to said Committee on the Judiciary, with a sergeant at arms, by himself or deputy, who shall serve the process of said committee and the process and orders of said subcommittee and shall attend the sittings of the same as ordered and as directed thereby, and that the expense of such investigation shall be paid out of the contingent fund of the House; that said Committee on the Judiciary, or subcommittee thereof, shall have power to sit during the sessions of this House or in vacation.

Mr. James R. Miron, of Illinois, objected and, under the rule, the resolution was referred to the Committee on Rules.

On the following day Mr. Clayton again submitted a unanimous-consent request for consideration of the resolution. There was no objection, and after debate the resolution was agreed to, with the following amendment:

Amend, page 2, by inserting after the word "House," in line 19 and before the semicolon, the following: "On vouchers ordered by the Committee on the Judiciary, signed by the chairman thereof and approved by the Committee on Accounts and evidenced by the signature of the chairman thereof."

On October 2, 1914[2] Mr. Edwin Yates Webb, of North Carolina, from the Committee on the Judiciary, submitted the report of the majority of that committee on the investigation authorized by the resolution.

The committee incorporate as a part of their report the report of the majority of a subcommittee which conducted the investigation, signed by Mr. Webb and Mr. Louis Fitzhenry, of Illinois. The history of the investigation is thus detailed in the majority report:

Your special subcommittee made a trip to the southern district of Georgia, leaving Washington on the evening of Saturday, January 17, and arriving at Macon, the seat of the court,

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[1] First session Sixty-third Congress, Journal, p. 254; Record p. 3777.

[2] House Report No. 1176.

on the evening of the following day. Monday morning, January 19, at 10 o'clock, the subcommittee opened its public hearings in the United States court room in the Federal Building at Macon, and examined witnesses who were caused to appear for the purpose of giving testimony. These hearings were held continuously throughout the week, ending Saturday, January 24. The committee then went to Savannah, Ga., in said district, and examined witnesses during the entire of the following week, concluding its hearings there on Saturday, January 31.

All of the hearings were public. Judge Speer attended each session of the committee and was accompanied by counsel, who were permitted to cross-examine the several witnesses.

A digest of the testimony of the witnesses examined is appended, and the committee thus summarize the evidence:

The conclusion of the subcommittee, deduced from the evidence taken and from the construction of the precedents of impeachment trials, is that at the present time satisfactory evidence sufficient to support a conviction upon a trial by the Senate is not obtainable.

The report continues:

A phase of the record is that it details a large number of official acts on the part of Judge Speer which are in themselves legal, yet, when taken together, develop into a system tending to approach a condition of tyranny and oppression. There has been an inequitable exercise of judicial discretion, many instances of which have been frequently criticized where the cases in which they were committed have been reviewed by the courts of appeal, while in others litigants were unable, financially, to prosecute appeals. That the power of the court has been exercised in a despotic and autocratic manner by the judge can not be questioned.

As to examination of witnesses and admission of evidence, the committee say:

In the conduct of the hearings the committee was extremely liberal and did not confine the witnesses to the giving of technically legal evidence. Some evidence of a hearsay nature was received. The committee felt justified in such a course in the light of the fact that it came to the attention of the committee that many witnesses were apprehensive of the consequences of giving evidence against Judge Speer in the event of his acquittal.

The committee also say:

The record shows instances where the judge, sitting in the trial of criminal cases, apparently forced pleas of guilty from defendants or convictions and there is strong evidence tending to show that in one case, at least, he forced innocent parties to enter such pleas through a fear of the consequences in the event of an unfavorable verdict at the hands of a jury presided over by the judge in the manner peculiar to himself.

The committee, however, decide:

The subcommittee regrets its inability to either recommend a complete acquittal of Judge Speer of all culpability so far as these charges are concerned, on the one hand, or an impeachment on the other. And yet it is persuaded that the competent legal evidence at hand is not sufficient to procure a conviction at the hands of the Senate. But it does feel that the record presents a series of legal oppressions and shows an abuse of judicial discretion which, though falling short of impeachable offenses, demand condemnation and criticism.

If Judge Speer's judicial acts in the future are marked by the rigorous and inflexible harshness shown by this record, these charges hang as a portentous cloud over his court, "impairing his usefulness, impeding the administration of justice, and endangering the integrity of American institutions."

The committee therefore recommend the adoption of the following resolution:

Resolved, That no further proceedings be had with reference to H. Res. 234.

Mr. Andrew J. Volstead, of Minnesota, a member of the subcommittee, in an accompanying minority report concurs in recommending the adoption of the resolution reported by the majority, but takes sharp issue with other conclusions set out in the majority report. After discussing in detail each charge considered in the majority report and warmly controverting conclusions reached by the majority, the minority views say:

While I concur in the recommendations made in the majority report, that no further proceedings be had upon the charges against Judge Speer, I desire to express in as emphatic language as possible my protest against the methods that have been pursued; but I desire to have it distinctly understood that I do not criticize the motives of my associates; for them I have the highest personal regards. In this investigation no effort was made to protect the judge against mere slander and abuse that could serve no other purpose than to disgrace and humiliate him. Every enemy that 29 years on the bench had produced was invited and eagerly encouraged to detail his grievance and to supplement that with all sorts of innuendoes, insinuations, and insulting opinions, utterly illegal as evidence and incompetent for any proper purpose. To add to this, the methods pursued in framing the majority report are equally reprehensible. It is apparent throughout that nothing has been considered pertinent that did not support some charge against the judge. As matters of explanation or denial do not meet this requirement, they are quite generally omitted, not only from the findings, but also from the summary of the evidence. Still this is not all. Although the majority report announces that there is not sufficient evidence to support any of the charges, that announcement is in the nature of a "Scotch verdict," or worse, because it is accompanied in almost every instance with an insinuation that the judge may be guilty, notwithstanding such finding. If anything could be more unfair or unjust, it is difficult to imagaine what it could be.

The minority views conclude:

It is not necessary to say anything in commendation of Judge Speer. The last line in the majority report, recommending no further action upon the charges, is, despite all criticism to the contrary, a complete vindication. It would not have been written if the evidence had pointed to anything worthy of real criticism. In conclusion let me add, the day win come when Judge Speer will be remembered with pride by the people of Georgia, not only for his ability and integrity, but especially for what Mr. Wimberly called his many beautiful acts of mercy to the oppressed.

On October 21, 1914, the House agreed to the majority report without debate or division.

528. The investigation into the conduct of Daniel Thew Wright, associate justice of the Supreme Court of the District of Columbia.

A Member, rising in his place, impeached judge Wright on his responsibility as a Member of the House.

A committee charged with an investigation looking to impeachment delegated the inquiry to a subcommittee.

During the investigation of Judge Wright with a view to impeachment he was permitted to appear before the committee with counsel.

Judge Wright having resigned his office before final report by the committee charged with the investigation, the House agreed to the recommendation of the committee and that it be discharged.

On March 20, 1914,[1] Mr. Frank Park, of Georgia, rose in his place and proposed as a matter of privilege the impeachment of Daniel Thew Wright, an associate justice of the Supreme Court of the District of Columbia. In the absence of a quorum, the House adjourned.

[1] Second session Sixty-third Congress, Record, p. 5204.

On the following day, immediately after the reading of the Journal, Mr. Park again rose and presented, as privileged, the following:

Mr. Speaker, at the adjournment hour on yesterday I brought to the attention of the House certain charges which I was about to deliver to the House.

Mr. Speaker, I rise to a question of the highest privilege and of the greatest importance. By virtue of my office as a Member of the House of Representatives I impeach Daniel Thew Wright, an associate justice of the Supreme Court of the District of Columbis of high crimes and misdemeanors.

I charge him with having accepted favors from practitioners at the bar of his court and of having permitted counsel for a street railway company to indorse his notes while said counsel was retained by said street railway company in business and causes before his court.

I charge him with performing the service of a lawyer and accepting a fee during his tenure or judicial office, in violation of the statute of the United States.

I charge him with collecting and wrongfully appropriating other people's money.

I charge him with purposely changing the record to prevent reversal of causes wherein be presided.

I charge him with bearing deadly weapons in violation of law.

I charge him with judicial misconduct in the trial of a writ of habeas corpus to an extent which provoked a reviewing court of the District of Columbia to justly characterize the trial as a "travesty of justice."

I charge him with arbitrarily revoking, without legal right, the order of a judge of concurrent jurisdiction, appointing three receivers, so as to favor his friend by appointing him sole receiver.

I charge him with being guilty of various other acts of personal and judicial misconduct for which he should be impeached.

I charge him with being morally and temperamentally unfit to hold judicial office.

Mr. Park continued:

Mr. Speaker, in accordance with former proceedings before the House in like cases, I submit the following resolution which I send to the Clerk's desk.

The resolution was as follows:

Resolved, That the Committee on the Judiciary be directed to inquire and report whether the action of this House is necessary concerning the alleged official misconduct of Daniel Thew Wright; whether he has accepted favors from lawyers appearing before him; whether he has permitted counsel for a street railway company to indorse his notes while said counsel was retained in business and causes before his court; whether he has performed the services of lawyer and accepted a fee during his tenure of judicial office, in violation of the statutes of the United States; whether he has collected and wrongfully appropriated other people's money; whether he has purposely changed the record in order to prevent reversal of causes wherein he presided; whether he has borne deadly weapons in violation of law; whether he is guilty of judicial misconduct in the trial of a writ of habeas corpus to an extent which provoked a reviewing court of the District of Columbia to justly characterize the trial as a "travesty of justice"; whether he has arbitrarily revoked, without legal right, an order of a judge of concurrent jurisdiction, appointing three receivers, so as to favor his friend by appointing him sole receiver; whether he is morally and temperamentally unfit to hold judicial office; and whether he has been guilty of various other acts of personal and judicial misconduct for which he should be impeached.

That this committee is hereby authorized and empowered to send for persons and papers, to administer oaths, to employ, if necessary, an additional clerk and stenographer, and to appoint and send a subcommittee whenever and wherever necessary. to take testimony for the use of said subcommittee,

That the subcommittee shall have the same power in respect to obtaining testimony as is herein given to the said Committee on the Judiciary; and the Speaker shall have authority to sign and the Clerk to attest subpoenas for any witness or witnesses.

That the expenses incurred in this investigation shall be paid out of the contingent fund of the House.

On motion of Mr. Park, the resolution was referred to the Committee on the Judiciary without debate.

On April 10[1] Mr. Henry D. Clayton, of Alabama, from the Committee on the Judiciary, submitted, as privileged, the following:

The Committee on the Judiciary, having had under consideration House resolution No. 446 report the same back with the recommendation that it be amended to read as follows, and as so amended that it be adopted:

"Resolved, That the Committee on the Judiciary be directed to inquire and report whether the action of this House is necessary concerning the alleged official misconduct of Daniel Thew Wright, an associate justice of the Supreme Court of the District of Columbia; whether he has corruptly accepted favors from lawyers appearing before him; whether he has corruptly permitted counsel for a street railway company to indorse his notes while said counsel was retained in business and causes before his court; whether he has performed the services of a lawyer and accepted a fee during his tenure of judicial office, in violation of the statute of the United States; whether he has collected and wrongfully appropriated other people's money; whether he has purposely and corruptly changed the record in order to prevent reversal of causes wherein he presided; whether he has borne deadly weapons in violation of law; whether he has arbitrarily revoked, without legal right, an order of a judge of concurrent jurisdiction appointing three receivers, so as to favor his friend by appointing him sole receiver; and whether said judge has been guilty of any misbehavior for which he should be impeached.

"And in making this investigation the said committee is hereby authorized to send for persons and papers, administer oaths, take testimony, employ a clerk and stenographer, and is also authorized to appoint a subcommittee to act for and on behalf of the whole committee whenever and wherever it may be deemed advisable to take testimony for the use of said committee. The said subcommittee while so employed shall have the same powers in respect to obtaining testimony as are herein given to said Committee on the Judiciary, with a sergeant at arms, by himself or deputy, who shall serve the process of said committee or subcommittee and shall attend the sitting of the same as ordered and directed thereby. The Speaker shall have authority to sign and the Clerk to attest subpoenas for any witness or witnesses.

"The expense of such investigation shall be paid out of the contingent fund of the House."

In response to an inquiry as to wherein the resolution proposed by the committee differed from the original resolution, Mr. Clayton said:

It does not differ in any material respect, but it puts it in better form.

On October 14[2] Mr. Jack Beall, of Texas, from the Committee on the Judiciary, submitted, through the Clerk of the House, the final report of that committee.

The committee reported the delegation of the inquiry to a subcommittee, the report of which is appended to and made a part of the report of the committee.

The subcommittee report says:

On May 1, 1914, the subcommittee began the examination of witnesses and held sessions on 43 days, including three night sessions, as well as numerous conferences with Mr. Justice Wright and his counsel, the taking of testimony being concluded on August 26, 1914. Such of the testimony and exhibits pertinent to the charges affecting Associate Justice Wright's official conduct

[1] House Report No. 514.

[2] House Report No. 1101.

that your subcommittee deemed necessary to print have been printed and a copy thereof is submitted herewith. Associate Justice Wright was duly notified and was present at each session of the subcommittee in person and was represented by counsel, Mr. J. J. Darlington, who was given opportunity to cross-examine the witnesses. Several witnesses were called on behalf of Mr. Justice Wright and examined by his counsel.

The committee report adds:

On October 6, 1914, Mr. Justice Wright tendered his resignation to the President, which was duly accepted October 7, 1914, to become effective November 15, 1914, and that because Judge Wright is not eligible under the law to retire with pay this resignation, when it becomes effective, will entirely separate him from the public service. Because of this fact the committee is of the opinion that further proceedings under House resolution 446 are unnecessary.

The committee therefore recommend the adoption of the following resolution:

Resolved, That the Committee on the Judiciary be discharged from further consideration of and action under House resolution 446.

The report of the committee was, under the rules, referred to the Committee of the Whole House on the state of the Union. On March 3 [1] Mr. Beall moved the adoption of the report. The motion was agreed to without debate or division.

529. The investigation into the conduct of Alston G. Dayton, United States district judge for the northern district of West Virginia in 1915.

A Member having presented charges against Judge Dayton, the House ordered an investigation.

In the investigation of Judge Dayton the respondent appeared before the subcommittee charged with the investigation and made an extended statement concerning the matters involved.

The Judiciary Committee authorized to make an investigation committed the matter to a subcommittee, the report of which was made a part of the committee report to the House.

A subcommittee visited West Virginia and took testimony in the case of Judge Dayton.

While the subcommittee, in its report, criticized Judge Dayton, it concluded there was little possibility of maintaining impeachment proceedings.

Minority views, although agreeing with the majority, report in the findings of fact, held that the evidence warranted further proceedings toward impeachment.

The committee and the House acted adversely on the proposition to impeach Judge Dayton.

On May 11, 1914,[2] Mr. M. M. Neeley, of West Virginia, submitted a resolution directing the Committee on the Judiciary to make an investigation of the official conduct of Alston G. Dayton, United States district judge for the northern district of West Virginia. Under the rule, the resolution was referred to the Committee on Rules.

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[1] Third session Sixty-third Congress, Journal, p. 301; Record, p. 5485.

[2] Second session Sixty-third Congress, Record, p. 8417.

On June 12 [1] Mr. Neeley rose in his place and presented as a privileged matter, the following:

Mr. Speaker, I rise to a question of the highest privilege. By virtue of my office as a Member of the House of Representatives, I impeach Alston G. Dayton, Judge of the District Court of the United States for the Northern District of West Virginia, of high crimes and misdemeanors.

At the conclusion of his arraignment, which consisted of 26 separate charges, Mr. Neeley offered the following:

Resolved, That the Committee on the Judiciary be directed to inquire and report whether the action of this House is necessary concerning the alleged official misconduct of Alston G. Dayton; whether he has unlawfully conspired with certain corporations and individuals to bring about the removal from office of the late John J. Jackson, judge of the District Court of the United States for the Northern District of West Virginia; whether he has shown marked favoritism to certain corporations having extensive litigation in his court; whether he has had summoned on juries in his court persons connected with certain corporations to which he has shown marked favoritism during his term of office; whether he has assisted his son, Arthur Dayton, in the preparation of the defense and trial of numerous cases against certain corporations for which the said Arthur Dayton is attorney, which cases were tried before him, the said Alston G. Dayton, and whether he has unlawfully used his high office and influence in behalf of said corporations; whether he has abused his power and influence as judge to further the interests of his son, Arthur Dayton; whether he has used the funds of the United States for an improper purpose; whether he has violated the acts of Congress regulating the selection of jurors; whether he has actively engaged in politics and used his high office as judge to further the political ambitions and aspirations of his friends; whether he has lent his services as judge to the coal operators of West Virginia by improperly issuing injunctions; whether he has shown hatred and bitterness toward miners on trial in his court; whether he has used his office as judge to discourage and prevent said miners from exercising their lawful right to organize and peacefully assemble under the laws of the United States and the State of West Virginia; whether he has wrongfully expressed his own opinions in charging grand juries in his court; whether he has conspired with certain corporations and individuals in the formation of a carbon trust in violation of law; whether he has unlawfully had an order entered staying a proceeding the object of which was the condemnation of a lot in Philippi, W. Va., for a site for a Federal building; whether he has publicly denounced the President of the United States from the bench and before a jury; whether he has unlawfully used the funds of the United States Government for his own private use; whether he has wrongfully collected from the Government funds as expenses not due or allowed to him under the statute; whether he has wrongfully kept open the books of his court at Philippi, W. Va.; whether he has, in open court and before a jury, accused witnesses of swearing falsely in cases then on trial before him; whether he has directed the marshal of his district to refuse to pay the fees of witnesses whom he had accused of testifying falsely; whether he has refused to enforce certain laws of the United States; whether he has openly denounced and criticised the United States Supreme Court; whether he has discharged jurors for rendering verdicts not agreeable to him; whether he has openly stated that he would not permit the United Mine Workers of America to exist within the jurisdiction of his court; whether he has refused to permit certain defendants in a case in his court to have an interpreter; whether he has stated in open court that the United Mine Workers of America are criminal conspirators; whether he is so prejudiced as to unfit him temperamentally to hold a judicial office; and whether he has been guilty of various other acts of personal and judicial misconduct for which he should be impeached.

That this committee is hereby authorized and empowered to send for persons and papers, to administer oaths, to employ, if necessary, an additional clerk and stenographer, and to appoint and send a subcommittee whenever and wherever necessary to take testimony for the use of said subcommittee.

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[1] Journal, p. 645; Record, p. 10327.

That the subcommittee shall have the same power in respect to obtaining testimony as is herein given to the said Committee on the Judiciary; that the Speaker shall have authority to sign and the Clerk to attest subpoenas for any witness or witnesses.

That the expenses incurred in this investigation shall be paid out of the contingent fund of the House.

Mr. Neeley moved that the resolution be referred to the Committee on the Judiciary without debate, and on that motion demanded the previous question.

The motion was agreed to without division.

On February 9, 1915,[1] Mr. Edwin Yates Webb, of North Carolina, from the Committee on the Judiciary, reported the resolution back, with the recommendation that it be amended to read as follows:

Resolved, That the Committee on the Judiciary be directed to inquire and report whether the action of this House is necessary concerning the alleged official misbehavior of Alston G. Dayton, United States district judge for the northern district of West Virginia; whether he, the said Alston G. Dayton, has unlawfully conspired with certain corporations and individuals to bring about the removal from office of the late John J. Jackson, judge of the District Court of the United States for the Northern District of West Virginia; whether he has shown marked favoritism to certain corporations having extensive litigation in his court; whether he has summoned on juries in his court persons connected with certain corporations to which he has shown marked favoritism during his term of office; whether he has abused his power and influence as judge to further the interests of his son, Arthur Dayton; whether he has violated the acts of Congress regulating the selection of jurors; whether he has lent his services as judge to the coal operators of West Virginia by improperly issuing injunctions; whether he has shown hatred and bitterness toward miners on trial in his court; whether he has used his office as judge to discourage and prevent said miners from exercising their lawful right to organize and peaceably assemble under the laws of the United States and the State of West Virginia; whether he has conspired with certain corporations and individuals in the formation of a carbon trust, in violation of law; whether he has openly stated that he would not permit the United Mine Workers of America to exist within the jurisdiction of his court; whether he has stated in open court that the United Mine Workers of America are criminal conspirators; and whether he has been guilty of any misbehavior for which he should be impeached.

And in making this investigation the said committee is hereby authorized to send for persons and papers, administer oaths, take testimony, employ a clerk and stenographer if necessary, and is also authorized to appoint a subcommittee to act for and on behalf of the whole committee whenever and wherever it may be deemed advisable to take testimony for the use of said committee. The said subcommittee while so employed shall have the same powers in respect to obtaining testimony as are herein given to said Committee on the Judiciary, with a sergeant at arms, by himself or deputy, who shall serve the process of said committee or subcommittee, and shall attend the sittings of the same as ordered and directed thereby.

The Speaker shall have authority to sign and the Clerk to attest subpoenas for any witness or witnesses.

The expense of such investigation shall be paid out of the contingent fund of the House on vouchers approved by the chairman of the Judiciary Committee and approved by the Committee on Accounts and evidenced by the signature of the chairman thereof.

The amendment recommended by the committee was agreed to, and the resolution as amended was unanimously adopted.

On March 3,[2] Mr. Warren Gard, of Ohio, from the Committee on the Judiciary, submitted a report incorporating the report of a majority of the subcommittee to

[1] House Report No. 1381.

[2] House Report No. 1490.

which the investigation had been committed, accompanied by minority views signed by Mr. Daniel J. McGillicuddy, of Maine, a member of the subcommittee.

The report of the majority of the subcommittee is prefaced as follows:

The subcommittee appointed by the Committee on the Judiciary to make investigation of the charges contained in the foregoing resolution heard the testimony of numerous witnesses in Parkersburg and Wheeling, W. Va., and in Washington, D.C., on February 12, 13, 15, 16, 17, 22, 23, 24, and 26, at all of which hearings, except that of February 26 last, the Hon. A. G. Dayton, respondent, was present in person and attended by legal counsel; and on February 26 the hearing was had with the consent and approval of said Hon. A. G. Dayton, who was represented at that hearing by legal counsel.

The Hon. A. G. Dayton appeared before the subcommittee and made fun and extended statement of and concerning the matters involved in said investigation.

The witnesses and respondent were each and all sworn, their evidence taken by shorthand reporters, the evidence reduced to writing and is on the file with this committee.

The report then takes up the items of impeachment in their order and summarizes the evidence adduced on each charge.

The conclusion reached by the majority, after hearing the testimony, is that:

This evidence shows many matters of individual bad taste on the part of Judge Dayton, some not of that high standard of judicial ethics which should crown the Federal judiciary, but a careful consideration of all the evidence and attendant circumstances convinces us that there is little possibility of maintaining to a conclusion of guilt the charges made, and impels us therefore to recommend that there be no further proceedings herein.

Mr. McGillicuddy filed the following minority views:

I concur with my colleagues in the above findings of fact, but I do not concur in the recommendation that no further proceedings be had, as it is my opinion that the evidence taken by the subcommittee and findings of fact above made warrant further proceedings looking toward impeachment.

The committee recommend:

The Committee on the Judiciary considered the report of add subcommittee and the evidence thereon and came to the conclusion that no further proceedings should be had with reference to said resolution, and the Committee on the Judiciary beg to report the same to the House and recommend that no further proceedings be had with reference to said resolution.

The report was agreed to without debate or division.

530. The investigation into the conduct of H. Snowden Marshall,[1] United States district attorney for the southern district of New York.

The House declined to order an investigation of District Attorney Marshall on evidence presented by a Member and referred the subject to a committee.

Form of resolution providing for an investigation by the Judiciary Committee and authorizing a subcommittee to exercise powers delegated to the committee.

On January 12, 1916,[2] Mr. Frank Buchanan, of Illinois, presented, as a privileged matter, a resolution detailing at length numerous charges alleging official misconduct on the part of H. Snowden Marshall, United States district attorney for the southern

[1] For preliminary proceedings in this case see section 468 of this volume.

[2] First session Sixty-fourth Congress, Journal, p. 204; Record, p. 963.

district of New York, and directing the Committee on the Judiciary, to conduct an investigation of the charges and report their conclusions to the House.

After debate, on motion of Mr. John J. Fitzgerald, of New York, this resolution was referred to the Committee on the Judiciary.

On January 27[1] Mr. Edwin Yates Webb, of North Carolina, from the Committee on the Judiciary, offered, as privileged, the following resolution:

Resolved, That the Committee on the Judiciary in continuing their consideration of House Resolution 90 be authorized and empowered to send for persons and papers, to subpoena witnesses, to administer oaths to such witnesses, and take their testimony.

The said committee is also authorized to appoint a subcommittee to act for and on behalf of the whole committee wherever it may be deemed advisable to take testimony for said committee. In case such subcommittee is appointed it shall have the same powers in respect to obtaining testimony as are herein given to the Committee on the Judiciary, with a sergeant at arms, by himself or deputy, who shall attend the sittings of such subcommittee and serve the process of same.

In case the Committee on the Judiciary or a subcommittee thereof deems it necessary it may employ such clerks and stenographers as are required to carry out the authority given in this resolution, and the expenses so incurred shall be paid out of the contingent fund of the House.

The Speaker of the House of Representatives shall have authority to sign, and the Clerk thereof to attest, subpoenas for witnesses, and the Sergeant at Arms or a deputy shall serve them.

Mr. Finis J. Garrett, of Tennessee, raised a question as to the privilege of the resolution, when, on motion of Mr. Webb, the resolution was considered by unanimous consent.

Mr. Webb said:

Mr. Speaker, the Committee on the Judiciary has had under consideration House Resolution No. 90, which was referred to that committee some 10 days ago. The committee has not come to any conclusion yet on the resolution, but feels that it should ask the House for the authority to subpoena some witnesses before it that might throw some light upon the charges made. The resolution was unanimously adopted by the Committee on the Judiciary to-day, and I trust that it may pass and that the committee may secure the authority, which it will immediately exercise.

The resolution was agreed to.

531. The case of H. Snowden Marshall, continued.

A witness having refused to testify before a subcommittee was arrested and detained in custody.

The action of a subcommittee in arresting a recalcitrant witness having been criticized in a letter addressed to the chairman, the committee reported the proceedings to the House, with recommendations for an investigation.

Instance in which the House authorized an investigation of purported violations of its privileges and its power to punish for contempt.

On April 5, 1916,[2] Mr. Edwin Yates Webb, of North Carolina, from the Committee on the Judiciary, as a question of privilege, reported:

While considering House Resolution 90 and House Resolution 110, on the 31st day of January, 1916, the Committee on the Judiciary authorized the chairman to appoint a subcommittee of three to execute the purposes of House Resolution 110 to act for and on behalf of the full committee

[1] Record, p. 1658.

[2] First Sixty-fourth Congress, House Report No. 494.

wherever it may be deemed advisable to take testimony for said committee, and on February 1, 1916, the chairman appointed Messrs. Charles C. Carlin, Warren Gard, and John M. Nelson as members of such subcommittee.

Thereafter the said subcommittee organized and heard the testimony of certain witnesses in the Judiciary Committee rooms in the city of Washington. The subcommittee determined, for its further information and in carrying out the duties assigned it under the resolution of the House of Representatives, that it should hear the testimony of certain other witnesses in the city of New York, and on the 28th day of February, 1916, the said subcommittee, under subpoenas duly signed by the Speaker of the House of Representatives and attested by the Clerk thereof, caused certain witnesses to be brought before it, in the Federal post-office building in the city of New York, and continued the examination of witnesses upon said charges up to and including the 4th day of March, 1916.

On the 3d day of March, 1916, there appeared in a New York newspaper an article containing among other things, the following language:

"It is the belief in the district attorney's office that the real aim of the Congress investigation is to put a stop to the criminal investigation of the pro-German partisans."

On the 3d of March, 1916, the subcommittee called before it one, Leonard R. Holme, who testified to the subcommittee that he wrote the article containing the foregoing language, but when asked whether or not he conferred with anybody in the district attorney's office before the article was written replied that he declined to give the source of his information. The chairman of the subcommittee then propounded this question to the witness, "Did you confer with Mr. Marshall before you wrote this article?" To which the witness replied, "I respectfully decline to answer the question, Sir." The chairman of the subcommittee then propounded the following question to him, "Did you confer with anybody in Mr. Marshall's office?" To which the witness replied, "I respectfully decline to answer that question, sir."

Whereupon, the Sergeant at Arms was directed by the chairman of the subcommittee to take charge of the witness and keep him in custody until the further order of the committee.

The report appends an excerpt from the transcript of the testimony by Witness Holme before the subcommittee and continues:

On Saturday, the 4th day of March, 1916, the said H. Snowden Marshall, as district attorney for the southern district of New York, caused to be transmitted to C. C. Carlin, chairman of said subcommittee, then in the performance of its duties, as required by the House of Representatives, the following letter:

DEPARTMENT OF JUSTICE,
UNITED STATES ATTORNEY'S OFFICE,
New York, March 4, 1916.

Sir: Yesterday afternoon, as I am informed, your honorable committee ordered the arrest of Mr. L. R. Holme, a representative of a newspaper which had published an article at which you took offense. The unfortunate gentleman of the press was placed in custody under your orders. He was taken to the United States marshal to be placed in confinement (I do not understand whether his sentence was to be one day or a dozen years). The marshal very properly declined to receive the prisoner. This left you at a loss, and I am advised that you tried to work your way out of the awkward situation by having Mr. Holme brought back and telling him that you were disposed to be "kind" to him and then discharged him for the purpose of avoiding unpleasant consequences to yourselves.

You are exploiting charges against me of oppressive conduct toward a member of your honorable body who is charged with a violation of law and of oppressive conduct on my part toward shysters in the blackmailing and bankruptcy business.

I may be able to lighten your labors by offering to resign if you can indicate anything I ever—did that remotely approximates the lawless tyranny of your order of arrest of Mr. Holme.

The supposed justification of your order that Mr. Holme be placed in custody was his refusal to answer the question you asked as to where he got the information on which was based on the article which displeased you.

It is not necessary for you to place anyone under arrest in order to get the answers to the question which you asked Mr. Holme, because I can and will answer it. I gave Mr. Holme information, part of which he published and from which he made deductions, so that if your honorable committee has a grievance it is against me and not against him.

What I told him was about as follows:

I said that your expedition to this town was not an investigation conducted in good faith, but was a deliberate effort to intimidate any district attorney who had the temerity to present charges against one of your honorable body.

I said that your whole proceeding here was irregular and extraordinary; that I had never heard of such conduct of an impeachment proceeding; that charges of this sort were not usually heard in public until the House of Representatives had considered them and were willing to stand back of them.

I pointed out to him that you, contrary to usual practice, had come here and had held public hearings; that among your witnesses you had invited every rogue that you could lay your hands on to come before you and blackguard and slander me and my assistants under the full privilege of testifying before a congressional committee.

I told him that you had called one of my junior assistants before you and had attempted to make it publicly appear that his refusal to answer your questions as to what occurred in the grand-jury room in the Buchanan case was due solely to my orders. I said that at the time you attempted to convey this public impression you knew that it was misleading because I had been asked by you to produce the minutes of the grand jury and had been instructed by the Attorney General not to comply with your request, as you well knew. I showed him the telegram of the Attorney General to me and showed him a copy of my letter to you, dated February 29, 1916, in which I sent you a copy of the telegram of the Attorney General instructing me not to give you the grand-jury minutes.

I told him that you were traveling around in your alleged investigation of me with Buchanan's counsel, Walsh and David Slade, in constant conference with you. I said that I believed that every word of the evidence, whether in so-called secret sessions or not, had been placed at the disposal of these worthies, and that I would be just as willing to give the grand-jury minutes to a defendant as to give them to your honorable subcommittee.

I told him that I did not share the views which seemed to prevail in your subcommittee on this subject. I said that I regarded a Member of Congress who would take money for an unlawful purpose from any foreign agent as a traitor, and that it was a great pity that such a person could only be indicted under the Sherman law, which carries only one year in jail as punishment.

I said that it was incomprehensible to me how your honorable subcommittee should rush to the assistance of an indicted defendant; how you had apparently resolved to prevent prosecution by causing the district attorney in charge to be publicly slandered.

I told him that I would not permit the prosecution of the persons whose cause you had apparently espoused to be impeded by you; I said that if you wanted the minutes of the grand jury in any case, you would not get them as long as I remained in office.

You will observe from the foregoing statement that what Mr. Holme published may have been based on what I said. If you have any quarrel, it is with me, and not with him.

It is amazing to me to think that you supposed that I did not understand what you have been attempting to do during your visit here. I realized that your effort was to ruin me and my office by publishing with your full approval the complaints of various persons who have run afoul of the criminal law under my administration. Your subcommittee has endeavored by insulting questions to my assistants and others, by giving publicity and countenance to the charges of rascals and by refusing to listen to the truth and refusing to examine public records to which your attention was directed, to publicly disgrace me and my office.

I propose to make this letter public.

Respectfully,

H. SNOWDEN MARSHALL,
United States Attorney

Hon. C. C. Carlin,
Chairman Subcommittee of the Judiciary Committee
of the House of Representatives, 323 Federal Building, New York, N. Y.

The report continues:

At the same time or before this letter was sent to the subcommittee, it was given to the newspapers and published by them.

On the 9th day of March 1916, the subcommittee aforesaid, through its chairman, Hon. C. C. Carlin, submitted to the Committee on the Judiciary the foregoing letter of H. Snowden Marshall.

On or about the 11th day of March, 1916, the following letter was received by the chairman of the Judiciary Committee and immediately laid before the full committee:

DEPARTMENT OF JUSTICE,
UNITED STATES ATTORNEY'S OFFICE,
New York, March 10, 1916.

DEAR SIR: Referring to my letter of March 4, addressed to the chairman of the subcommittee which has recently taken testimony in New York concerning my administration of my office, I notice from the press that some persons appear to have construed my statements as directed toward your honorable committee as a whole. I beg to advise you that the criticism in that letter were addressed to the methods pursued by the subcommittee. I do not retract nor modify any of those criticisms. But I did not intend (nor do I think my letter should be so construed) to reflect in any way upon the Judiciary Committee, nor did I question the power of the House of Representatives to order such an investigation.

If you and the other members of your committee, for whom I have high respect, have gained the impression that my letter carried any personal reflection upon your honorable committee, it gives me pleasure to assure you that I had no such purpose.

Respectfully,

H. SNOWDEN MARSHALL.

Hon. EDWIN Y. WEBB,
Chairman of the Judiciary Committee,
House of Representatives, Washington, D.C.

The report of the committee concludes:

The Judiciary Committee has carefully considered said letters in the light of congressional and judicial precedents as touching the prerogatives of the House of Representatives and its Members, and the committee has come to the determination that said letters, their publication and attendant circumstances, are of such nature, that they should be called to the attention of the House. For obvious reasons the committee deems it advisable to take this step rather than to report directly upon the facts and the law in the case. I am, therefore, directed by the committee to report the whole matter to the House of Representatives, with the recommendation that a select committee of five be appointed by the Speaker to report upon the facts in this case; the violations, if any, of the privileges of the House or the Committee on the Judiciary or the subcommittee thereof; the power of the House to punish for contempt; and the procedure in contempt proceedings, to the end that the privileges of the House shall be maintained and the rights of the Members protected in the performance of their official duties.

The House agreed to the following resolution:

Resolved, That a select committee of five members be appointed forthwith by the Speaker to consider the report, in the nature of a statement, from the Judiciary Committee with reference to certain conduct of H. Snowden Marshall, and to report to the House of Representatives the facts in the case; the violations, if any, of the privileges of the House of Representatives or of the Committee on the Judiciary, or of the subcommittee thereof; the power of the House to punish for contempt; and the procedure in contempt proceedings, in case they find a contempt has been committed, to the end that the privileges of the House shall be maintained and the rights of Members protected in the performance of their official duties.

The select committee shall have the power to send for persons and papers and shall submit its report to the House not later than April fourteenth, nineteen hundred and sixteen.

The Speaker appointed as members of this committee Messrs. John A. Moon, of Tennessee; John N. Garner, of Texas; Charles R. Crisp, of Georgia; John A. Sterling, of Illinois; and Irvine L. Lenroot, of Wisconsin.

532. The case of H. Snowden Marshall, continued.

By direction of the House, the Speaker issued and the Sergeant at Arms served a warrant for the arrest of a person charged with contempt of the House.

A person arrested by order of the House secured a writ of habeas corpus and was released on his own recognizance.

Discussion of the delegation of power to subcommittees.

On April 14, 1916,[1] Mr. Moon, from the select committee, presented the report of that committee, accompanied by a transcript of testimony.

The report quotes the following letter addressed to H. Snowden Marshall by direction of the committee:

APRIL 7, 1916.

Hon. H. SNOWDEN MARSHALL,

United States District Attorney for the
Southern District of New York, New York City.

DEAR SIR: Inclosed is House Resolution 193 and Report No. 494, which explain themselves. The select committee appointed by the Speaker of the House of Representatives are now engaged in the investigation of the matters referred to herein. We will be glad to have you appear before us, if you so desire, at the rooms of the Committee on the Post Office and Post Roads of the House of Representatives, in the Capitol Building, Washington, D.C., on Monday, April 10, 1916, at 10 o'clock a. m., and make such statement as you may desire before the committee touching this matter. As the time of the committee is limited in which to report, you will oblige us by advising by wire whether you desire to be present or not. This communication is made to you by order of the select committee.

Very truly yours,

JOHN A. MOON,
Chairman Select Committee.

In response to this letter, Judge Marshall appeared before the committee, and the report incorporates the following findings reached by the committee after hearing his testimony:

We conclude and find that the letter written and published by said H. Snowden Marshall to Hon. C. C. Carlin, chairman of the subcommittee of the Judiciary Committee of the House of Representatives, on March 4, 1916, is as a whole and in several of the separate sentences defamatory and insulting and tends to bring the House into public contempt and ridicule, and that the said H. Snowden Marshall, by writing and publishing the same, is guilty of contempt of the House of Representatives of the United States because of the violation of its privileges, its honor and its dignity.

We find that Mr. Marshall's testimony is an aggravation of his contempt.

In discussing the delegation of power to subcommittees, the report says:

No legislative body consisting of a large number of members can move from one place to another to take testimony in cases where its power and authority or dignity is called into question. Its power in this respect must, therefore, necessarily be delegated to one of its committees or a subcommittee by a proper resolution, as was done in this case. This delegation of power

[1] First session Sixty-fourth Congress, H. Rept. 544.

to a subcommittee is lawful, and carries with it all of the authority belonging to the House in the execution of the immediate purpose for which the committee was called into existence.

Any conduct that would be a violation of the privileges of the House if directed against the House in the first place, would be a contempt against the House and a breach of its privileges when directed against one of its committees or subcommittees appointed by authority of the House to do a specific thing and acting within its delegated power and in the scope of its authority. Any other view would leave the House powerless to protect its honor and dignity and its constitutional rights. It would set at defiance the sovereignty of the people represented by the House. That the House as a representative body has the inherent power to protect itself from defamation and all slanderous and lawless conduct that would bring it into reproach and popular contempt, whether uttered or committed in the presence of the House or elsewhere, has not been disputed since the case of Anderson *v.* Dunn. Offensive, abusive, and defamatory language against a committee of the House acting within its authority is offensive, abusive, and defamatory against the House, and is just as dangerous to the integrity of that body as if had been committed in its presence.

As to the power of the House to punish for contempt, the committee decides:

We find, therefore, that the House has full power to punish for contempt committed in its presence, or not within its presence, by publication of matter that is defamatory against it or its committee lawfully constituted and acting within its authority. We find as stated that the privileges of the House in this case were breached by H. Snowden Marshall by the letter which he wrote to the subcommittee. This letter as a whole is insulting, defamatory, and a clear expression of contempt. The purpose for which it was written and printed was to defame—to bring into ridicule and contempt—the subcommittee of the Judiciary Committee having under investigation the impeachment charges against H. Snowden Marshall. It was as much a violation of the privileges of the House to have directed a scurrilous and offensive letter of this character against one of its committees, as if it had been addressed directly to the House.

It is proper for us to say that Mr. Marshall was given every opportunity to retract or apologize or in some way modify his statements contained in the letter. Parts of the letter containing the most defamatory matter were read to him, and he was asked if he meant to still say that that was true. He reaffirmed and reasserted the same, only with the statement that it was intended to criticize the procedure of the subcommittee and was not intended as a contempt of the House. It is clear that if the House could tolerate such a construction of this letter and could tolerate such vile and defamatory language against one of its committees, it would be powerless to conduct impeachment trials or perform any other duty without living under the disgrace of the contempt that would necessarily come to a body so unmindful of its duties to the people as to permit such insult and injury.

The committee therefore recommend:

As to the method of procedure that should be followed in the House in trial of the said H. Snowden Marshall for the contempt which the committee finds that he has committed, we recommend the passage of the following resolution:

Resolved, That the Speaker do issue his warrant, directed to the Sergeant at Arms, commanding him to take in custody, wherever to be found, the body of H. Snowden Marshall, of the State of New York, and to proceed forthwith to bring the said H. Snowden Marshall to the bar of the House of Representatives, to answer the charge that he, on March 4, 1916, in the city of New York, did violate the privileges of the House of Representatives of the United States by writing and causing to be published the following letter. (The letter is here quoted in full.)

Resolved, That the said H. Snowden Marshall, in writing and publishing said letter, was guilty of a breach of the privileges and a contempt of the House of Representatives, and that the said H. Snowden Marshall be furnished with a copy of this resolution, and a copy of the report of the select committee of the House of Representatives, appointed to investigate the charges made against him in the House of Representatives.

Resolved, That when H. Snowden Marshall shall be brought to the bar of the House, to answer the charge of having violated the privileges of the House of Representatives, as afore set out, the Speaker shall then cause to be read to said H. Snowden Marshall the findings of fact and findings of law by the special committee of the House, charged with the duty of investigating whether or not the said H. Snowden Marshall had violated the privileges of the House of Representatives, or was in contempt of same; the Speaker shall then inquire of said H. Snowden Marshall if he desires to be heard, and to have counsel on the charge of being in contempt of the House of Representatives for having violated its privileges. If the said H. Snowden Marshall desires to avail himself of either of these privileges, the same shall be granted him. If not, the House shall thereupon proceed to take order in the matter.

This report was considered in the House on June 20. In the course of the debate, Mr. Andrew J. Montague, of Virginia, said:

Mr. Speaker, I beg to submit to this House, without fear of successful contradiction, that neither this House nor the Senate has ever heretofore undertaken to exercise jurisdiction in contempt proceedings of a case of the character we are now considering. No slander or libel of this body has ever heretofore been treated as contempt by this body. This statement can not be controverted. Therefore we are driven to the unfortunate predicament of making a new law to fit a new case. The report attempts to declare that to be contempt which has never heretofore been adjudged to be contempt by either House of Congress. In other words, Mr. Speaker, we now seek to declare that unlawful which when heretofore done was lawful.

After extended debate, the resolutions recommended by the committee were agreed to—yeas 209, nays 85.

On June 22 the Speaker announced:

The Chair directs the reporter to record the fact to go in the Record that the Speaker signs this warrant for H. Snowden Marshall in the presence of the House.

The Chair does not think it necessary, but some gentlemen did.

On June 26 [1] the Sergeant at Arms addressed a letter to the Speaker advising him that in compliance with this warrant he had arrested Judge Snowden, who had thereupon secured a writ of habeas corpus and had been released on his own recognizance. On the same day the House agreed to the following:

Resolved, That the Sergeant at Arms of the House is hereby authorized to employ legal counsel in the matter of the proceedings against H. Snowden Marshall, United States district attorney for the southern district of New York, for contempt, the expenses to be paid out of the contingent fund of the House.

The hearing in the habeas corpus proceedings was held in the United States District Court for the Southern District of New York, which dismissed the writ of habeas corpus, remanded Judge Marshall to the custody of the Sergeant at Arms and directed that he be brought before the House.[2] The relator thereupon appealed the case to the Supreme Court.

533. The case of H. Snowden Marshall, continued.

A committee, after investigation of impeachment charges referred to it by the House, recommended that no further action be taken thereon.

On August 4, 1916,[3] Mr. Webb, from the Committee on the Judiciary, submitted the report of the committee on the resolution, proposing impeachment of H. Snowden

[1] Record, p. 10372.

[2] First session Sixty-fourth Congress, Record, p. 11691.

[3] House Report No. 1077.

Marshall, recommending that no further proceedings be had in the matter. The report was referred to the House Calendar and was not considered by the House.

534. The case of H. Snowden Marshall, continued.

Decision by the Supreme Court on the power of the House to punish for contempt.

The House is without constitutional jurisdiction to punish summarily for contempt in certain cases.

The power to punish contempt vested in the House of Commons is not conferred by the Constitution upon Congress.

While power to punish contempt is not expressly granted to Congress by the Constitution, it has the implied power to preserve itself and to deal by way of contempt with direct obstruction to its legislative duties.

The implied power to punish for contempt is limited to imprisonment and such imprisonment may not extend beyond the session of the body in which the contempt occurred.

In cases of contempt which it is not authorized to redress, the remedy of the House is resort to judicial proceedings under the criminal law.

On April 23, 1917,[1] the Supreme Court of the United States handed down a unanimous decision in the case of H. Snowden Marshall, appellant, *v.* Robert B. Gordon, Sergeant at Arms of the House of Representatives of the United States.[2]

As to the authority of the House of Commons to punish for contempt the decision says:

> Undoubtedly what went before the adoption of the Constitution may be resorted to for the purpose of throwing light on its provisions. Certain is it that authority was possessed by the House of Commons in England to punish for contempt directly—that is, without the intervention of courts—and that such power included a variety of acts and many forms of punishment including the right to fix a prolonged term of imprisonment. Indubitable also is it, however, that this power rested upon an assumed blending of legislative and judicial authority possessed by the Parliament when the Lords and Commons were one, and continued to operate after the division of Parliament into two houses either because the interblended power was thought to continue to reside in the Commons, or by the force of routine the mere reminiscence of the commingled powers led to a continued exercise of the wide authority as to contempt formerly existing long after the foundation of judicial-legislative power upon which it rested had ceased to exist. That this exercise of the right of legislative-judicial power to exert the authority stated prevailed in England at the time of the adoption of the Constitution and for some time after has been so often recognized as to make it too certain for anything but statement.

The opinion then differentiates between the power vested in the House of Commons and that conferred by the Constitution on the House of Representatives:

> No power was expressly conferred by the Constitution of the United States on the subject except that given to the House to deal with contempt committed by its own Members. Article 1, section 5. As the rule concerning the Constitution of the United States is that powers not delegated were reserved to the people or the States, it follows that no other express authority to deal with contempt can be conceived of. It comes, then, to this: Was such an authority implied from the powers granted? As it is unthinkable that in any case from a power expressly granted there can be implied the authority to destroy the grant made, and as the possession by Congress of the

[1] First session Sixty-fifth Congress, Record, p. 1706.

[2] U. S. 243, p. 521.

commingled legislative-judicial authority as to contempts which was exerted in the House of Commons would be absolutely destructive of the distinction between legislative, executive, and judicial authority which is interwoven in the very fabric of the Constitution and would disregard express limitations therein, it must follow that there is no ground whatever for assuming that any implication as to such a power may be deduced from any grant of authority made to Congress by the Constitution. This conclusion has long since been authoritatively settled and is not open to be disputed.

The court holds, however, that, while not expressly granted, implied powers are conferred as follows:

As we have already said, the power possessed by the House of Commons was incompatible with the Constitution and could not be exerted by the House, it was yet explicitly decided that from the power to legislate given by the Constitution to Congress there was to be implied the right of Congress to preserve itself; that is, to deal by way of contempt with direct obstructions to its legislative duties.

As to the nature of these implied powers:

What does this implied power embrace, is thus the question. In answering, it must be borne in mind that the power rests simply upon the implication that the right has been given to do that which is essential to the execution of some other and substantive authority expressly conferred. The power is therefore but a force implied to bring into existence the conditions to which constitutional limitations apply. It is a means to an end and not the end itself. Hence it rests solely upon the right of self-preservation to enable the public powers given to be exerted.

Without undertaking to inclusively mention the subjects embraced in the implied power, we think from the very nature of that power it is clear that it does not embrace punishment for contempt as punishment, since it rests only upon the right of self-preservation; that is, the right to prevent acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed. And the essential nature of the power also makes clear the cogency and application of two limitations; that is, that the power, even when applied to subjects which justified its exercise, is limited to imprisonment, and such imprisonment may not be extended beyond the session of the body in which the contempt occurred. Not only the adjudged cases but the congressional action in enacting legislation as well as in exerting the implied power conclusively sustain the views just stated.

The court then cites instances of the exercise of the power by Congress and characterizes them as dealing—

with either physical obstruction of the legislative body in the discharge of its duties or physical assault upon its Members for action taken or words spoken in the body, or obstruction of its officers in the performance of their official duties, or the prevention of Members from attending so that their duties might be performed, or, finally, with contumacy in refusing to obey orders to produce documents or give testimony which there was a right to compel.

In the two or three instances not embraced in the classes we think it plainly appears that for the moment the distinction was overlooked which existed between the legislative power to make criminal every form of act which can constitute a contempt to be punished according to the orderly process of law and the accessory implied power to deal with particular acts as contempts outside of the ordinary process of law because of the effect such particular acts may have in preventing the exercise of legislative authority. And in the debates which ensued when the various cases were under consideration it would seem that the difference between the legislative and the judicial power was also sometimes forgotten-that is to say, the legislative right to exercise discretion was confounded with the want of judicial power to interfere with the legislative discretion when lawfully exerted. But these considerations are incidental and do not change the concrete result manifested by considering the subject from the beginning. Thus we have been able to discover no single instance wherein the exertion of the power to compel testimony restraint

was ever made to extend beyond the time when the witness should signify his willingness to testify, the penalty or punishment for the refusal remaining controlled by the general criminal law. So again we have been able to discover no instance, except the two or three above referred to, where acts of physical interference were treated as within the implied power unless they possessed the obstructive or preventive characteristics which we have stated, or any case where any restraint was imposed after it became manifest that there was no room for a legislative judgment as to the virtual continuance of the wrongful interference which was the subject of consideration. And this latter statement causes us to say that where a particular act because of interference with the right of self-preservation comes within the jurisdiction of the House to deal with directly under its implied power to preserve its functions and therefore without resort to judicial proceedings under the general criminal law, we are of opinion that authority does not cease to exist because the act complained of had been committed when the authority was exerted, for to so hold would be to admit the authority and at the same time deny it. On the contrary, when an act is of such a character as to subject it to be dealt with as a contempt under the implied authority, we are of opinion that jurisdiction is acquired by Congress to act on the subject, and therefore there necessarily results from this power the right to determine in the use of legitimate and fair discretion how far from the nature and character of the act there is necessity for repression to prevent immediate recurrence—that is to say, the continued existence of the interference or obstruction to the exercise of the legislative power. And of course in such case, as in every other, unless there be manifest an absolute disregard of discretion and a mere exertion of arbitrary power coming within the reach of constitutional limitations, the exercise of the authority is not subject to judicial interference.

As to the application of these implied powers to the case at bar, the court holds:

It remains only to consider whether the acts which were dealt with in the case in hand were of such a character as to bring them within the implied power to deal with contempt; that is, the accessory power possessed to prevent the right to exert the powers given from being obstructed and virtually destroyed. That they were not, would seem to be demonstrated by the fact that the contentions relied upon in the elaborate arguments at bar to sustain the authority were principally rested not upon such assumption, but upon the application and controlling force of the rule governing in the House of Commons. But aside from this, coming to test the question by a consideration of the conclusion upon which the contempt proceedings were based as expressed in the report of the select committee which we have previously quoted and the action of the House of Representatives based on it, there is room only for the conclusion that the contempt was deemed to result from the writing of the letter not because of any obstruction to the performance of legislative duty resulting from the letter or because the preservation of the power of the House to carry out its legislative authority was endangered by its writing, but because of the effect and operation which the irritating and ill-tempered statements made in the letter would produce upon the public mind or because of the sense of indignation which it may be assumed was produced by the letter upon the members of the committee and of the House generally. But to state this situation is to demonstrate that the contempt relied upon was not intrinsic to the right of the House to preserve the means of discharging its legislative duties, but was extrinsic to the discharge of such duties and related only to the presumed operation which the letter might have upon the public mind and the indignation naturally felt by members of the committee on the subject. But these considerations plainly serve to mark the broad boundary line which separates the limited implied power to deal with classes of acts as contempts for self-preservation and the comprehensive legislative power to provide by law for punishment for wrongful acts.

The opinion thus sums up the relation between the legislative and judicial departments of the Government:

The conclusions which we have stated bring about a concordant operation of all the powers of the legislative and judicial departments of the Government, express or implied, as contemplated

by the Constitution. And as this is considered, the reverent thought may not be repressed that the result is due to the wise foresight of the fathers manifested in State constitutions even before the adoption of the Constitution of the United States by which they substituted for the intermingling of the legislative and judicial power to deal with contempt as it existed in the House of Commons a system permitting the dealing with that subject in such a way as to prevent the obstruction of the legislative powers granted and secure their free exertion and yet at the same time not substantially interfere with the great guaranties and limitations concerning the exertion of the power to criminally punish—a beneficent result which additionally arises from the golden silence by which the framers of the Constitution left the subject to be controlled by the implication of authority resulting from the powers granted.

As to the privilege of the House in impeachment proceedings, the decision says:

It is suggested in argument that whatever be the general rule, it is here not applicable because the House was considering and its committee contemplating impeachment proceedings. The argument is irrelevant because we are of opinion that the premise upon which it rests is unfounded. But indulging in the assumption to the contrary we think it is wholly without merit, as we see no reason for holding that if the situation suggested be assumed it authorized a disregard of the plain purposes and objects of the Constitution as we have stated them. Besides, it must be apparent that the suggestion could not be accepted without the conclusion that under the hypothesis stated the implied power to deal with contempt as ancillary to the legislative power had been transformed into judicial authority and become subject to all the restrictions and limitations imposed by the Constitution upon that authority—a conclusion which would frustrate and destroy the very purpose which the proposition is advanced to accomplish and would create a worse evil than that which the wisdom of the fathers corrected before the Constitution of the United States was adopted.

In conclusion the court recapitulates:

We repeat, out of abundance of precautions, we are called upon to consider not the legislative power of Congress to provide for punishment and prosecution under the criminal laws in the amplest degree for any and every wrongful act, since we are alone called upon to determine the limits and extent of an ancillary and implied authority essential to preserve the fullest legislative power, which would necessarily perish by operation of the Constitution if not confined to the particular ancillary atmosphere from which alone the power arises and upon which its existence depends.

It follows from what we have said that the court below erred in refusing to grant the writ of habeas corpus and its action must be, and it is, therefore, reversed, and the case remanded with directions to discharge the relator from custody.

And it is so ordered.

535. The investigation of the conduct of Judge Kenesaw Mountain Landis.

A Member, rising in his place, impeached Judge Landis on his responsibility as a Member of the House.

As the Congress was nearing its close, the majority of the Judiciary Committee recommended that the further prosecution of the investigation be left to the succeeding Congress.

Conflicting views of the majority and minority of the Judiciary Committee, in 1921, as to offenses justifying impeachment.

On February 14, 1921,[1] Mr. Benjamin F. Welty, of Ohio, claiming the floor for a question of privilege, said:

I impeach said Kenesaw M. Landis for high crimes and misdemeanors and charge said Kenesaw M. Landis as follows:

[1] Third session Sixty-sixth Congress, Record, p. 3142.

First. For neglecting his official duties for another gainful occupation not connected therewith,

Second. For using his office as district judge of the United States to settle disputes which might come into his court as provided by the laws of the United States.

Third. For lobbying before the legislatures of the several States of the Union to procure the passage of State laws to prevent gambling in baseball, instead of discharging his duties as district judge of the United States.

Fourth. For accepting the position as chief arbiter of disputes in baseball associations at a salary of $42,500 per annum, while attempting to discharge the duties as a district judge of the United States which tends to nullify the effect of the judgment of the Supreme Court of the District of Columbia and the baseball gambling indictments pending in the criminal courts of Cook County, Ill.

Fifth. For injuring the national sport of baseball by permitting the use of his office as district judge of the United States because the impression will prevail that gambling and other illegal acts in baseball will not be punished in the open forum as in other cases.

Mr. Speaker, I move that this charge be referred to the Committee on the Judiciary without debate for investigation and report, and on that I move the previous question.

The House, without division, agreed to the motion.

On March 2,[1] Mr. Leonidas C. Dyer, of Missouri, from the Committee on the Judiciary, reported that the committee had considered the impeachment charges against Judge Landis—

which involve the legal and moral character of his alleged act in accepting employment while a district judge of the United States from certain baseball associations within the United States, to act as an arbitrator in disputes which may hereafter arise between them, at a compensation of $42,500 per annum, and that said committee find that said act of accepting the employment aforesaid, if proved, is, in their opinion, at least inconsistent with the full and adequate performance of the duty of the said the Hon. Kenesaw Mountain Landis, as a United States district judge, and that said act would constitute a serious impropriety on the part of said judge.

That said charges were filed too late in the present session of the Congress to admit of the full and complete investigation which their serious nature requires, and for that reason your committee recommend that the question of the further prosecution of said charges by full and adequate investigation be left to the Sixty-seventh Congress.

The minority views, submitted by Mr. Andrew J. Volstead, of Minnesota, fail to agree with the conclusions reached by the majority and take this position:

No violation of any law has been called to the attention of the committee, nor is it claimed that the judge is guilty of any act that would establish moral turpitude. One or both of those grounds would have to be established before impeachment proceedings could be maintained.

The investigation has gone far enough to disclose the actual facts and there is no reason for the recommendation that a further investigation be had in the next Congress. To postpone action is not only unjust to the judge, but equally unjust to the public. If the judge is guilty, this committee should say so; if he is not, he is entitled to have the public know that fact. Postponement tends only to discredit him in the eyes of the public and to weaken him in the administration of justice.

The Congress was nearing its close and consideration of the report was not reached by the House.

No action by Sixty-seventh Congress appears.

536. The investigation of charges against Attorney General Harry M. Daugherty

[1] House Report No. 407: Record. p. 4359.

Instance wherein a Member rising to a question of privilege, impeached the Attorney General on his responsibility as a Member of the House.

A Member proposing impeachment is required to present definite charges before proceeding in debate.

Charges of impeachment may not be denied presentation because of generality in statement.

A committee was authorized to send for persons and papers and to administer oaths in an investigation delegated to it by the House.

On September 11, 1922,[1] Mr. Oscar E. Keller, of Minnesota, rising to a question of privilege, said:

Mr. Speaker, I impeach Harry M. Daugherty, Attorney General of the United States, for high crime and misdemeanors in office.

Mr. Keller proceeded in debate, when the Speaker interposed:

The Chair will say to the gentleman that he ought first to prefer his charges. When the gentleman rises to a question of this high privilege he ought to present definite charges at the outset.

Thereupon Mr. Keller submitted:

First. Harry M. Daugherty, Attorney General of the United States, has used his high office to violate the Constitution of the United States in the following particulars:

(1) By abridging freedom of speech.

(2) By abridging the freedom of the press.

(3) By abridging the right of people peaceably to assemble.

Second. Unmindful of the duties of his office and his oath to defend the Constitution of the United States, and unmindful of his obligations to discharge those duties faithfully and impartially, the said Harry M. Daugherty has, in his capacity of Attorney General of the United States, conducted himself in a manner arbitrary, oppressive, unjust, and illegal.

Third. He has, without warrant, threatened with punishment citizens of the United States who have opposed his attempts to override the Constitution and the laws of this Nation.

Fourth. He has used the funds of his office illegally and without warrant in the prosecution of individuals and organizations for certain lawful acts which, under the law, he was specifically forbidden to prosecute.

Fifth. He has failed to prosecute individuals and organizations violating the law after those violations have become public scandal.

Mr. Thomas L. Blanton, of Texas, made the point of order that the charges recited were too general in character to constitute an impeachment of a public official.

The Speaker overruled the point of order, and Mr. Kelier offered the following resolution:

Whereas impeachment of Harry M. Daugherty, Attorney General of the United States, has been made on the floor of the House by the Representative from the fourth district of Minnesota: Be it

Resolved, That the Committee on the Judiciary be, and they hereby are, authorized and directed to inquire into the official conduct of Harry M. Daugherty, Attorney General of the United States, and to report to the House whether, in their opinion, the said Harry M. Daugherty has been guilty of any acts which in contemplation of the Constitution are high crimes or misdemeanors requiring the interposition of the constitutional powers of this House; and that the

[1] Second session Sixty-seventh Congress, Record p. 12346.

said committee have power to send for persons and papers and to administer the customary oaths to witnesses.

On motion of Mr. Frank W. Mondell, of Wyoming, the resolution was referred to the Committee on the Judiciary.

On December 4[1] the House, by resolution, authorized the committee in the consideration of the resolution, to send for persons and papers, administer oaths to witnesses, and sit during sessions of the House.

537. The investigation of charges against Attorney General Harry M. Daugherty, continued.

Instance wherein a Member declined to obey a summons to appear and testify before a committee of the House.

A committee having summoned a Member to testify as to statements made by him in debate, he protested that it was an invasion of his constitutional privilege.

Form of subpoena served on a Member of the House.

A committee asserted the power of the House to arrest and imprison recalcitrant Members in order to compel obedience to its summons.

An official against whom charges of impeachment were pending asked leave and was allowed to file an answer.

In compliance with a request from the committee that he furnish it with a statement of the facts relied on by him as constituting the offenses charged, Mr. Keller filed a statement specifying some 60 different charges. Thereupon Attorney General Daugherty asked leave and was allowed to file an answer.

While these pleadings were under consideration by the Committee on the Judiciary Mr. Keller appeared before the committee and read a prepared statement criticizing the methods of the committee in conducting the inquiry and announcing:

> I reiterate now that I am in possession of evidence ample to prove Harry M. Daugherty guilty of all of the high crimes and misdemeanors with which I have charged him. I am ready and anxious to present this evidence in a proper way before an unbiased committee, but I emphatically refuse to permit it to be used as whitewashing material.
>
> I now repeat my demand that my resolution, House Resolution 425, be reported to the House of Representatives with the recommendation that it pass, and that I be permitted to present my evidence before an unbiased committee in the proper way. With these whitewashing proceedings I shall have nothing further to do.

He then withdrew and declined to further participate in the proceedings.

By direction of the committee the following subpoena was issued and was served upon Mr. Keller by the Sergeant at Arms of the House December 14:

> BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA.
>
> To the SERGEANT AT ARMS or his special messenger:
>
> You are hereby commanded to summon Hon. Oscar E. Keller to be and appear before the Judiciary Committee of the House of Representatives of the United States, of which the Hon. Andrew J. Volstead is chairman, in their chamber in the city of Washington on December 15, 1922,

[1] Fourth session Sixty-seventh Congress, Record, p. 18.

at the hour of 10:30 a. m., then and there to testify touching matters of inquiry committed to said committee; and he is not to depart without leave of said committee.

Herein fail not, and make return of this summons.

Witness my hand and the seal of the House of Representatives of the United States at the city of Washington, this 14th day of December, 1922.

[SEAL.]

F. H. GILLETT, *Speaker*.

Attest:

WM. TYLER PAGE, *Clerk*.

Mr. Keller refused to heed the summon and by his attorney, who appeared before the committee for him, submitted that as a Representative in Congress he was not legally bound to obey the subpoena.

On January 25, 1923,[1] Mr. Andrew J. Volstead, of Minnesota, from the Committee on the Judiciary, submitted a report reciting:

That the said Oscar E. Keller was duly summoned as a witness by authority of the House of Representatives to give testimony before this committee touching matters of inquiry committed to that committee, and that he willfully made default in that in disobedience to said subpoena and without valid cause or excuse, but in contempt of the authority of the House of Representatives, he willfully failed and refused to appear as such witness and willfully failed and refused to testify in obedience to said subpoena. Your committee is of the opinion that Mr. Keller was legally required to obey said subpoena and that the excuse he submitted through his said attorney is without any merit; that the House of Representatives possesses the power to cause him to be arrested and confined in prison until he shall consent to testify, such confinement not to extend beyond the term of this Congress, and power to otherwise deal with him so as to compel obedience to the summons.

Subsequent illness of Mr. Keller rendered inadvisable further action on the part of the committee or the House.

538. The investigation of the charges against Attorney General Harry M. Daugherty, continued.

A motion to lay on the table a resolution providing for final disposition of impeachment proceedings does not, if agreed to, carry such proceedings to the table with the resolution.

Minority views submitted by Mr. R. Y. Thomas, jr., of Kentucky, takes the position that House Resolution 425 merely authorized an investigation of the charges and not a trial of the Attorney General, and conclude with the recommendation:

I therefore recommend, in view of what I consider the farcical investigation of this case, that a special committee be appointed by the Speaker of the House with instructions to make a full and fair investigation of all the charges against the Attorney General.

On January 25, 1923,[2] Mr. Volstead called up the majority report and offered the following resolution:

That whereas the Committee on the Judiciary has made an examination touching the charges sought to be investigated under House resolution 425 to ascertain if there is any probable ground to believe that any of the charges are true; and on consideration of the charges and the evidence obtained it does not appear that there is any ground to believe that Harry M. Daugherty, Attorney General of the United States, has been guilty of any high crime or misdemeanor requiring the interposition of the impeachment powers of the House:

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[1] Fourth session Sixty-seventh Congress, House Report No. 1371.

[2] Fourth session Sixty-seventh Congress, Journal, p. 148; Record, p. 2410.

Resolved, That the Committee on the Judiciary be discharged from further consideration of the charges and proposed impeachment of Harry M. Daugherty, Attorney General, and that House Resolution 425 be laid upon the table.

After extended debate, Mr. Finis J. Garrett, of Tennessee, moved to lay the resolution on the table.

In response to a parliamentary inquiry as to whether an affirmative vote on the motion would carry the entire impeachment proceedings to the table, the Speaker held:

This is a resolution laying the whole subject on the table. A motion to lay that on the table, if it carried, would be equivalent to rejecting it. A motion to lay the impeachment proceedings on the table would still leave the impeachment matter pending.

On the question of agreeing to the motion to lay the resolution on the table there were 88 yeas and 204 nays, and the motion was rejected.

A division of the question on the pending resolution and preamble having been demanded, the resolution was agreed to without division, and the preamble by a vote of yeas 206, nays 78.

539. Instance wherein the Senate transmitted to the House testimony adduced before one of its committees for consideration by the House with a view to impeachment.

An official against whom charges were pending having resigned his office, the House committee to which they had been referred made no report.

On March 25, 1924,[1] the Senate passed and messaged to the House the following resolution:

Whereas one Clarence C. Chase is and, for more than a year last past, has been a civil officer of the United States, to wit, the collector of customs at the port of El Paso, Tex.; and

Whereas in the prosecution of an inquiry by the Committee on Public Lands and Surveys of the Senate under Senate Resolution 147, it became necessary to inquire into the source from which one A. B. Fall, late Secretary of the Interior, secured large sums of money at or about the time or shortly after he entered upon negotiations resulting in the execution of leases or contracts relating to the naval oil reserves; and

Whereas it appears from the testimony taken and proceedings had before the said committee that the said Clarence C. Chase entered into a conspiracy with the said A. B. Fall to mislead and deceive the said committee concerning the source of such moneys, and that pursuant to such conspiracy the said Clarence C. Chase, on or about the 29th of November, 1923, endeavored to induce one Price McKinney to represent to and testify before the said committee that he had loaned to the said Fall at or about the time hereinbefore mentioned the sum of $100,000; and

Whereas the said Clarence C. Chase well knew that the said Price McKinney had made no such loan to the said Fall; and

Whereas the said Clarence C. Chase being, on the 24th day of March, 1924, called before the said committee and interrogated concerning the matters herein referred to by the said committee, declined and refused to answer any questions in relation to the same upon the ground that his answers might tend to incriminate him: Now, therefore, be it

Resolved, That a copy of the testimony adduced and the proceedings had before the said Committee on Public Lands and Surveys under Senate Resolution 147 be, with a copy of this resolution, transmitted to the House of Representatives for such proceeding against the said Clarence C. Chase as may be appropriate.

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[1] First session Sixty-eighth Congress, Record, p. 4915.

On the following day[1] the resignation of Clarence C. Chase was announced in the Senate.

In the House the resolution was referred from the Speaker's table to the Committee on the Judiciary, which made no report thereon.

540. Proposed inquiry into the eligibility of Andrew W. Mellon to serve as Secretary of the Treasury, in 1932.

Secretary Mellon having been nominated and confirmed as ambassador to a foreign country and having resigned as Secretary of the Treasury, the House declined to authorize an investigation.

On January 6, 1932,[2] Mr. Wright Patman, of Texas, rising in his place in the House, charged that Andrew William Mellon, of Pennsylvania, was serving as Secretary of the Treasury of the United States in contravention of statutes[3] prohibiting certain officials from owning certain classes of property and engaging in certain business enterprises, and offered a privileged resolution providing for an investigation.

On February 13,[4] Mr. Hatton W. Sumners, of Texas, from the Committee on the Judiciary to which the resolution had been referred, presented a report[5] recommending the adoption of the following:

Whereas Hon. Wright Patman, Member of the House of Representatives, filed certain impeachment charges against Hon. Andrew W. Mellon, Secretary of the Treasury, which were referred to this committee; and

Whereas pending the investigation of said charges by said committee, and before said investigation had been completed, the said Hon. Andrew W. Mellon was nominated by the President of the United States for the post of ambassador to the Court of St. James and the said nomination was duly confirmed by the United States Senate pursuant to law, and the said Andrew W. Mellon has resigned the position of Secretary of the Treasury: Be it

Resolved by this committee, That the further consideration of the said charges made against the said Andrew W. Mellon, as Secretary of the Treasury, be, and the same are hereby discontinued.

The resolution submitted by the committee was agreed to without debate or division.

541. A proposal to investigate the official conduct of the President of the United States with a view to impeachment was laid on the table.

The question of consideration may not be demanded on a resolution of impeachment until the reading of the resolution has been concluded.

Recognition to propound a parliamentary inquiry is within the discretion of the Chair and may interrupt proceedings of high privilege.

The laying on the table of a resolution of impeachment does not preclude the offering of a similar resolution if not in identical language.

Motions for the disposition of a resolution of impeachment are not in order until it has been read in full.

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[1] Record p. 5009.

[2] First session, Seventy-second Congress, Record, p. 1400.

[3] U. S. Code, title 5, sec. 243; title 14, sections 1, 51, 66; title 19, sections 3, 382, etc.

[4] Record, p. 3850.

[5] House Report No. 444.

A resolution of impeachment may be expunged from the record by unanimous consent only.

On December 13, 1932,[1] Mr. Louis T. McFadden, of Pennsylvania, rising to a question of constitutional privilege in the House, proposed to impeach the President of the United States for "high crimes and misdemeanors" in that he had "unlawfully attempted to usurp legislative powers" and otherwise in domestic and foreign relations "violated the Constitution and laws of the United States." The charges were of a general nature and prefaced a resolution authorizing the Committee on the Judiciary to conduct an investigation with a view to impeachment.

In the course of the reading of the resolution by the Clerk, Mr. William H. Stafford, of Wisconsin, interrupted and proposed to submit a parliamentary inquiry, when Mr. Thomas L. Blanton, of Texas, presented the point of order that a proceeding of this character could not be interrupted by a parliamentary inquiry.

The Speaker[2] overruled the point of order and said:

> That is in the discretion of the Chair. The Chair will recognize the gentleman from Wisconsin to make a parliamentary inquiry.

Mr. Stafford inquired if it would be in order to raise the question of consideration. The Speaker, Mr. John N. Gamer, replied that the question of consideration could not be raised until the reading of the resolution had been completed.

The reading of the resolution having been concluded, Mr. Edward W. Pou, of North Carolina, moved that the resolution be laid on the table.

On a yea and nay vote, ordered on the demand of Mr. Leonidas C. Dyer, of Missouri, the yeas were 361, the nays, were 8, and the resolution was laid on the table.

On January 17, 1933,[3] Mr. McFadden again rose to a question of privilege and submitted a similar but not identical, resolution embodying similar charges and carrying a similar proposal for an investigation by the Committee of the Judiciary, and asked recognition to debate it. The Speaker said:

> The gentleman is entitled to an hour, but first the Clerk must report the resolution of impeachment.

During the reading of the resolution by the Clerk, Mr. Robert Luce, of Massachusetts, interrupted and submitted a parliamentary inquiry asking if it were in order to bring up at this time a proposition of similar import to one previously laid on the table.

The Speaker said:

> The Chair, of course, has not heard the resolution read. Probably if it was identical with the resolution submitted some time ago and laid on the table there would be some question whether or not a second impeachment could be had. But the President can be impeached, or any person provided for by the Constitution, a second time, and the Chair thinks the better policy would be to have the resolution read and determine whether or not it is the same.

Mr. Fred A. Britten, of Illinois, inquired if it would be in order at this time to offer a motion for disposition of the resolution.

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[1] Second session, Seventy-second Congress, Record, p. 399.

[2] John N. Garner, of Texas, Speaker.

[3] Second session seventy-second Congress, Record, p. 1954.

The Speaker replied:

No. The Chair would not recognize any Member to make a motion until the resolution is read.

Mr. Britten further inquired if a motion to expunge the resolution would be entertained.

The Speaker responded:

It may only be done by unanimous consent.

The Clerk having concluded the reading of the resolution, Mr. Henry T. Rainey,[1] of Illinois, offered a motion to lay the resolution on the table.

Mr. McFadden submitted that he was entitled to recognition for one hour.

The Speaker differentiated:

The gentleman from Illinois moves to lay the resolution of impeachment on the table.

May the Chair be permitted to make a statement with reference to the rules applying to that motion. The parliamentarian has examined the precedents with reference to the motion. Speaker Clark and Speaker Gillette, under identical conditions, held that a motion to lay on the table deprived a Member of the floor, although the general rules granted him one hour in which to discuss the resolution of impeachment or privileges of the House. Therefore the motion is in order.

The question being put, and the yeas and nays being ordered, it was decided in the affirmative, yeas, 344, nays, 11, and the resolution was laid on the table.

542. The inquiry into the conduct of Harry B. Anderson, United States judge for the western district of Tennessee, in 1931.

The inquiry into the conduct of Judge Anderson was initiated by a resolution supplemented by a report from the Department of Justice.

While the House decided against impeachment, it expressed disapproval of practices disclosed by the investigation.

On March 24, 1930,[2] Mr. Fiorello LaGuardia, of New York, introduced a resolution authorizing a special committee of five members of the Committee on the Judiciary to inquire into the official conduct of Harry B. Anderson, United States judge for the western district of Tennessee.

The resolution was referred to the Committee on the Judiciary and reported to the House by direction of that committee through Mr. Andrew J. Hickey, of Indiana, on June 13.[3]

After brief debate, the resolution was agreed to with an amendment providing for the designation of the members of the special committee by the chairman of the Committee on the Judiciary.

In the course of his remarks, Mr. Hickey, in response to an inquiry from Mr. William H. Stafford, of Wisconsin, explained that the preliminary inquiry had been delegated by the committee to a subcommittee which in addition to its own research had the advantage of a report by the Department of Justice which had made an

[1] Mr. McFadden and the President were members of the same party; Mr. Pou and Mr. Rainey were members of the opposing party.

[2] Second session Seventy-first Congress, Record, p. 6051.

[3] Record, p. 10649.

extensive investigation of the handling of bankruptcy proceedings in Judge Anderson's court.

Pursuant to the resolution, Mr. Hickey, Mr. LaGuardia, Mr. Charles I. Sparks, of Kansas, Mr. Hatton W. Sumners, of Texas, and Mr. Gordon Browning, of Tennessee, were appointed to the special committee which after investigation recommended to the committee that no further action be taken.

On February 18, 1931,[1] Mr. George S. Graham of Pennsylvania, presented the report of the Committee on the Judiciary, embodying the recommendation of the subcommittee.

The report recited that while there were no grounds for invoking the high power of impeachment, the investigation disclosed—

certain matters which the committee does not desire to be regarded as in any way approving or sanctioning. The practice existing in the western district of Tennessee, both under Judge Anderson and his predecessors, of appointing referees to the place and position of receivers in bankruptcy matters is one which the committee thinks ought to be discontinued and desires to express its disapproval of the practice. The atmosphere and surroundings in the Tully case while free from evidence of wrong on the part of the judge, lead the committee to say that in their opinion when private matters or family matters come in touch with the court a judge should exercise more than ordinary care to avoid the appearance of improperly using the process of the court in any way that might be misunderstood, for in such matters the conduct of a judge must always be above suspicion.

The report then recommended the adoption of the following resolution which was agreed to by the House without debate:

Resolved, That the evidence submitted on the charges against Hon. Harry B. Anderson, district judge for the western district of Tennessee, does not warrant the interposition of the constitutional powers of impeachment of the House.

543. The investigation into the conduct of William E. Baker, United States district judge for the northern district of West Virginia.

A memorial addressed to the Speaker and setting forth charges against a civil officer was referred to the Committee on the Judiciary, which recommended an investigation.

The House referred the case of Judge Baker to the Committee on the Judiciary instead of to a select committee for investigation.

On May 22, 1934,[3] Mr. George S. Graham, of Pennsylvania, from the Committee on the Judiciary, reported the following resolution, which was agreed to:

Whereas certain charges[4] against William E. Baker, United States district judge for the Northern District of West Virginia, have been transmitted by the Speaker of the House of Representatives to the Judiciary Committee: Be it

Resolved, That the Committee on the Judiciary be, and they hereby are, authorized and directed to inquire into the official conduct of William E. Baker, United States district judge for the Northern District of West Virginia, and to report to the House whenther in their opinion the

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[1] Third session Seventy-first Congress, Record, p. 5312.

[2] Record, p. 5009.

[3] First session Sixty-eighth Congress, Record, p. 9240.

[4] The memorial submitting the charges appears in full at p. 4875 of the Record.

said William E. Baker has been guilty of any acts which in contemplation of the Constitution are high crimes or misdemeanors requiring interposition of the constitutional powers of this House; and that the said committee have power to send for persons and papers, to administer the customary oaths to witnesses, and to sit during the sessions of the House until adjournment and thereafter until said inquiry is completed and report to the next session of the House.

The committee thus constituted was by later resolution authorized to employ clerical assistance and to incur expenses not to exceed $2,500.

On February 10, 1925,[1] Mr. Leonidas C. Dyer, of Missouri, from the Committee on the Judiciary, submitted the report of the committee on the case.

The committee found:

That in their opinion the said William E. Baker has not been guilty of any acts which in contemplation of the Constitution are high crimes or misdemeanors requiring the interposition of the constitutional powers of this House, and recommends that articles of impeachment be not directed by the House against the said William E. Baker.

The report was referred to the Committee of the Whole House.

544. The inquiry into the conduct of Judge George W. English, United States judge for the eastern judicial district of Illinois.

A resolution proposing investigation with a view to impeachment was introduced by delivery to the Clerk and was referred to the Committee on Rules, on request of which committee it was referred to the Committee on the Judiciary.

A joint resolution created a select committee (in effect a commission), composed of Members of the House, and authorized it to report to the succeeding Congress.

A select committee visited various States and took testimony.

January 13, 1925,[2] Mr. Harry B. Hawes, of Missouri, introduced, by delivery to the Clerk, a resolution for an investigation of the official conduct of George W. English, district judge for the eastern district of Illinois, which, under the rule, was referred to the Committee on Rules. On February 3.[3] Mr. Bertrand H. Snell, from the Committee on Rules, by direction of that committee, asked unanimous consent that the resolution be referred to the Committee on the Judiciary, to which communications relating to the charges have been previously referred. The request was agreed to, and subsequently [4] Mr. George S. Graham, of Pennsylvania, introduced a joint resolution which was reported from the Committee on the Judiciary and agreed to February 12,[5] as follows:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That William D. Boies, Charles A. Christopherson, Ira G. Hersey, Earl C. Michener, Hatton W. Sumners, John N. Tillman, and Royal H. Weller, being a subcommittee of the Committee on the Judiciary of the House of Representatives, be, and they hereby are, authorized and directed to inquire into the official conduct of George W. English, United States district judge for the eastern district of Illinois, and so report to the House whether in their opinion the said

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[1] House Report No. 1443.

[2] Second session Sixty-eighth Congress, Record, p. 1790.

[3] Record, p. 2940.

[4] Second session Sixty-eighth Congress, Record, p. 3472.[5] Journal, p. 237.

George W. English has been guilty of any acts which in contemplation of the Constitution are high crimes or misdemeanors requiring the interposition of the constitutional powers of the House; and that the said special committee have power to hold meetings in the city of Washington, District of Columbia, and elsewhere and to send for persons and papers, to administer the customary oaths to witnesses, all process to be signed by the Clerk of the House of Representatives under its seal, and be served by the Sergeant at Arms of the House or his special messenger; to sit during the sessions of the House and until adjournment sine die of the Sixty-eighth Congress, and thereafter until said inquiry is completed, and report to the Sixty-ninth Congress.

SEC. 2. That said special committee be, and the same is hereby, authorized to employ such stenographic and clerical assistance as they may deem necessary, and all expenses incurred by said special committee, including the expenses of such committee when sitting in or outside of the District of Columbia, shall be paid out of the contingent fund of the House of Representatives on vouchers ordered by said committee, signed by the chairman of said committee: *Provided, however*, That the total expenditures authorized by this resolution shall not exceed the sum of $5,000.

The joint resolution was passed by the Senate and approved by the President. Under the authorization thus conferred, the committee held hearings in Illinois, Missouri, and the District of Columbia following the adjournment of the Sixty-eighth Congress and submitted a report to the Sixty-ninth Congress.[1]

545. Impeachable offenses are not confined to acts interdicted by the constitution or the Federal Statutes but include also acts not commonly defined as criminal or subject to indictment.

Impeachment may be based on offenses of a political character, on gross betrayal of public interests, inexcusable neglect of duty, tyrannical abuse of power, and offenses of conduct tending to bring the office into disrepute.

No judge is subject to impeachment on the complaint that he has rendered an erroneous decision.

A committee finding that a judge had failed to live up to the standards of the judiciary in matters of personal integrity and in the discharge of the duties of his office, recommended articles of impeachment.

It is in order to demand a division of the question on agreeing to a resolution of impeachment and a separate vote may be had on each article.

On March 25, 1926,[2] Mr. George S. Graham, of Pennsylvania, from the Committee on the Judiciary submitted the report of the committee reviewing the several charges in detail.

In determining whether the nature of the offenses charged warranted indictment, the committee decide:

Although frequently debated, and the negative advocated by some high authorities, it is now, we believe, considered that impeachment is not confined alone to acts which are forbidden by the Constitution or Federal statutes. The better sustained and modern view is that the provision for impeachment in the Constitution applies not only to high crimes and misdemeanors as those words were understood at common law but also acts which are not defined as criminal and made subject to indictment, but also to those which affect the public welfare. Thus an official may be impeached for offenses of a political character and for gross betrayal of public interests. Also, for abuses or, betrayal of trusts, for inexcusable negligence of duty, for the tyrannical abuse of power, or,

[1] First session Sixty-ninth Congress, House Report No. 145.

[2] First session Sixty-ninth Congress, House Report No. 653.

as one writer puts it, for a "breach of official duty by malfeasance or misfeasance, including conduct such as drunkenness when habitual, or in the performance of official duties, gross indecency, profanity, obscenity, or other language used in the discharge of an official function, which tends to bring the office into disrepute, or for an abuse or reckless exercise of discretionary power as well as the breach of an official duty imposed by statute or common law."

The committee hold, however, that:

No judge may be impeached for a wrong decision.

In support of the contention that the personal conduct of an official may be made the basis of impeachment the report says:

A Federal judge is entitled to hold office under the Constitution during good behavior, and this provision should be considered along with article 4, section 2, providing that all civil officers of the United States shall be removed from office upon impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors. Good behavior is the essential condition on which the tenure to judicial office rests, and any act committed or omitted by the incumbent in violation of this condition necessarily works a forfeiture of the office.

A civil officer may have behaved in public so as to bring disgrace upon himself and shame upon the country and he would continue to do this until his name became a public stench and yet might not be subject to indictment under any law of the United States, but he certainly could be impeached. Otherwise the public would in this and kindred cases be beyond the protection intended by the Constitution. When the Constitution says a judge shall hold office during good behavior it means that he shall not hold it when his behavior ceases to be good behavior.

The report therefore concludes:

The Federal judiciary has been marked by the services of men of high character and integrity, men of independence and incorruptibility, men who have not used their office for the promotion of their private interests or those of their friends. No one reading the record in this case can conclude that this man has lived up to the standards of our judiciary, nor is he the personification of integrity, high honor, and uprightness, as the evidence presents the picture of the manner in which he discharged the high duties and exercised the powers of his great office.

The committee accordingly submit five articles of impeachment with the recommendation that they be adopted by the House and presented to the Senate with a demand for conviction and removal from office.

Minority views [1] are filed taking issue with facts determined and conclusions reached in the several specific charges discussed in the majority report, but indicating no disagreement with the views of the majority as to the law governing impeachment proceedings as set forth in the report.

The report was debated in the House on March 30, 31, and April 1, when the resolution reported by the committee was agreed to—yeas, 306; nays, 62.

The House then adopted a resolution [2] submitted by Mr. Graham naming Messrs. Earl C. Michener, Ira G. Hersey, W. D. Boies, C. Ellis Moore, George R. Stobbs, Hatton W. Sumners, and Andrew J. Montague, majority and minority members of the Committee on the Judiciary, as managers to conduct the impeachment, and instructing them to appear at the bar of the Senate and demand conviction.

[1] Record, p. 6363.

[2] Record, p. 6736

On reception of the report in the House on March 25, Mr. Charles R. Crisp, of Georgia, rising to a parliamentary inquiry, asked if it would be in order to demand a separate vote on each of the five articles of impeachment.

The Speaker replied in the affirmative, and when the vote was taken on April 1,[1] recognized Mr. William B. Bowling, of Alabama, to demand a separate vote on the first article of the impeachment, and said:

In response to the query of the gentleman may the Chair state that in view of the fact he is about to recognize the gentleman from Alabama to demand a separate vote on article of impeachment No. 1, the Chair will now put the question on agreeing to the resolution with all the articles except article 1.

In the opinion of the Chair the proper procedure under the circumstances, a separate vote having been demanded on only one article, would be that the vote should be first taken on the resolution and all other articles.

546. The managers on the part of the House having formally presented articles of impeachment, the Senate organized for the trial.

A Senator excused himself from participation in impeachment proceedings on the ground of close personal relations with one of the managers for the House, but on suggestion took the oath as a member of the court of impeachment.

A committee of the Senate after investigation expressed the opinion that during a trial of impeachment the House could, with the consent of the Senate, adjourn and the Senate proceed with the trial.

By common consent it was agreed that a judge under trial before the Senate continued undisturbed in the exercise of the judicial duties of his office.

On April 6,[2] the House by resolution notified the Senate of the appointment of managers and a message was communicated from the Senate in response informing the House that the Senate was ready to receive them.

Accordingly, on April 22,[3] at 2 o'clock p. m., the managers of the impeachment on the part of the House appeared before the bar of the Senate and were announced by the doorkeeper. The Vice President received them and they were seated by the Sergeant at Arms.

By direction of the Vice President the Sergeant at Arms made proclamation:

Hear ye! Hear ye! Hear ye! All persons are commanded to keep silence, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against Hon. George W. English, judge of the United States Court for the Eastern District of Illinois.

Thereupon Mr. Manager Michener read the resolution appointing the managers on the part of the House and presented the articles of impeachment with the demand of the House for impeachment, conviction, and removal from office.

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[1] Record, p. 6735.

[2] Record, p. 6963.

[3] Record, p. 7962.

On motion of Mr. Albert B. Cummins, of Iowa, the Senate agreed to an order fixing Friday, April 23, as the date on which the Senate would organize for the trial, and the managers on the part of the House retired from the Chamber.

Mr. Coleman L. Blease, of South Carolina, thereupon excused himself from participation in the trial on account of his former business relations with Mr. Manager Dominick.

When, however, on the day of trial, Mr. Blease's name was called for him to be sworn and he failed to appear to take the oath, Mr. John S. Williams, of Mississippi, submitted:

Mr. President, I noticed that, when the name of the Senator from South Carolina was called, he shook his head to indicate that he would not take the oath. On yesterday the Senator from South Carolina asked to be excused from participating in the trial of Judge English and gave as his reason for so doing the relationship which exists between himself and one of the board of managers of the House, Representative Dominick. We all sympathize with the views expressed by the Senator from South Carolina; but in the composition of the Senate as a court to try Judge English on the indictment which has been returned here by the House of Representatives, I think no one may be excused from taking the oath.

What shall happen to the Senator from South Carolina when it become necessary to vote is an entirely different matter, but the rule specifically provides that all the Members of the Senate who are present shall present themselves and take the oath, and that absent Senators shall take the oath as they appear in the Senate. I therefore think it not competent for us to excuse the Senator from South Carolina from taking the oath as a member of the court. I hope the question will not be raised and that we shall avoid any technicality which might be urged at any time. I ask the Senator from South Carolina to take the oath.

Thereupon Mr. Blease, when his name was called the second time, came forward and took the oath.

The designated day[1] having arrived, the senior Senator from Iowa, Mr. Cummins, by request administered the oath as the Presiding Officer of the court to the Vice President, who in turn swore in the Senators in groups of 10.

Mr. James A. Reed, of Missouri, having raised a question as to the administration of the oath of absent Senators, the Vice President said:

Under the precedents of the Senate each Senator who has not been sworn will be called to the desk when he enters the Chamber and the oath will be administered to him.

The Senate then agreed to an order submitted by Mr. Cummins notifying the House of Representatives that the Senate was ready for the trial of the articles of impeachment.

Pending the appearance of the House managers, Mr. Claude A. Swanson, of Virginia, inquired of Mr. Cummins, the Chairman of the Judiciary Committee, if conclusion has been reached as to whether the trial required that both Houses of Congress remain in session during the trial or whether the House of Representatives with consent of the Senate could adjourn sine die while the latter remained in session for the trial of the case of whether both Houses might adjourn and the Senate convene in extra session for the trial.

Mr. Cummin said:

Certain members of the Judiciary Committee, of which I happen to be chairman, have made rather an exhaustive study of that subject. I think it is the opinion of all the members of the

[1] Record, p. 8026.

Judiciary Committee who have examined the matter that the House can adjourn sine die, with the consent, of course, of the Senate, and that the impeachment proceedings can go forward without the presence of the House of Representatives; although I say, very frankly, that the only precedent with regard to that question was decided the other way. That precedent was in the impeachment of Secretary Belknap. It was then ruled by the Senate that the House of Representatives must be present during the impeachment trial. A very close vote. I think the vote was 19 to 17, but there were not more than 2 votes either way.

In the Belknap case the question arose whether it was necessary for the House to be in session during the trial of the impeachment, and it was ruled in that case that the House must remain in in session. I think everybody recognizes that there were very peculiar circumstances surrounding the trial of the impeachment of Secretary Belknap. There were political considerations, which I have no doubt had great weight in the determination of the matter. It was alleged that certain of the Senators did not want to try the Belknap case until after November elections. That did not appear, of course, in the ruling; but, at any rate, that was one of the material things that developed in that case. There was a controversy in respect to the time at which the case should be tried. Some wanted to put it over until after the elections and some wanted to try it before the elections. There are, I think, 12 precedents in the various States with constitutions substantially like our own.

There are half a dozen or more precedents in the States in which it has been uniformly held that the Senate could go forward in the trial of an impeachment case without the presence of the House.

Without any order on the part of the Senate, I appointed a committee—a subcommittee it may be called—of the Judiciary Committee to study and consider that subject.

And the majority of the committee, so far as I know, without any dissent, although they were not all present when the final conclusion was reached, held that it was not necessary for the House to be present or in session during the trial of the impeachment.

Mr. Joseph E. Ransdell, of Louisiana, further inquired if there was any question as to the right of a judge on trial to continue in the exercise of the judicial duties of his office.

Mr. Cummins replied:

None whatever. He will continue to discharge his duties as judge until after the trial of the impeachment.

The managers on the part of the House having appeared, an order was made that a summons be issued for George W. English returnable on May 3, and the Senate sitting for the trial of the impeachment adjourned until that date.

547. The answer of the respondent was printed and time allowed for replication of managers, with order that further pleadings be filed with the Secretary with due notice to the other party prior to a designated date.

The resignation of the respondent in no way affects the right of the court of impeachment to continue the trial and hear and determine all charges.

The respondent having retired from office, the managers, while maintaining their right to prosecute the charges to a final verdict, recommended that impeachment proceedings be discontinued.

On May 3,[1] the Senate convened as a court of impeachment and the respondent appeared and was seated with counsel in the area in front of the Secretary's desk. The return of the Sergeant at Arms was read and sworn to and the respondent presented his answer which was read by the Secretary. The answer was ordered

[1] Record, p. 8578.

printed and the managers on the part of the House were by order of the Senate given until May 5 in which to present a replication, with direction that further pleadings be filed with the Secretary of the Senate with notice to the other party and that all pleadings be closed not later than May 10. The Senate sitting as a court of impeachment then adjourned until May 5.

In the House on May 4,[1] Mr. Earl C. Michener, of Michigan, presented for the managers on the part of the House, their replication which was approved by the House and by resolution ordered to be messaged to the Senate.

On the following day[2] the Vice President laid before the court of impeachment the message received from the House transmitting the replication which was read by the Secretary and was ordered to be printed. The court of impeachment adopted the usual order relating to the procedure of the Senate sitting as a court of impeachment, and a further order setting the trial for November 10, 1926.

On November 10,[3] the court of impeachment having convened and the managers on the part of the House and counsel for the respondent having been received, Mr. Manager Michener announced:

> Mr. President, I am directed by the managers on the part of the House of Representatives to advise the Senate, sitting as a court of impeachment, that in consideration of the resignation of George W. English, district judge of the United States for the eastern district of Illinois, and its acceptance by the President of the United States, certified copies of which I hereby submit, the managers on the part of the House have determined to recommend the dismissal of the pending impeachment proceedings. The managers desire to report their action to the House, and to this end they respectfully request the Senate, sitting as a court of impeachment, to adjourn to such time as may be necessary to permit the House to take appropriate action upon their report.

The resignation and its acceptance are as follows:

> UNITED STATES DISTRICT COURT,
> EASTERN DISTRICT OF ILLINOIS,
> CHAMBERS OF JUDGE GEORGE W. ENGLISH, EAST ST. LOUIS,
> *East St. Louis, Ill, November 4, 1926.*
>
> To His Excellency the PRESIDENT OF THE UNITED STATES:
>
> I hereby tender my resignation as judge of the District Court of the United States for the Eastern District of Illinois, to take effect at once.
>
> In tendering this resignation I think it is due you and the public that I state my reasons for this action.
>
> While I am conscious of the fact that I have discharged my duties as district judge to the best of my ability, and while I am satisfied that I have the confidence of the law-abiding people of the district, yet I have come to the conclusion on account of the impeachment proceedings instituted against me, regardless of the final result thereof, that my usefulness as a judge has been seriously impaired.
>
> I therefore feel that it is my patriotic duty to resign and let someone who is in no wise hampered be appointed to discharge the duties of the office.
>
> Your obedient servant,
>
> GEORGE W. ENGLISH.
> THE WHITE HOUSE,
> *Washington, November 4, 1926.*

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[1] Record, p. 8686.

[2] Record, p. 8725.

[3] First session Sixty-ninth Congress, Record, p. 3

Hon. GEORGE W. ENGLISH,
United States District Court, But St. Louis, Ill.

SIR: Your resignation as judge of the District Court of the United States for the Eastern District of Illinois dated November 4, 1926, has been received and is hereby accepted to take effect at once.

Very truly yours,

CALVIN COOLIDGE

On motion of Mr. Charles Curtis, of Kansas, it was:

Ordered, That the Sergeant at Arms be directed to notify all witnesses heretofore subpoenaed that they will not be required to appear at the bar of the Senate until so notified by him.

It was further ordered:

That in view of the statement just made by the chairman of the managers on the part of the House of Representatives, the Senate, sitting for the trial of the impeachment of Judge George W. English, adjourn until Monday, the 13th day of December, 1926, at 1'clock p.m.

The managers on the part of the House and counsel for the respondent then retired from the Chamber.

In the House on December 11,[1] Mr. Michener, by direction of the managers on the part of the House, submitted their unanimous report, reciting the resignation of George W. English, and holding:

The managers are of the opinion that the resignation of Judge English in no way affects the right of the Senate, sitting as a court of impeachment, to hear and determine said impeachment charges.

The managers, however, recommended:

Inasmuch, however, as the respondent, George W. English, is no longer a civil officer of the United States, having ceased to be a judge of the District Court of the United States for the Eastern District of Illinois, the managers on the part of the House of Representatives respectfully recommend that the impeachment proceedings pending in the Senate against said George W. English be discontinued.

Mr. Michener, then moved the following resolution:

Resolved, That the managers on the part of the House of Representatives in the impeachment proceedings now pending in the Senate against George W. English, late judge of the District Court of the United States for the Eastern District of Illinois, be instructed to appear before the Senate, sitting as a court of impeachment in said cause, and advise the Senate that in consideration of the fact that said George W. English is no longer a civil officer of the United States, having ceased to be a district judge of the United States for the eastern district of Illinois, the House of Representatives does not desire further to urge the articles of impeachment heretofore filed in the Senate against said George W. English.

After debate, the yeas and nays being demanded and ordered, the resolution was agreed to, yeas 290, nays 23.

The resolution of the House was messaged to the Senate and was considered by the Senate sitting as a court of impeachment on December 13,[2] when after debate the following order was agreed to, yeas 70, nays 9.

Ordered, That the impeachment proceedings against George W. English, late judge of the District Court of the United States for the Eastern District of Illinois, be and the same are, duly dismissed.

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[1] Record, p. 297.

[2] Record, p. 344.

The Secretary having been directed to communicate the order to the House of Representatives, the Senate sitting as a court of impeachment adjourned sine die.

548. The investigation into the conduct of Frederick A. Fenning, a commissioner of the District of Columbia, in 1926.

A Member by virtue of his office submitted articles of impeachment and offered a resolution referring them to a committee of the House.

A committee of the House by majority report held a commissioner of the District of Columbia not to be a civil officer subject to impeachment under the Constitution.

A committee having reported that evidence adduced, while not supporting impeachment, disclosed grave irregularities, the respondent resigned.

On April 19, 1926,[1] Mr. Thomas L. Blanton, of Texas, claiming the floor for a question of privilege, announced that by virtue of his office as a Member of the House he impeached Frederick A. Fenning, Commissioner of the District of Columbia, of high crimes and misdemeanors, and submitted written charges. At the conclusion of the reading of the charges, Mr. Blanton proposed the following resolution which was referred to the Committee on the Judiciary.

Resolved, That the Committee on the Judiciary be, and it is hereby, directed to inquire and report whether the action of this House is necessary concerning the alleged official misconduct of Frederick A. Fenning, a commissioner of the District of Columbia, and said Committee on the Judiciary is in all things hereby fully authorized and empowered to investigate all acts of misconduct and report to the House whether in their opinion the said Frederick A. Fenning has been guilty of any acts which in the contemplation of the Constitution, the statute laws, and the precedents of Congress are high crimes and misdemeanors requiring the interposition of the constitutional powers of this House, and for which he should be impeached.

That this committee is hereby authorized and empowered to send for persons and papers, to administer oaths, to employ, if necessary, an additional clerk, and to appoint and send a subcommittee whenever and wherever necessary to take necessary testimony for the use of said committee or subcommittee, which shall have the same power in respect to obtaining testimony as exercised and is hereby given to said Committee on the Judiciary.

That the expenses incurred by this investigation shall be paid out of the contingent fund of the House upon the vouchers of the chairman of said committee, approved by the Clerk of this House.

Mr. George S. Graham, of Pennsylvania, from that committee reported the resolution back to the House on May 4[2] with amendments as to phraseology and on May 6,[3] it was agreed to as amended.

The report[4] of the committee, presented on July 2, considers first the power and right of the House to impeach and thus analyzes the requisites essential to impeachment:

Two things are necessary before the House will authorize impeachment: First, there must be an officer who, by reason of holding such office, is impeachable under the Constitution and laws of the United States, and, second, the establishment by creditable evidence of such misconduct on the part of such officer, defined as "treason, bribery, or other high crimes and misdemeanors" as will

[1] First session Sixty-ninth Congress, Record, p. 7753.

[2] Record, p. 8718.

[3] Record, p. 8828.

[4] House Report No. 1590.

bring the office into disrepute, and which will require his removal, to maintain its purity and the respect of the people for the office.

The question as to whether a Commissioner of the District of Columbia is a Federal officer and subject to the interposition of the Constitutional powers of the House in this respect, is answered in the negative as follows:

The first question that confronts us is, Is a Commissioner of the District of Columbia, appointed by the President and confirmed by the Senate, a civil officer of the United States, subject to the foregoing provision of the Federal Constitution? In order to arrive at a correct solution of this question it is necessary to review the sets of Congress relating to the District of Columbia.

The area within the District of Columbia was ceded by Maryland to, and accepted by, the Government in accordance with clause 17 of Article I of the Constitution, which granted to Congress exclusive legislative jurisdiction over such District. This in effect makes Congress the legislative body for the District with the same power as legislative bodies of the various States, and it has full authority in legislative matters pertaining to the District, subject to the prohibitions contained in the Constitution.

That act of July 16, 1790, provided for the establishment of a seat of government in the District of Columbia. On February 21, 1871, Congress created of the District a municipal corporation by the name of "the District of Columbia," with power to sue, be sued, contract, have a seal, and exercise all other powers of a municipal corporation not inconsistent with the Constitution, the laws of the United States, and the provisions of this act.

Subsequently, on June 11, 1878, the organic act of the District of Columbia was enacted by Congress, which provides that the District of Columbia shall remain and continue a municipal corporation as provided in section 2 of the Revised Statutes relating to said District, and that the commissioners provided for should be deemed and taken as officers of such corporation.

This seems to be as clear as language can express it that thereafter the District of Columbia should enjoy a municipal corporate status and that its officer should be deemed and taken as officers of such corporation. The fact that Congress retains legislative authority and that the method of appointing Federal officers was followed in the appointment of the commissioners is not material and certainly not controlling, for the selection of the commissioners could have been delegated to the President alone or to the people of the District. Had it been the intent of Congress that the commissioners should enjoy the status of Federal officials then no expression thereon was necessary, but the fact that Congress in specific words gave them the status of municipal officers indicates clearly that Congress was making and did make a distinction as to the official status of these officers while, at the same time, retaining the Federal method of appointment.

This was a very reasonable provision for, while these officials are appointed by the President and confirmed by the Senate, they are not paid in the same manner as Federal officers. They are paid out of the District funds, to which, it is true, the Government contributes a certain sum, but they are not paid out of the Federal Treasury as are officials of the Federal Government.

For the reasons stated, it is our conclusion that Frederick A. Fennin is an officer of a municipal corporation, to wit, the District of Columbia, and as such is not a civil officer of the United States and as such is not subject to impeachment.

The report then discusses seriatim. the charges filed, and finds in each case insufficient evidence to support the allegation.

In concluding, however, the committee find that the evidence adduced in the course of the hearings discloses practices "illegal and contrary to law," neglect of duty, and conditions "which can not be too severely criticized and condemned" and recommend an investigation by a "proper committee of Congress."

Seven minority views filed by nine members of the committee disagree with the findings of the majority as to proof of various charges but with the exception of two

concur in the opinion that a Commissioner of the District of Columbia is not a Civil officer subject to impeachment within the meaning of the Constitution.

Congress adjourned on July 3,[1] and in the interim Frederick A. Fenning tendered his resignation as Commissioner of the District of Columbia.

549. The inquiry into the conduct of Judge Frank Cooper, in l927.

In instituting impeachment proceedings it is necessary first to present the charges on which the proposal is based.

Articles of impeachment having been presented, debate is in order only on debatable motions related thereto.

A motion to refer impeachment charges was entertained as a matter of constitutional privilege.

The proponent of a proposition to refer impeachment charges to a committee is entitled to one hour in debate exclusive of the time required for the reading of the charges.

The motion to refer is debatable in narrow limits only and does not admit discussion of the merits of the proposition sought to be referred.

Propositions relating to impeachment are privileged and a resolution authorizing the taking of testimony and defrayment of expenses of investigations in connection with impeachment proceedings was entertained as privileged.

On January 28, 1927,[2] Mr. Fiorello H. LaGuardia, of New York, rising to a question of high privilege, proposed to impeach Judge Frank Cooper, United States district judge for the Northern District of New York. After he had proceeded for some time in debate, Mr. Thomas L. Blanton, of Texas, made the point of order that he was not entitled to the floor, not having presented formal articles of impeachment.

The Speaker[3] sustained the point of order and said:

> The Chair thinks the gentleman from New York should make his charges. The Chair understood he was simply leading up to the charges. But if a point of order is made, the gentleman is bound to state his charges.

Mr. LaGuardia presented formal charges in writing and was again proceeding in debate when Mr. Leonidas C. Dyer, of Missouri, raised the further point of order that impeachment charges were not debatable except in connection with some admissible and debatable motion relating thereto.

The Speaker said:

> The Chair would think that the proper procedure would be to introduce the motion or resolution and then it would be proper.

Mr. LaGuardia moved to refer the charges to the Committee on the Judiciary and was again proceeding in debate when Mr. Louis C. Cramton, of Michigan, interposed the point of order that having secured the floor on a motion to refer, it was not in order to discuss the merits of the propositions sought to be referred.

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[1] Second session Sixty-ninth Congress, Record, p. 3723.

[2] Second session Sixty-ninth Congress, Record, p. 2487.

[3] Nicholas Longworth, of Ohio, Speaker.

The Speaker sustained the point of order and said:

The Chair thinks that under the motion to refer the gentleman from New York would be limited to a discussion of the reasons why these charges should or should not be referred to the Committee on the Judiciary.

The precedent to which the Chair will call attention is this:

"The simple motion to refer is debatable within narrow limits, but the merits of the proposition which it is proposed to refer may not be brought into the debate."

Under that the Chair would think the gentleman from New York would be confined to a discussion of the reasons why the resolution should be referred to the Committee on the Judiciary.

The gentleman from New York ought not to argue the merits of the case to the House. That is what will be argued before the Committee on the Judiciary, but the gentleman may argue to the House the merits of his motion, to wit, whether this matter should or should not be referred to the Committee on the Judiciary.

After further debate, Mr. Cramton submitted a parliamentary inquiry as to whether the time consumed in reading the charges should be taken from the hour allotted to the proponent of the motion to refer the charges.

The Speaker held:

No; the Chair would think not. The Chair would think that on his motion to refer, the gentleman is entitled to one hour.

The time taken to read the charges was simply time taken to inform the House of the matter before it, such as time taken by the clerk to read a bill. Now, the gentleman from New York makes a motion to refer, and under the rules of the House a motion to refer is debatable for one hour.

The gentleman did not present his case by way of argument. The gentleman read a series of charges, obtaining the floor as a matter of privilege. The reading of those charges was simply to give the House information—not argument, but information. The Chair held, in ruling on the point of order raised by the gentleman from Texas, that the gentleman from New York must read his charges before making any argument. Having now read his charges, the gentleman from New York moves to refer the charges to the Committee on the Judiciary, and under the rules of the House the gentleman is entitled to one hour.

The Chair overrules the point of order.

Subsequently, Mr. Cramton rose to the point of order that the debate was not being confined to the motion to refer.

The Speaker ruled:

The point of order has been made. The Chair thinks the gentleman from New York is going over the line of the argument and into the merits of the question instead of the merits of the motion to refer. The Chair in cases like this is always inclined to be in favor of a reasonable debate, but the Chair thinks that the line of argument which is being made now by the gentleman from New York goes more to the merits of the case than to the merits of the motion. The gentleman will proceed in order.

Debate having been concluded, the motion was agreed to and the charges were referred to the Committee on the Judiciary.

On February 11,[1] Mr. George S. Graham, of Pennsylvania, from that committee submitted the following resolution:

Resolved, That the Committee on the Judiciary, and any subcommittee that it may create or appoint, is hereby authorized and empowered to act by itself or its subcommittee to hold meetings and to issue subpoenas for persons and papers, to administer the customary oaths to witnesses, and

[1] Record, p. 3525.

to sit during the sessions of the House until the inquiry into the charges against Hon. Frank Cooper, United States district judge for the northern district of New York is completed, and to report to this House.

That said committee be, and the same is hereby, authorized to appoint such clerical assistance as they may deem necessary, and all expenses incurred by said committee or subcommittee shall be paid out of the contingent fund of the House of Representatives on vouchers ordered by said committee and signed by the chairman of said committee.

In response to a parliamentary inquiry from Mr. Blanton, as to the privilege of the resolution, the Speaker said:

It is privileged because it relates to impeachment proceedings.

Mr. Graham submitted the report of the committee on March 3,[1] as follows:

The committee has examined into the charges against Hon. Frank Cooper, United States district judge for the northern district of New York, made on the floor of the House and referred to it by the House on the 28th day of January, 1927 (Cong. Rec. pp. 2497–2493), and has heard all witnesses tendered by accuser and accused and reports to the House the oral and documentary evidence submitted, and while certain activities of the Hon. Frank Cooper with relation to the manner of procuring evidence in cases which would come before him for trial are not to be considered as approved by this report, it has reached the conclusion and finds that the evidence does not call for the interposition of the constitutional powers of the House with regard to impeachment. The committee, therefore, recommends the adoption of the following resolution:

"Resolved, That the evidence submitted to the Committee on the Judiciary in regard to the conduct of Hon. Frank Cooper, United States district judge for the northern district of New York, does not call for the interposition of the constitutional powers of the House with regard to impeachment."

The report was agreed to by the House without division.

550. The inquiry into the conduct of Francis A. Winslow, judge of the southern district of New York, in 1929.

Discussion of methods of authorizing an investigation with a view to impeachment.

Instance wherein a special committee was created for the purpose of instituting an inquiry and drafting articles of impeachment if found to be warranted by the circumstances.

Instance wherein a special committee of investigation was authorized to sit after adjournment of the current Congress and report to the succeeding Congress.

A special committee having been created to investigate charges, a member supplemented the proceedings by rising to a question of privilege in the House and proposing impeachment.

A judge whose conduct was under investigation having resigned, no further action was taken by the committee charged with the investigation.

A judge against whom impeachment proceedings were instituted refrained from the exercise of judicial functions from the date of the fling of the charges.

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[1] Record, p. 5619.

On February 12, 1929,[1] during consideration of the legislative appropriation bill in the Committee of the Whole House on the state of the Union, Mr. Fiorello H. LaGuardia, of New York, having been yielded time for debate said:

Mr. Chairman and members of the committee, at times it becomes necessary for a Member of the House to invoke the machinery provided in the rules of the House to ascertain whether or not a judge of the Federal court has been guilty of crimes and misdemeanors to warrant his impeachment. We have a situation in the southern district of New York so bad that it has shocked both the bench and the bar; so bad that it is reflecting on the integrity of that court; and unless we have an investigation either to ascertain the truth of these charges or otherwise, the people of that district will lose confidence in that court.

With the permission of the House I will read the resolution which I am now introducing:

Mr. LaGuardia then read from a written memorandum of specific charges and an appended resolution authorizing an investigation.

The resolution with the accompanying charges was later delivered to the Clerk and was referred by the Speaker to the Committee on the Judiciary.

On February 18, Mr. George S. Graham of Pennsylvania, submitted a report from the Committee on the Judiciary recommending the passage of the following joint resolution:

Whereas certain statements against Francis A. Winslow, United States district judge for the southern district of New York, have been transmitted by the Speaker of the House of Representatives to the Judiciary Committee: Therefore be it

Resolved, That Leonidas C. Dyer, Charles A. Christopherson, Andrew J. Hickey, George R. Stobbs, Hatton W. Sumners, Andrew J. Montague, and Fred H. Dominick, being a subcommittee of the Committee on the Judiciary of the House of Representatives, be, and they are hereby, authorized and directed to inquire into the official conduct of Francis A. Winslow, United States district judge for the southern district of New York, and to report to the House whether in their opinion the said Francis A. Winslow has been guilty of any acts which in contemplation of the Constitution are high crimes or misdemeanors requiring the interposition of the constitutional powers of the House; and that the said special committee have power to hold meetings in the city of Washington, D. C., and elsewhere, and to send for persons and papers, to administer the customary oaths to witnesses, all process to be signed by the Clerk of the House of Representatives under its seal and be served by the Sergeant at Arms of the House or his special messenger; to sit during the sessions of the House until adjournment sine die of the Seventieth Congress and thereafter until aid inquiry is completed, and report to the Seventy-first Congress.

SEC. 2. That said special committee be, and the same is hereby, authorized to employ such stenographic, clerical, and other assistance as they may deem necessary, and all expenses incurred by said special committee, including the expenses of such committee when sitting in or outside the District of Columbia, shall be paid out of the contingent fund of the House of Representatives on vouchers ordered by said committee, signed by the chairman of said committee: *Provided, however,* That the total expenditures authorized by this resolution shall not exceed the sum of $5,000.

Mr. Bertrand H. Snell, of New York, questioned the method of procedure on the grounds that under the rules a proposition for the creation of a special committee of investigation would come regularly within the jurisdiction of the Committee on Rules, and suggested that if impeachment was contemplated the matter should follow precedent and go direct to the Committee on the Judiciary.

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[1] Second session Seventieth Congress, Record, p. 3334.

Mr. Graham replied:

Mr. Speaker, this will not set up a special investigating committee. This resolution is exactly the same as was passed by this House under exactly similar circumstances in the English case. On the strength of that resolution the committee in the English case charged with the duty of investigating was able to subpoena witnesses and proceed in a regular and orderly way to ascertain whether or not the charges that had been made on the floor of the House were well founded. In the English case exactly the same procedure was followed. The-House referred the resolutions to the Committee on the Judiciary.

They made a preliminary examination, which was a preliminary step in the procedure. That committee heard any witnesses that were willing to appear before the committee. They had no power to compel anyone to appear before the committee. We have not the right, unless the House gives it to us, to subpoena witnesses and call on them to testify under oath. That authority being given, and the committee, recognizing that it was proceeding under the Congress and that the Congress would die on the 4th of March succeeding, took charge and this investigation was started but, of course, would die with the Congress. A resolution exactly the same as this was adopted by the House for two purposes, first, to give the committee power to make an investigation, and, second, to give the committee all the necessary machinery and prolong its life beyond the period of its extinction through the adjournment of the Congress.

Now, then, in addition to that the committee was instructed to report back to the House. That meant through the regular channel , which would be by the subcommittee of the Committee on the Judiciary reporting to that body, and it to the House. This subcommittee was not a special investigating committee.

Now, I want to say on the general principle that if this were the rule of the House then these resolutions ought not to have been referred to us. They ought to have been referred in the first instance to the Committee on Rules. I want to say to my friends of the House and everybody that such a procedure as this will be marked with regret by those who assent to it making it the practice of the House. Whenever a man on the floor of the House presents such statements as cloud the reputation and standing of a judge of the district court of the United States he puts against that man what is equivalent to impeachment. I care not by what name you call it, impeachment or charges, it is an impeachment of the integrity and mars the usefulness of the judge himself. The matter ought to be proceeded with. It will be a sad day when these matters have first to go to the Committee on Rules where it would be said by the public it was only a subterfuge to delay a procedure which was started by charges made on the floor of the House.

After further debate Mr. Graham offered the following amendment:

To sit during the sessions of the House until adjournment sine die of the Seventieth Congress, and thereafter until said inquiry is completed, and report to the Committee on the Judiciary of the House of the Seventy-first Congress.

The amendment was agreed to and the joint resolution as amended was adopted by the House, and on February 23,[1] was agreed to by the Senate.

On March 2, Mr. LaGuardia, rising to a question of high privilege in the House, formally proposed the impeachment of Francis A. Winslow and submitted 12 specific charges accompanied by a resolution as follows:

Resolved, That Francis A. Winslow, United States district judge for the southern district of New York be impeached of high crimes and misdemeanors in office as hereinbelow in part specifically set forth.

The Speaker referred the resolution to the Committee on the Judiciary.

The subcommittee created by the joint resolution designated April 1 for the opening of the inquiry and notified Judge Winslow who on that day tendered his resignation to the President and issued the following statement by counsel:

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[1] Record, p. 4123.

Judge Winslow has felt, from the time the charges were made against him, that his usefulness as a member of the judiciary was thereby impaired, and he has since refrained from appearing as a judge. The same belief is still uppermost in his mind. In the interval, the charges directed against him in Congress have been made the subject of inquiry by the grand jury in New York.

Also, since the presentment of the grand jury was made, proceedings have been instituted and concluded against certain of those whose names have been associated with his in the complaints. These several proceedings having ended, Judge Winslow finds that he now has to consider the future of his relations to the bench in the light of his own sense of duty. He can not but realize, notwithstanding the failure to impugn his personal integrity, that the prestige of the court would be impaired should he return to it, and this he could not for himself endure, nor could he allow it to continue as an embarrassment to the other judges.

The resignation was accepted by the President on the day on which received and the committee discontinued the investigation.

Notwithstanding the resignation, Mr. LaGuardia again preferred the charges by resolution on the convening of the Seventy-first Congress.[1] The resolution was referred to the Committee on the Judiciary which made no report thereon.

551. The inquiry into the conduct of Harry B. Anderson, judge of the western district of Tennessee, in 1930.

Charges having been preferred by a Member of the House, the committee to which the matter was referred reported a resolution providing for the creation of a special committee of investigation.

On March 12, 1930,[2] Mr. Fiorello H. LaGuardia, of New York, filed charges against Harry B. Anderson, judge of the western district of Tennessee with a view to the institution of proceedings for impeachment.

The charges and the accompanying resolution were referred by the Speaker to the Committee on the Judiciary which, on June 13,[3] reported to the House the following resolution which was agreed to:

Resolved, That a special committee of five Members of the House of Representatives who are members of the Committee on the Judiciary of the House, be, and is hereby authorized and directed to inquire into the official conduct of Harry B. Anderson, United States district judge for the western district of Tennessee, and to report to the Committee on the Judiciary of the House whether in their opinion the said Harry B. Anderson has been guilty of any acts which in contemplation of the Constitution are high crimes or misdemeanors requiring the interposition of the constitutional powers of the House; and that the said special committee have power to hold meetings in the city of Washington, D.C., and elsewhere, and to send for persons and papers, to administer the customary oaths to witnesses, all process to be signed by the Clerk of the House of Representatives under its seal and be served by the Sergeant at Arms of the House or his special messenger; to sit during the sessions of the House and until adjournment of the second session of the Seventy-first Congress and thereafter until said inquiry is completed, and report to the Committee on the Judiciary of the House; and be it further

Resolved, That said special committee be, and the same is hereby, authorized to employ such stenographic, clerical, and other assistance as they may deem necessary; and all expenses incurred by said special committee, including the expenses of such committee when sitting in or outside the District of Columbia, shall be paid out of the contingent fund of the House of Representatives on vouchers ordered by said committee, signed by the chairman of said committee: *Provided, however,* That the total expenditures authorized by this resolution shall not exceed the sum of $5,000.

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[1] First session Seventy-first Congress, Record, p. 33.

[2] Second session Seventy-first Congress, Record p. 5105.

[3] Record, p. 11097 tem.

552. The inquiry into the conduct of Grover M. Moscowitz, judge for the eastern district of New York, in 1930.

An instance wherein impeachment proceedings were set in motion by memorials filed with the Speaker and by him transmitted to a committee of the House.

A committee of the House having conducted a preliminary inquiry, a special subcommittee was by joint resolution created to further investigate the case with a view to impeachment.

A vacancy on a special committee created by joint resolution was filled by a further joint resolution.

The committee while criticizing the official conduct of a judge failed to find facts sufficient to warrant impeachment.

On February 27, 1929,[1] the Committee on the Judiciary, in response to certain memorials filed with the Speaker and by him referred to the committee, reported a joint resolution creating a special subcommittee of the Committee on the Judiciary to inquire into the official conduct of Grover M. Moscowitz, judge for the eastern district of New York, with authority to sit after adjournment of the Seventieth Congress and report to the Seventy-first Congress.

The resolution was agreed to by the Senate on March 1,[2] and was thereafter supplemented by a further joint resolution[3] filling a vacancy on the subcommittee.

The report[4] of the Committee on the Judiciary submitted by Mr. George S. Graham, of Pennsylvania, for the committee, on April 8,[5] thus explains the inception of the proceedings:

> This investigation had its origin in a letter addressed to the Speaker of the House of Representatives by Representative Andrew L. Somers, of the sixth New York district, transmitting to the Speaker a statement made by Sidney Levine and Joseph Levine, also some correspondence submitted by J. C. Rochester Co. (Inc.), charging misconduct on the part of Judge Grover M. Moscowitz.
>
> The Speaker of the House referred the matter to the Committee on the Judiciary, and owing to the fact that the Seventieth Congress was about to expire, House Joint Resolution 431 was presented by the chairman of the Committee on the Judiciary for the purpose of giving vitality to a subcommittee that might make an investigation during the recess and report to the Judiciary Committee in the next Congress.

The Committee finds grounds for severe criticism and the report recites:

> After seeing the witnesses, hearing them testify, and with due regard to the argument of counsel and all of the evidence in the case, individual members of this committee do not approve each and every act of Judge Moscowitz concerning which evidence was introduced. For example, the committee can not and does not indorse a business arrangement of Judge Moscowitz with his former partner which continued after Judge Moscowitz became a district judge, especially when he was appointing members of the legal firm to which this former partner belonged to various receiverships in his court. While this committee finds nothing corrupt in these transactions, yet

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[1] Second session Seventieth Congress, Record, p. 4610.

[2] Record, p. 4939.

[3] Record, p. 5015, 5068.

[4] House Report No. 1106.

[5] Record, P. 6992.

this procedure throws the court open to criticism and misunderstanding by the uninformed, as has happened in this case; and, therefore, this committee can not and does not indorse this practice.

The Committee, however, conclude:

Nevertheless, after a careful consideration of all the evidence in the case, and giving full consideration to the problems and persons with which the court had to deal, this committee is unanimous in its opinion that sufficient facts have not been presented or adduced to warrant the interposition of the constitutional powers of impeachment by the House.

The House accordingly approved the report and—

Resolved, That the House of Representatives hereby adopts the report of the Committee on the Judiciary relative to the charges filed against Hon. Grover M. Moscowitz, United States district judge for the eastern district of New York; and further

Resolved, That no further action be taken by the House with reference to the charges heretofore filed with the committee against Hon. Grover M. Moscowitz, United States district judge for the eastern district of New York.

Chapter CCIII.[1]

QUESTIONS OF PRIVILEGE AND THEIR PRECEDENCE.

553. A question of privilege takes precedence over business in order under the rule on "suspension day."

A Member, questioned because of words spoken in debate, rose to a question of privilege and submitted the matter to the House for consideration and disposition.

The issue raised by the questioning of a Member for words spoken in debate was referred to the Judiciary Committee.

A newspaper correspondent who violated the privileges of the House was, by resolution, excluded from that portion of the Capitol under the jurisdiction of the House for a period of 10 days.

On February 6, 1911,[2] a suspension day, Mr. Robert B. Macon, of Arkansas, rose to a question of personal privilege and stated that he had been questioned by one Walter J. Fahy, a newspaper correspondent, for words spoken in debate on the floor of the House, and that he submitted the matter to the House for its consideration and disposition.

Thereupon Mr. Augustus P. Gardner, of Massachusetts, offered the following resolution:

Resolved, That the matter brought to the attention of the House by the gentleman from Arkansas [Mr. Macon] be referred to the Committee on Rules, with authority to send for persons and papers, to examine witnesses upon oath, with instructions to report not later than March 1, 1911.

Mr. James R. Mann, of Illinois, made the point of order that, the day being set apart by the rules for the consideration of bills on the unanimous consent calendar and for motions to discharge committees, the resolution proposed by Mr. Gardner was not in order.

The Speaker[3] said:

The Chair is prepared to rule. The constitutional provision is as follows:

"* * * They [the Senators and Representatives] shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; * * *."

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[1] Supplementary to Chapter LXXX.

[2] Third session Sixty-first Congress, Journal, p. 258; Record, p. 1997.

[3] Joseph G. Cannon, of Illinois, Speaker.

And further:

"* * * and for any speech or debate in either House, they [the Senators and Representatives] shall not be questioned in any other place."

Now, this resolution, as it seems to the Chair, raises the question of high constitutional privilege, namely, touching the questioning of the Representative from Arkansas, Mr. Macon, in another place than in a session of the House.

The gentleman from Illinois, Mr. Mann, makes the point of order that, even if it be a question of privilege, this is a day especially set apart by the rules for the Unanimous Consent Calendar, Discharge of Committee Calendar, and Suspension Calendar. The Chair has no hesitation in holding that when a constitutional privilege, affecting a Member of this House, is presented, and affecting the freedom of debate in the House, it takes precedence of any other business affected by any rule that the House has made or can make governing its order of business.

The resolution was then amended and agreed to, as follows:

Resolved, That the matter brought to the attention of the House by the gentleman from Arkansas (Mr. Macon) be referred to the Committee on the Judiciary, with authority to send for persons and papers and to proceed, by subcommittee or committee, to examine witnesses upon oath, and with instructions to report not later than February 18, 1911.

On February 9 the Speaker laid before the House a letter of apology from Walter J. Fahy, which was referred to the Committee on the Judiciary.

On February 15,[1] Mr. Wayne R. Parker, of New Jersey, submitted the report of the committee, recommending the adoption of the following resolution, which was agreed to without debate or division:

Resolved, That Walter J. Fahy did, on the fourth day of February, nineteen hundred and eleven, commit a breach of the privileges of the House of Representatives, and that he be excluded from the House of Representatives and from all privileges therein for ten days.

554. A question of privilege is in order after the House has voted to resolve into Committee of the Whole, the Speaker being still in the chair. A question of privilege may not interrupt a roll call.

On April 29, 1918,[2] the House agreed to a motion to resolve into the Committee of the Whole House on the state of the Union for the consideration of the war metals bill.

After the result of the roll call had been announced but before the Speaker had left the chair, Mr. Britten, of Illinois, claimed the floor for a question of privilege.

Mr. Otis Wingo, of Arkansas, made the point of order that the House having voted to go into the Committee of the Whole, it was too late to present a question of privilege.

The Speaker[3] replied that a question of privilege took precedence over all other business and was in order at any time except during roll call, and recognized Mr. Britten.

555. A statement by a Member in debate that he would "need a crooked spine to walk in the crooked paths" in which a colleague would lead him was ruled not to entitle the latter to recognition on a question of privilege.

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[1] House Report No. 2167.

[2] Second session Sixty-fifth Congress, Journal, p. 347; Record, p. 5774.

[3] Champ Clark, of Missouri, Speaker.

A question of personal privilege takes precedence over matters merely privileged under the rules and is in order following the adoption of a resolution granting privilege to motions to resolve into Committee of the Whole.

On March 4, 1927,[1] the House agreed to the resolution (H. Res. 447) giving precedence to motions making it in order to move to resolve into the Committee of the Whole for the consideration of the bill (S. 3896) to amend the merchant marine act, when Mr. Albert Johnson, of Washington, demanded recognition to speak to a question of personal privilege.

Mr. Thomas L. Blanton, of Texas, made the point of order that questions of privilege were not in order after the adoption of the resolution.

The Speaker[2] declined to entertain the point of order, and Mr. Johnson submitted in support of his claim to the floor the following excerpt from a speech made by Mr. John C. Box of Texas, in the House on the preceding day:

I would hate to be a sheep and have the gentleman from Washington for a shepherd. I would need a crooked and weak spine to walk in all the crooked paths in which he would lead me.

Mr. Tom Connally, of Texas, objected that the remarks complained of did not impute any personal reflection on which a question of privilege could be based.

The Speaker sustained the point of order and said:

The Chair has read this language carefully several times. The Chair does not think that it raises a question of privilege. He does not think there is any imputation upon the standing of the gentleman from Washington as a Member. It occurs to the Chair that the word "crooked" there simply refers to a path, and not to the gentleman from Washington.

There is much latitude allowed in debate. In the opinion of the Chair the gentleman from Texas did not impute anything dishonorable to the gentleman from Washington. The Chair sustains the point of order.

556. A Member rising to a question of privilege was recognized in preference to the Member in charge without inquiry as to the purpose for which the latter rose.

On August 7, 1919,[3] Mr. Frank W. Mondell, of Wyoming, the majority leader, addressed the Chair. Simultaneously Mr. Thomas L. Blanton, of Texas, claimed the floor for a question of privilege.

The Speaker[4] said:

The gentleman from Texas rises to a question of personal privilege. The Chair thinks that takes precedence.

557. Although a Member had been recognized to present a privileged report from the Committee on Ways and Means, a question of privilege was given precedence.

On August 5, 1919,[5] Mr. Joseph W. Fordney, of Michigan, from the Committee on Ways and Means was recognized to submit a privileged report from that committee, when Mr. William L. Igoe, of Missouri claimed the floor for a question of privilege.

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[1] Second session Sixty-ninth Congress, Record, p. 5936.

[2] Nicholas Longworth, of Ohio, Speaker.

[3] First session Sixty-sixth Congress, Record, p. 3701.

[4] Frederick H. Gillett, of Massachusetts, Speaker.

[5] First Session Sixty-sixth Congress, Record, p. 3662.

The Speaker [1] recognized Mr. Igoe, who proceeded to address the House relative to a newspaper statement—

that the Speaker, in explaining his action, said that he "did not intend that one man, Igoe, should bulldoze the House."

Mr. Frank W. Mondell, of Wyoming, made the point of order that Mr. Igoe was not discussing a matter of personal privilege.

The Speaker said:

Inasmuch as the matter affects what the Speaker is reported to have said, the Speaker, of course, is going to be very liberal and will hold that it is a matter of personal privilege.

558. A motion raising a question relating to the privilege of the House was held to take precedence over a special order.

On November 10, 1919,[2] the House was considering the resolution (H. Res. 6) declaring Victor L. Berger, of Wisconsin, ineligible to take the oath of office as a Member of the House. Under a special order providing for five and one-half hours debate, certain time was allotted to Mr. Berger. At the conclusion of Mr. Berger's remarks, Mr. William W. Rucker, of Missouri, moved that the remarks be excluded from the Record.

Mr. Frederick W. Dallinger, of Massachusetts, made the point of order that under the special order debate continued for five and a half hours and therefore Mr. Rucker's motion was not then in order.

The Speaker [3] held that the motion raised a question of the privilege of the House and took precedence over the special rule.

559. A Member proposing a resolution relating to the privilege of the House was recognized in preference to a Member requesting recognition to call up a conference report.

On March 11, 1924 [4] Mr. Finis J. Garrett, of Tennessee, submitted as privileged a resolution (H. Res. 217) providing for an investigation by a select committee of certain charges against two Members of the House.

Mr. Louis C. Cramton, of Michigan, asked recognition to call up the conference report on the Interior Department appropriation bill.

The Speaker,[3] after expressing doubt as to the relative privilege of the conference report and the resolution, held that the resolution involved the privilege of the House and recognized Mr. Garrett.

560. A question of privilege has precedence at a time set apart by special order for other business.

The question of consideration may be raised on a question involving the privilege of the House.

A resolution presenting a question of privilege may be laid on the table.

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[1] Frederick H. Gillett, of Massachusetts, Speaker.

[2] First session Sixty-sixth Congress, Record, p. 8236.

[3] Frederick H. Gillett, of Massachusetts, Speaker.

[4] First session Sixty-eighth Congress, Record, p. 3995.

On August 20, 1921,[1] during the consideration of the revenue bill under a special order adopted by the House, Mr. W. Bourke Cochran, of New York, claimed the floor for a question of privilege, and proposed to present a resolution relating thereto.

Mr. James R. Mann, of Illinois, submitted that, under the special order under which the House was proceeding, no business could be transacted until the pending bill was disposed of, and a question of privilege was not then in order.

The Speaker[2] said:

> This is a question for the Chair to decide. It has been held constantly that questions of privilege may be presented at any time, and the Chair finds in the precedents one case which it seems to the Chair cannot be distinguished from this, where in the House a certain time was set apart by a rule for the business of the House, but a question of privilege was brought in, and it was allowed, on the theory that the rights and privileges of the House and its Members take precedence of everything else. If the House wishes to consider it, any person who thinks it is a proper time to bring it up has the right and the Chair feels constrained to rule that it is a question of privilege of the House the gentleman brings up, he has the right to present it.

Thereupon Mr. Joseph Walsh, of Massachusetts, raised the question of consideration.

The Speaker held that the question of consideration was in order, but before it could be raised the resolution should be reported.

The resolution was read by the Clerk, when Mr. Frank W. Mondell, of Wyoming, moved to lay the resolution on the table.

Mr. Cochran made the point of order that the motion to table could not be applied to a resolution relating to the privilege of the House.

The Speaker overruled the point of order and, the question being taken, the motion was agreed to and the resolution was laid on the table.

561. Although the previous question had been ordered on a pending resolution, it was held that a question of privilege might be debated.

A Member may present a question of privilege involving words spoken in debate notwithstanding the rule affording another method of procedure under such circumstances.

On December 12, 1912,[3] the House was considering the contested election case of McLean *v.* Bowman. The previous question had been ordered on the resolution offered by Mr. S. F. Prouty, of Iowa, as a substitute for the resolution (H. Res. 687) recommended by the Committee on Elections No. 1, when Mr. A. Mitchell Palmer, of Pennsylvania, claimed the floor for a question of privilege based on personal references made in debate by Mr. John R. Farr, of Pennsylvania.

Mr. James R. Mann, of Illinois, submitted that the proper procedure under the circumstances was to demand that the words objected to be taken down under the rule, and a question of privilege was not involved.

The Speaker[4] said:

> It seems to the Chair it would be an outrageous decision to hold that a man can stand here as a Member and say anything he happens to think of about another Member and the one who is

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[1] First session Sixty-seventh Congress, Journal, p. 436; Record, p. 5356.

[2] Frederick H. Gillett, of Massachusetts, Speaker.

[3] Third session Sixty-second Congress, Journal, p. 52; Record, p. 549.

[4] Champ Clark, of Missouri, Speaker.

assaulted shall not have personal privilege of replying. That is a general rule. If the gentleman, Mr. Palmer, will state what the other gentleman from Pennsylvania, Mr. Farr, said, then the Chair will rule whether it is a question of personal privilege.

Thereupon Mr. Mann made the further point of order that the previous question having been ordered Mr. Palmer could not be recognized to present a question of privilege until the vote was taken on the pending resolution.

The Speaker said:

The only question in deciding this point of order is whether, the previous question having been ordered on this contest, it brings the transaction to such a conclusion that the gentleman will have to wait until the House gets through voting. That is the point of order last made by the gentleman from Illinois, Mr. Mann.

The Chair is of the opinion that if there is a question of personal privilege involved the gentleman ought to be heard on it, notwithstanding the fact that the previous question has been ordered on the pending resolutions.

562. Having presented one question of privilege, a Member, before discussing it, may submit a second question of privilege related to the first and discuss both on one recognition.

Newspaper statements that Cabinet members regard the official acts of a Member as a nuisance do not present a question of privilege.

The application of epithets which subject a Member to ridicule give rise to a question of privilege.

Assertions in a circular letter that a Member has broken faith with his constituents involve a question of privilege.

On June 14, 1919,[1] Mr. Thomas L. Blanton, of Texas, presented, as involving a question of privilege, an extract from a newspaper article, which he read, as follows:

The Cabinet officials make no secret of the fact that they regard the Blanton resolutions as a nuisance.

Mr. Finis J. Garrett, of Tennessee, submitted that the extract did not constitute a question of privilege. The Speaker pro tempore[2] Sustained the point of order.

Mr. Blanton then submitted, as involving a question of privilege, the following paragraph from another paper:

He then took occasion to refer to Representative Blanton, of Texas, as "Bleating Blanton" for remarks the Congressman recently made.

"As time goes on," said Mr. Gompers, "Blanton will be eliminated or left at home, as others of his stamp have been."

Mr. James B. Aswell, of Louisiana, raised the point of order that the quotations submitted did not present a question of privilege.

The Speaker pro tempore said:

The Chair will state that the reference to the gentleman from Texas in the newspaper article as "a man of his stamp," in the Chair's opinion, does not present a question of personal privilege. The reference to the gentleman from Texas as "Bleating Blanton" might be considered a reference which would hold the gentleman up to ridicule and contempt, and, although the question is rather close, the Chair is inclined to rule that the gentleman has stated a question of personal privilege in the characterization of the article as referring to him as "Bleating Blanton." The gentleman will proceed and confine his remarks to that characterization.

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[1] First Sixty-Sixth Congress, Record p. 1102.

[2] Joseph Walsh, of Massachusetts, Speaker pro tempore.

Mr. Blanton then proposed to present, as related to the question already submitted and pending, the following excerpt from a circular letter mailed to newspapers from a departmental bureau—

Asserting that Congressman Blanton has broken faith with his constituents, and, despite his promises to support an appropriation for the United States Employment Service, he has killed it in the House on a point of order.

Mr. Clifton N. McArthur, of Oregon, made the point of order that only one question could be pending at a time, and a second question of privilege was not in order until the first had been disposed of.

The Speaker pro tempore overruled the point of order and recognized Mr. Blanton.

In response to an inquiry from Mr. Blanton, the Speaker pro tempore added:

The words charge the gentleman with a breach of faith, and the Chair thinks the gentleman has presented a question of personal privilege, and the gentleman will proceed.

563. A Member recognized to present a question of privilege based on a telegram was permitted to discuss subjects indirectly referred to in a resolution mentioned in the telegram.

A Member recognized to discuss a question of privilege may not yield for debate.

The statement in a telegram, published in a newspaper, that a resolution introduced by a Member was "a tissue of misrepresentation" was held to involve a question of personal privilege.

On May 6, 1909,[1] Mr. Arthur P. Murphy, of Missouri, rose to a question of privilege and stated that he had recently introduced in the House a resolution relating to the 2-cent passenger fare litigation in Missouri, and then read a telegram from an attorney representing litigants in the case, which included the following:

Representative Murphy's resolution about the Missouri Rate case is an outrageous tissue of misrepresentation by one who has no knowledge of the facts.

Mr. Henry D. Clayton, of Alabama, made the point of order that no question of personal privilege was presented.

The Speaker[2] held that the communication reflected upon the Member in his representative capacity and recognized Mr. Murphy.

During his discussion of the question of privilege Mr. Murphy proposed to yield to Mr. William W. Rucker, of Missouri, for a corroborating statement, when Mr. Sereno E. Payne, of New York, made the point of order that in addressing himself to a question of privilege a Member may not yield for debate. The Speaker sustained the point of order.

Mr. Payne made the further point of order that in debating the question of privilege Mr. Murphy was referring to incidents attending the trial of the rate cases, which were not mentioned in either the telegram or the resolution on which the question of privilege was premised.

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[1] First session Sixty-first Congress, Record, p. 1801.

[2] Joseph G. Cannon, of Illinois, Speaker.

The Speaker said:

The Chair understands the gentleman from New York to make the point of order that the remarks of the gentleman from Missouri are not the question of privilege that arises from his resolution, and would not arise were it not for the telegram which the Chair now holds in his hand. The Chair has hastily glanced at the resolution, and will read the telegram. This is a telegram to the Attorney General. The telegram is very broad:

"Representative Murphy's resolution about the Missouri Rate case is an outrageous tissue of misrepresentation by one who has no knowledge of the facts."

It clearly refers to that part of the resolution touching the rate cases. The resolution is broader than the rate cases, somewhat general in its terms. But the telegram is also broad. The gentleman's resolution is broad; the telegram is broad. The gentleman is familiar with his resolution and with the telegram. The gentleman will proceed in order.

564. A roll call may not be interrupted for the presentation of a question of privilege.

March 1, 1919,[1] during a roll call on the adoption of a resolution offered as a substitute for the resolution reported by the Committee on Elections No. 3 in the contested election case of Britt *v.* Weaver, Mr. Martin Dies, of Texas, claimed the floor on a question of privilege.

Mr. James R. Mann, of Illinois, made the point of order that a roll call may not be interrupted by the presentation of a question of privilege.

The Speaker[2] sustained the point of order.

565. In presenting a question involving the privilege of the House the Member is required in the first instance to make a motion or offer a resolution, but not in presenting a question of personal privilege.

A question of privilege takes precedence over business in order under the rule on "suspension day."

A resolution condemning an official act of the Speaker was decided by the House not to involve a question of privilege.

A quorum is presumed to be present unless it is otherwise determined and it is not necessarily the function of the Speaker to ascertain the presence of a quorum unless the point is raised.

The Speaker called a Member to the chair during consideration of a resolution criticizing his official conduct.

Instance in which a question of procedure was submitted by the Speaker to the House, which overruled his former decision.

On April 20, 1908,[3] immediately following the reading and approval of the Journal, Mr. John Sharp Williams, of Mississippi, addressed the Speaker and announced that he desired to be heard on a question involving the privilege of the House.

In response to an inquiry from the Speaker as to whether he proposed to offer a resolution thereon, Mr. Williams said:

It is not easily susceptible of a resolution. It is a question concerning the privilege of the House under Rule IX.

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[1] Third session Sixty-fifth Congress, Record, p. 4803.

[2] Champ Clark, of Missouri, Speaker.

[3] First session Sixtieth Congress, Journal, p. 760, Record, p. 4972.

If the Chair will permit me to state the question, I think the Chair will agree with me it is almost impossible to put it specifically in the shape of a resolution.

The Speaker [1] held:

The gentleman can proceed by unanimous consent without a resolution, but under the rules the question of the privilege of the House requires a resolution. A question of personal privilege to the Member does not.

Mr. Williams continued:

Does the Chair decline to let me state what the question of privilege, in my opinion, is before arguing? The power of recognition is within the discretion of the Chair. If the Chair will recognize me to state——

The Speaker said:

Not on a question of privilege of the House. That is a question of the highest privilege and under the rules requires a resolution.

Whereupon Mr. William submitted the following:

Resolved, That the action of the Speaker of the House of Representatives in adjourning the House on Saturday, April 18, 1908, was a breach of the privileges of the House affecting its safety, dignity, and the integrity of its proceedings.

Mr. Sereno E. Payne, of New York, having raised the point of order that the resolution did not present a question of privilege, the Speaker overruled the point of order and called Mr. John Dalzell, of Pennsylvania, to the chair.

On motion of Mr. Payne, the resolution was laid on the table, yeas 148, nays; 119.

565a. On April 18, 1910,[2] the Speaker directed the Clerk to read the Journal of the proceedings of the previous day, when Mr. Robert L. Henry, of Texas, claimed the floor and offered as involving the privilege of the House the following resolution:

Resolved, That the action of the Speaker in refusing each day to ascertain the appearance of a quorum before the reading of the Journal of proceedings of the previous day is in violation of the mandatory provisions of Rule I, subdivision 1, and other rules, and subject to objection, and he is hereby instructed to enforce the mandates of said rule.

Mr. Sereno, E. Payne, of New York, made the point of order that the resolution did not present a question of privilege.

Mr. Martin E. Olmsted, of Pennsylvania, made the further point of order that, under paragraph 3 of Rule XIII, the consideration of bills on the Unanimous Consent Calendar was in order and might not be displaced by a question of privilege.

The Speaker [3] said.

The Chair, on this unanimous-consent and committee suspension day, desires to consume as little time as possible in disposing of this resolution. The rule referred to and read by the gentleman from Pennsylvania [Mr. Olmsted] on the point of order made by the gentleman from New York [Mr. Payne] is mandatory in its language, that on this day, Monday, the House shall, immediately

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[1] Joseph G. Cannon, of Illinois, Speaker.

[2] Second session Sixty-first Congress, Journal, p. 579; Record, p. 4900.

[3] Joseph G. Cannon, of Illinois, Speaker.

after the approval of the Journal, proceed to the consideration of bills on the Unanimous Consent Calendar.

The resolution which the gentleman submits reads as follows:

"Resolved, That the action of the Speaker in refusing from day to day to ascertain the appearance of a quorum before the reading of the Journal of proceedings of the previous day is in violation of the mandatory provisions of Rule I, subdivision 1, and other rules, and subject to objection, and he is hereby instructed to enforce the mandates of said rule."

Now, the rule to which the gentleman referred reads as follows:

"The Speaker shall take the chair on every legislative day precisely at the hour to which the House shall have adjourned at the last sitting, immediately call the Members to order, and on the appearance of a quorum cause the Journal of the proceedings of the last day's sitting to be read, having previously examined and approved the same."

Now, the following note appears to that rule:

"This rule was adopted in 1789 and perfected in 1811 and 1824."

But the part to which the gentleman referred was adopted in 1789, one hundred and twenty years ago. In all that time the question that the gentleman from Texas raises has never been raised in any Congress by any Member.

Now, the Speaker assumes the presence of a quorum. At that time and at all other times under the universal practice of the House in all the history of the Republic the Speaker has never assumed otherwise. Now, before the Journal is read, after the Journal is read, or at any time, it is within the power of any one of the 391 Members of the House to suggest the absence of a quorum. And the Chair has never found a precedent, and, in fact, there is no precedent, of any Speaker ever having refused to proceed as the rules provide to ascertain the presence of a quorum, except in the case of a mere dilatory proceeding, where a quorum was, in fact, present. And whenever the gentleman from Texas [Mr. Henry] or anyone else has, before the reading of the Journal, raised the question of the absence of a quorum, the Chair has immediately proceeded under the rule to ascertain whether or not a quorum was present. So the Chair has not refused, as the resolution says, to ascertain the presence of a quorum.

The gentleman from Texas calls attention to the index, which reads:

"A resolution condemning an official act of the Speaker was offered and submitted as a matter of privilege. (60th Cong., 1st., pp. 4972, 4974; from the old Digest.")

The Chair has the Record showing the resolution that was offered, and the disposition made of it by the House. Mr. Williams offered the following resolution:

"Resolved, That the action of the Speaker of the House of Representatives in adjourning the House on Saturday, April 18,1908, was a breach of the privileges of the House, affecting its safety, dignity, and the integrity of its proceedings."

Mr. Payne moved to lay the resolution on the table.

The conditions then existing will be recollected by the House, as it was during the famous filibuster that was led in the Sixtieth Congress for many weeks by the gentleman from Mississippi [Mr. Williams], then minority leader. If this were an original question, the Chair might well question whether it presents a question of privilege, but the Chair, under the then conditions, held that it did present a privileged question. The motion was made and the resolution was laid on the table. And as this resolution affects the conduct of the Chair, the Chair prefers to treat it as a question of privilege to the extent of submitting it to the House.

Thereupon the Speaker submitted to the House the question, as follows:

Does the resolution presented by the gentleman from Texas [Mr. Henry] involve a question of the privileges of the House? As many as are of the opinion that the resolution involves such question of privilege will say "aye," and those opposed will say "no."

The yeas and nays being demanded by Mr. Henry, and ordered, it was decided in the negative, yeas 120, nays 162.

So the House decided that the resolution did not present a question of privilege.

566. In presenting a question of personal privilege a Member is not required to offer a motion or resolution, but must take this preliminary step in raising a question involving the privilege of the House.

Strictures in newspaper articles, however severe, do not present a question of privilege unless directed against a Member in his representative capacity.

A newspaper reference to Members as "demagogues" does not warrant the raising of a question of privilege.

On February 19, 1917,[1] Mr. J. Hampton Moore, of Pennsylvania, presented, as involving a question of privilege, a newspaper editorial referring to Members of Congress as "demagogues."

The Speaker asked if the question related to the privileges of the House or to a matter of personal privilege, and explained that if it related to the former it would be necessary to offer a resolution; if to the latter, no resolution was required.

Mr. Moore read extracts from the editorial, and Mr. Swagar Sherley, of Kentucky, made the point of order that a question of privilege was not involved.

Mr. Moore retorted that the statements read were untrue and he desired to reply to them.

The Speaker[2] said:

> A reply is one thing and a question of privilege is another. The rule is this: A newspaper can print all sorts of things about a Member personally; but if the charge is as to his conduct as a Member of the House, that makes it a question of privilege.

567. On February 13, 1917,[3] Mr. J. Hampton Moore, of Pennsylvania, claiming the floor for a question of privilege, proceeded to read remarks printed in the Congressional Record of February 9, under leave, by Mr. Oscar Callaway, of Texas, charging that English interests had purchased control of newspapers in the United States and through them were attempting to influence Congress in favor of the Allies.

Mr. John N. Garner, of Texas, made the point of order that a question of privilege was not presented.

The Speaker[4] inquired if the question presented was one of personal privilege or of the privilege of the House, and upon Mr. Moore's statement that it related to the latter, held that a question of privilege of the House could be presented only through the submission of a resolution. Thereupon Mr. Moore proceeded by unanimous consent.

568. Questions of the privileges of the House are raised by presentation of resolutions.

Proceedings in the Senate reflecting on the dignity of the House or affecting the comity between the Houses were held to justify a resolution calling the attention of the Senate to the infringement of the rule.

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[1] Second session Sixty-fourth Congress, Record, p. 3618.

[2] Champ Clark, of Missouri, Speaker.

[3] Second session Sixty-fourth Congress, Record, p. 3216.

[4] Champ Clark, of Missouri, Chairman.

While it is in order to discuss proceedings of conference committees, it has been held improper to criticize the conferees of the other House in such a manner as to reflect on them in their official capacity.

It is not in order in debate to criticize Members of the other body, but such rule does not apply to criticism of statements made by Members of the other body outside the Chamber.

On June 8, 1929,[1] in the Senate, during consideration of the conference report on the bill (H. R. 1) to establish a Federal Farm Board to promote the effective merchandizing of agricultural commodities in interstate and foreign commerce, and to place agriculture on a basis of economic equality with other industries, Mr. Kenneth McKellar, of Tennessee, said:

As I understood the Senator a few moments ago, it is his judgment, after this conference, that the sole reason actuating the members of the conference committee on the part of the House in not submitting the debenture plan to the House was the desire to relieve Members of the House of the embarrassment which would come from voting on the debenture plan.

On the following legislative day[2] Mr. Edward E. Denison, of Illinois, rising to a parliamentary inquiry, cited sections 364 and 301 of Jefferson's Manual and proposed to read from the Record the statement made by Mr. McKellar in the Senate on the preceding legislative day, when Mr. John N. Garner, of Texas, interposed the point of order that the gentleman was violating the very rule which he had just read and his reference to debate in the Senate was not in order.

The Speaker[3] ruled:

As the Chair understands the custom, questions of the privileges of the House are raised by the presenting of a resolution. The Chair has been listening to the gentleman to find out whether his remarks were introductory to the offering of a resolution.

If the gentleman will pardon the Chair for a moment, it seems to the Chair that so far this proceeding has been quite irregular.

The attention of the House has not been called to any specific thing upon which to base a question of privilege of the House. Of course, the gentleman may propound a parliamentary inquiry any time he sees fit; but if we are proceeding now on a question of the privilege of the House, the Chair thinks his attention should be called to a specific subject and that the remedy should be offered at the same time.

It is almost the invariable custom in the House, where a question of privilege of the House is raised, to proceed by resolution.

The Chair thinks that the House may at any time, when in its opinion the Senate has violated or reflected on the dignity of the House or brought up questions that would affect the comity between the Houses, it would be in order to offer a resolution respectfully calling the attention of the Senate to the matter to which it took exception.

In response to an inquiry by Mr. Denison as to whether the matter could be referred to the Committee on Rules, the Speaker continued:

The Chair thinks it would be in order to refer such a resolution to the Committee on Rules, but would doubt the propriety of such a course in instances like these. The Chair thinks that would go further in destroying amity between the Houses. The Chair thinks the only thing the House could do, if in its opinion certain things said in another body reflected on the dignity of the

[1] First session Seventy-first Congress, Record, p. 2565.

[2] First session Seventy-first Congress, Record, p. 2617.

[3] Nicholas Longworth, of Ohio, Speaker.

House and threatened to destroy friendly feeling between the two bodies, would be to send a resolution to the other body calling attention to that fact, and nothing more; then the other body could take such action as it saw fit.

Replying to a further inquiry as to propriety of calling the attention of the House to passages in the Record submitted as violating the rule, the Speaker reiterated:

The Chair thinks the gentleman can not call the attention of the House to such matters unless they are based on a resolution. Then it would be for the House to decide whether it desired to call the attention of the Senate to those remarks or not.

Mr. Denison then inquired:

I desire to present this parliamentary inquiry: Does the rule to which I have been referring make it improper to criticize in either Chamber the conferees that are appointed by the other Chamber on account of what they say or do in the performance of their duty as conferees? When conferees are appointed to manage the conference on the part of the respective Chambers, they are usually appointed at the request of the other Chamber and are performing the duties of their respective Chambers. They are representing their respective Chambers. If it is improper to criticize in one Chamber the actions or the words of Members of the other Chamber, I propose the inquiry to the Speaker whether or not that rule would apply to the actions and the words of the representatives of the Chambers when they are engaged in their business in the conference for which the two Houses have appointed them.

The Speaker replied:

The Chair thinks that if reference be made to the proceedings of conferees on the part of another House which tend to reflect upon them, such reference would not be in order, but the mere discussion of the proceedings the Chair thinks would be in order.

Of course, the trouble the Chair finds himself in is upon the question whether such criticism was made. Generally speaking, all the Chair can say, until his attention is called to some specific instance, is that it is not proper for Members of either House to criticize Members of the other House, either on the floor or as members of a conference committee. Before ruling any further on the question the Chair thinks the gentleman from Illinois ought to introduce a resolution and call attention to the remarks of which he complains, and it will then be for the House to decide whether or not those remarks invade the rule of comity between the two Houses; and if so, the House may then send a resolution to the Senate respectfully calling the attention of the Senate to that fact.

569. In presenting a question involving the privilege of the House, a Member is required to submit a resolution before proceeding in debate.

While a question relating to the privilege of the House may be raised by any Member, a question of personal privilege may be raised only by the Member to whom it relates.

A newspaper article criticizing a Member personally and not in his representative capacity does not present a question of privilege.

On February 8, 1923,[1] Mr. Manuel Herrick, of Oklahoma, presented, as a question of personal privilege, a newspaper article relating to personalities.

The Speaker[2] held that as it did not attack the gentleman in his representative capacity, no question of privilege was presented.

Thereupon Mr. Thomas L. Blanton, of Texas, submitted that the article involved the privilege of the House. The Speaker sustained a point of order by Mr. Everett Sanders, of Indiana, that such question must be presented by resolution.

[1] Fourth session, Sixty-seventh Congress, Journal, p. 196; Record, p. 3266.

[2] Frederick H. Gillett, of Massachusetts, Speaker.

Mr. Blanton then submitted, further, that the article ridiculed a Member of the House and claimed the floor for a question of personal privilege relating to Mr. Herrick.

The Speaker said:

Any Member of Congress has the right to raise the question of privilege of the House. Any gentleman has the right to raise the question of his own privilege, but the Chair is not aware of any precedent where one gentleman can rise to a question of personal privilege respecting another gentleman.

Mr. Blanton appealed from the decision of the Chair. On motion of Mr. Frank W. Mondell, of Wyoming, the appeal was laid on the table.

570. Vague charges in newspaper articles have not been entertained as questions of privilege.

A Member has the right to withdraw a resolution before a decision thereon, and may modify the proposition in the House, but not in the committee.

On March 7, 1924,[1] Mr. Thomas L. Blanton, of Texas, offered as involving a question of the privilege of the House, the following:

Whereas the Star, Times, and News, published in Washington, D.C., yesterday afternoon, and the Post, published this morning, all state that when arrested near the House Office Building one B. F. Dorsey had in his possession a half-gallon jug of whisky which he claimed he had procured for and was taking to a Congressman in said House Office Building, where he claimed to be employed: Therefore be it

Resolved, That the said B. F. Dorsey be directed to transmit to the House of Representatives the name of the Congressman whom he alleges he procured said whisky for, and instructions, if any, that were given him by such Congressman.

The resolution having been read by the Clerk, Mr. Blanton asked to amend the last paragraph to read as follows:

Resolved, That the Speaker appoint a special committee of five Members of the House to investigate as to the truth or falsity of these charges and report back to the House at the earliest possible moment.

Mr. Nicholas Longworth, of Ohio, objected, and argued that the resolution could be modified only by consent of the House.

The Speaker[2] said:

In committee he has not, but in the House the gentleman has the right to modify his resolution.

Mr. Bertrand H. Snell, of New York, made the point of order that the resolution did not present a question of privilege.

The Speaker sustained the point of order and said:

Of course, the Chair always wishes, as the membership undoubtedly wishes, to protect the privileges of the House, but the Chair is disposed to think that the citations made by the gentleman from New York [Mr. Snell], stating that vague rumors or accusations against the House do not constitute privilege, are applicable here. This is simply a statement by an individual whom the gentleman from New York says is not an employee of the House endeavoring to excuse himself from a breach of the law by implicating a Member of the House. The Chair does not think this is such a charge against the dignity of the House as to make it privileged. The Chair sustains the point of order.

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[1] First session Sixty-eighth Congress, Record, p. 3773.

[2] Frederick H. Gillett, of Massachusetts, Speaker.

Chapter CCIV.[1]

PRIVILEGE OF THE HOUSE.

571. A resolution alleging that the rights and dignity of the House have been invaded by the Executive presents a question of privilege.

On February 23, 1909,[2] Mr. Frank Clark, of Florida, claiming the floor for a question of privilege, submitted the following:

Whereas on the 26th day of January, A. D. 1909, this House of Representatives being then in session at the Capitol, and having under consideration in Committee of the Whole House on the state of the Union H.R. 26305, in "general debate," the Hon. Henry T. Rainey, a Representative in the Congress of the United States from the State of Illinois, then and there delivered from his place on the floor of the House an address in which he discussed the manner in which the Government of the United States acquired rights on the Isthmus of Panama, with relation to the proposed canal across said Isthmus; the manner of consummating the contract for the purchase of the canal property; the conduct of certain persons, official and nonofficial, connected therewith; and the general subject of the acquirement, construction, and management of the said Panama Canal, as well as the acts and doings of the said persons in and about the same; and

Whereas on the 29th day of January, A. D. 1909, in the open session of the House of Representatives, the same being in Committee of the Whole House on the state of the Union, and having under consideration in "general debate" H.R. 26915, the said Hon. Henry T. Rainey, a Representative as aforesaid, again further addressed the House in Committee of the Whole as stated, on the subject aforesaid, and in continuation of his address so delivered as aforesaid on the said 26th day of January, A. D. 1909; and

Whereas on the 9th day of February, A. D. 1909, the Hon. Robert Bacon, Secretary of State of the United States, caused to be composed, written, printed, and published in certain and numerous newspapers, which are published in the city of Washington and elsewhere throughout the United States, and which are of general circulation in the United States and elsewhere, as well as making the same by filing therein a part of the permanent records of the State Department of the United States, a certain document alleged to be in reply to a communication said to have been

[1] Supplementary to Chapter LXXXI.

[2] Second session Sixtieth Congress, Record, p. 2950.

received by him, the said Hon. Robert Bacon, Secretary of State as aforesaid, and to have been written by some official of the Government of the Republic of Panama, taking exception to and complaining of the said addresses of the said Hon. Henry T. Rainey, a Representative as aforesaid, in behalf of his Government, the said Republic of Panama, and which said document so composed and published by the said the Hon. Robert Bacon, Secretary of State as aforesaid, as the same was published and appeared in the Washington Post, a daily newspaper published at the city of Washington, D.C., in its issue of the 10th day of February, A. D. 1909, and which said newspaper has and enjoys a wide circulation throughout the United States, was and is as as follows, viz:

"SIR: The President directs me to say in answer to your communication of February 9, 1909, that the remarks complained of were made in the House of Representatives. Under our Constitution we have, for what we regard wise reasons, provided that for any speech or debate in either House they (the Senators and Representatives) shall not be questioned in any other place.

"This provision we regard as essential to secure full liberty of speech to the elected representatives of the people; and we feel that such liberty of speech should be preserved even though it may occasionally be abused.

"It ought to be understood that the utterances of individual Members are not to be taken as expressing the views either of the Government of the United States or the House in which such remarks are made. As regards the statement in question made by Representative Rainey, the President attached so little importance to him that he had not even read them until your protest came. He has now read them, and none of them concerning which he has knowledge have any foundation in fact.

"The President wishes me to recall to your attention that the attack was made even more upon Americans, including the President-elect, than upon the officials of Panama. The President need hardly say that this Government disavows all responsibility for the remarks of Representative Rainey, to which you refer.

"Accept, sir, the renewed assurance of my high consideration.

"ROBERT BACON."

Now, therefore, be it resolved:

First, That the matter of the said communication of the said the Hon. Robert Bacon, Secretary of State of the United States, to the said official of the Government of the Republic of Panama and a matters connected therewith, be, and the same is hereby, referred to the Committee on the Judiciary of the House of Representatives for the careful consideration of the said committee to determine:

(1) If the said communication of the said Hon. Robert Bacon, Secretary of State as aforesaid, constitutes a breach of the privileges of a Member of the House and of the House, violating either in letter or spirit section 6 of Article I of the Constitution of the United States, where it is provided that a Representative in Congress "shall not be questioned in any other place" for "any speech or debate" in the House.

(2) If there has been such violation, what remedy, if any, exists.

(3) If there has been such violation and it is found that no remedy exists, to suggest some plan to prevent such violations and to punish them in the future.

Second, That the said Committee on the Judiciary make full report herein to the House of Representatives within five days from the reference to said committee of this resolution.

Mr. Jesse Overstreet, of Indiana, made the point of order that the resolution did not present a question of privilege.

The Speaker [1] said:

The Chair has listened carefully to the reading of the preamble and the resolution. It seems to the Chair that if a question of privilege be presented at all by this resolution, it is presented in the communication by the Secretary of State by direction of the President to another government. It is true that a Member of the House shall not be called in question in the performance of his duty. As to what is meant by being "called in question" is a matter that the House must

[1] Joseph G. Cannon, of Illinois, Speaker.

determine for itself when the matter is presented by proper resolution. The Chair takes it that a citizen might criticize the remarks of a Member of the House, from a friendly or an unfriendly standpoint, without violating the privileges of the House.

In this case neither the Secretary of State nor the President has sent any communication to the House. It has referred in answering the communication from a foreign government to the words spoken by a Member of the House. If the Secretary of State, as an individual, had made this criticism, the Chair thinks it is entirely possible that there would have been no question of privilege presented, or if in a newspaper editorial such a remark had been made touching the speech of a Member, the Chair very much doubts whether it would present a question of privilege.

There are some precedents, however, where more than one Speaker has submitted the matter to the House as to whether a question of privilege is stated in the resolution. The Chair prefers in this case not to pass upon the point of order, sustaining the same, but believes it would be better to take such action as it seems proper by overruling the point of order; and whether a question of privilege is involved, or even a shadow of a question of privilege, will be for the House to determine. Therefore, the Chair overrules the point of order.

On motion of Mr. Sereno E. Payne, of New York. the resolution was laid on the table, yeas 188, noes 121.

572. Consideration of a contested-election case presents a question of high privilege which takes precedence of a question involving the privilege of the House generally.

On May 27, 1922,[1] Mr. Royal Johnson, of South Dakota, claimed the floor for a question of privilege relating to the integrity of the procedure of the House.

Simultaneously, Mr. Robert Luce, of Massachusetts, from the Committee on Elections No. 2, asked for the consideration of the report of that committee on the contested-election case of Campbell *v.* Doughton.

The Speaker[2] said:

The gentleman from Massachusetts, Mr. Luce, is now claiming recognition for the purpose of presenting a contested election case.

According to endless precedents a contested-election case is the highest privilege of the House. Granting for the sake of argument that the contention of the gentleman from South Dakota is correct, it would certainly not give him the right to bring it up now in opposition to a contested-election case. Therefore, and on that account, the Chair declines to recognize the question of privilege.

573. A motion relating to the introduction of bills without authorization was entertained as a question of privilege.

On February 24, 1911,[3] Mr. James A. Hamill, of New Jersey, rose to a question of the privilege of the House and moved that the bills (H. R. 27838 and H.R. 27839) and the joint resolution (H. J. Res. 244), which had been introduced under his name without his sanction or knowledge, be stricken from the files of the House.

The Speaker[4] recognized Mr. Hamill to present the motion as a matter of privilege, and the question being taken, the motion was agreed to and the bills were stricken from the files of the House.

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[1] Second session Sixty-seventh Congress, Record, p. 7808.

[2] Frederick H. Gillett, of Massachusetts, Speaker.

[3] Third session Sixty-first Congress, Journal, p. 361; Record, p. 3311.

[4] Joseph G. Cannon, of Illinois, Speaker.

574. A resolution authorizing an investigation of the propriety of introducing bills in the name of more than one Member was held to involve a question of privilege.

On February 10, 1909,[1] Mr. John J. Fitzgerald, of New York, presented, as a question of privilege, the following preamble and resolution:

Whereas it appears from the Record of February 9, 1909, that House Resolutions Nos. 548 and 551 purport to have been introduced by a number of Members of the House; and

Whereas it is a question of serious doubt whether such a practice is in conformity with and is authorized under the parliamentary procedure governing the control and the conduct of the business of this House; and

Whereas it is desirable to determine whether bills or resolutions may be presented to the House in the name of more than one Member:

Resolved, That the Speaker be, and he is hereby, authorized and directed to appoint a select committee of five Members of the House to investigate and report as to the right of Members to present bills or resolutions as provided by the rules with the name of more than one Member of the House attached thereto.

The Speaker[2] recognized Mr. Fitzgerald to offer the resolution as privileged, and the House agreed to the resolution, on division, yeas 120, noes 6.

Whereupon, Mr. Charles L. Underhill, of Massachusetts, asked if the rule also applied to criticism on the floor of remarks made by Members of the other body outside the Chamber. The Speaker answered in the negative.[3]

575. A resolution proposing an investigation of improper reporting of bills by a committee of the House was entertained as raising a question of privilege.

An exceptional instance in which bills relating to the same subject and proposing the enactment of conflicting provisions of law were reported simultaneously with favorable recommendation, followed by announcement in reporting of a rule providing for their consideration that it was not to be taken as a precedent.

On April 29, 1926,[4] Mr. Clarence Cannon, of Missouri, rising to a question of the privilege of the House, offered the following resolution:

Whereas the Committee on Agriculture has reported simultaneously, with favorable recommendation, the bills H. R. 11603, H. R. 11606, and H. R. 11618, relating to the same subject, having the same purpose, and proposing the enactment of conflicting provisions of law; and

Whereas such action is without precedent, is not in conformity with the practice of this House, and is not authorized under the parliamentary procedure governing the control and conduct of the business of this House; and

Whereas a far-reaching question of parliamentary procedure is involved, and a precedent of this importance should not lightly be established, and it is therefore desirable to determine whether standing committees may report simultaneously for the consideration of the House more than one bill dealing with substantially the same subject matter:

Resolved, That the Speaker be, and he is hereby, authorized and directed to appoint a select committee of five Members of the House to investigate and report not later than April 30, 1926, as

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[1] Second session Sixtieth Congress, Record, p. 2150.

[2] Joseph G. Cannon, of Illinois, Speaker.

[3] Under the prevailing practice, it has been considered permissible to criticize on the floor statements of Members of the other body given to the press.

[4] First session Sixty-ninth Congress, Record, p. 8455.

to the right of a committee to report with favorable recommendation, under the provisions of the rules, more than one bill on the same subject, having in view the same purpose and proposing conflicting legislative enactments.

Mr. Carl E. Mapes, of Michigan, made the point of order that the resolution was not privileged.

The Speaker[1] overruled the point of order and held that the resolution presented a question of privilege and was entitled to immediate consideration.

Subsequently[2] Mr. Bertrand H. Snell, of New York, in reporting from the Committee on Rules a resolution providing for the consideration of bills referred to in the resolution, said:

Mr. Speaker, the rule just read by the Clerk is somewhat different from the average rule presented by the Rules Committee. Let me say in the beginning that I do not want this rule to be considered as a precedent. The Rules Committee has gone further in trying to meet the wishes of the Agricultural Committee than it has ever done since I have been a Member of this House. We have gone further than I think the committee would do on a report from any other committee in the House. We have done it because each Member is deeply interested in agriculture; we recognize it as a basic industry, and we are willing and anxious to do everything in our power to aid in passing legislation that will be a definite benefit to the agricultural interests of the country. It was for this reason that we have gone beyond the original precedents in drafting this rule for the consideration of this legislation.

576. Charges published as newspaper advertising that "Bad bills pass without reading" and "Steals are attempted" were held so to reflect upon the integrity of the proceeding of the House as to support a question of privilege.

A telegram reprinted in a newspaper charging that a Member had been influenced in his official acts by unworthy motives was held to involve a question of personal privilege.

In debating a question of personal privilege a Member may not discuss extraneous or irrelevant matters.

On June 2, 1930[3] following the administration of the oath to Mr. Thomas L. Blanton, of Texas, who had been elected to fill an unexpired term, Mr. Robert H. Clancy, of Michigan, submitted the following resolution as involving a question of the privilege of the House:

Resolved, That the paid advertisement appearing in the Abilene Daily Reporter, a newspaper of Abilene, Tex., on May 19, 1930, setting forth the following, vitally affects the rights of the House collectively, its dignity, and the integrity of its proceedings; and second, the rights, reputation, and conduct of Members, individually in their representative capacity:

"SERVICE OR SENTIMENT—VOTE MAY 20 FOR YEAR'S SERVICE—THE LAST FEW WEEKS OF EVERY SESSION OF CONGRESS

"Toward the close of each session of Congress many Members leave Washington. Those who remain become careless, with minds preoccupied with approaching campaigns and thoughts of home. During this period waste and extravagance run rampant, and bad bills of every kind

[1] Nicholas Longworth, of Ohio, Speaker.

[2] Record, p. 8691.

[3] Second session Seventy-first Congress, Record, p. 9892; Journal, p. 14.

pass without reading. Rules are suspended. Junketing trips abroad are arranged. It is at this time, more than any other, there is urgently needed on the floor at all times some Member to stand guard and watch the interests of the people.

"BLANTON ON THE FLOOR AT ALL SESSIONS

"When Governor Moody called this special election, why was it that the press reported a howl from some leaders in Washington? They believed that the people would return Blanton to Congress. They knew he would upset some of their riotous spending and their arrangements for summer junkets.

* * * * * * *

"BLANTON NEEDED ON GUARD IN CLOSING WEEKS OF THIS CONGRESS

"If you elect Blanton on May 20, he will be sworn in on May 22. He will take his seat immediately. He will begin functioning immediately. He knows the rules and precedents as well as any other Member. He knows how to stop and kill steals when they are attempted. And he will attend the special session contemplated by Hoover in September and the regular session from December 1, 1930, to March 4, 1931. And during this time the 500,000 people of this district will have a man of experience to attend to their business with the several hundred bureaus of Government."

Resolved further, That the Speaker appoint a select committee of three Members of the House and that such committee be instructed to inquire into the above-mentioned charges, and for such purposes it shall have the power to send for persons and papers and enforce their appearance before said committee and to administer oaths and shall have the right to report at any time what action should be taken.

Mr. William H. Stafford, of Wisconsin, made the point of order that the resolution did not present a question of privilege.

After debate, the Speaker [1] ruled:

The question is whether these quoted statements form the basis for a question of privilege.

Rule 9 provides as follows:

"Questions of privilege shall be, fast, those affecting the rights of the House collectively, its safety, dignity, and the integrity of its proceedings."

Query. Does this statement affect the integrity of the proceedings of the House; that is, the words—

"During this period waste and extravagance run rampant and bad bills of every kind pass without reading."

And in another place—

"He, Mr. Blanton, knows how to stop and kill steals when they are attempted?"

The only precedent of which the Chair is aware occurred on January 3, 1917, when Mr. Wood, of Indiana, rose to a question of privilege on some newspaper statements of Thomas W. Lawson, of Boston, in which, among other things, he used this phrase:

"The good old Capitol has been wallowing in Wall Street leaks for 40 years, wallowing hale and hearty."

The gentleman from Illinois, Mr. Mann, supported it on the ground that this affected privileges of the House, and the Speaker so held.

It seems to the Chair that the statements in the advertisement reflecting on the integrity of the proceedings of the House are at least as bad as those of Mr. Lawson. The Chair therefore holds that the resolution is privileged.

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[1] Nicholas Longworth, Speaker.

Thereupon, Mr. Clancy requested recognition and submitted as involving a question of personal privilege a telegram from Mr. Blanton appearing in a Texas newspaper, as follows:

Until governor's commission arrives a new Member can qualify only by unanimous consent; hence any Member can object. Clancy is exercising long-existing grudge. In former Congresses I blocked several of his wasteful, extravagant measures, and he retaliates by depriving me of remuneration for enormous district business I am now performing.

The Speaker held the matter to involve a question of personal privilege and recognized Mr. Clancy to debate it.

In the course of his remarks Mr. Clancy referred to extraneous matters and Mr. John N. Garner, of Texas, raised a question of order.

The Speaker ruled:

The Chair thinks the gentleman from Michigan should confine himself to the question of privilege which pertains to himself alone.

The gentlemen from Michigan should confine himself to questions which attribute wrongful motives to himself. The other circumstances are entirely extraneous, and the gentleman from Michigan will confine himself to his own personal privilege.

577. Lack of authority to convene a committee in the absence of the chairman having prevented the consideration of legislation, a resolution directing the committee to meet at a designated time was held to involve a question of the privilege of the House.

On January 29, 1931,[1] Mr. John E. Rankin, of Mississippi, offered, as involving the privilege of the House, the following resolution:

Whereas the chairman of the Committee on World War Veterans' Legislation is unavoidably absent on account of illness and unable to be present and preside over said committee; and

Whereas there is no one else authorized to act for him in calling said committee together and presiding over its deliberations; and

Whereas there are pending before that committee various and sundry bill providing for relief for the disabled veterans of the World War, their widows, and orphans; and

Whereas it is vitally necessary that said committee meet and consider such legislation without delay: Therefore be it

Resolved, That the members of the said Committee on World War Veterans' Legislation be, and they are hereby, authorized and directed to meet in the committee room now provided for said committee on Tuesday, February 3, 1931, at 10 o'clock a. m., to elect a temporary chairman and consider the legislation pending before said committee.

Mr. Carl E. Mapes, of Michigan, questioned the privilege of the resolution.

The Speaker[2] ruled:

The Chair is inclined to think that inasmuch as this committee is a legislative agent of the House and the question deals with legislative procedure, it is a matter of privilege.

The Chair desires to emphasize the fact that he has said repeatedly it is always within the power of the House to call a meeting of a committee if it so desires under such circumstances as these.

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[1] Third session of Seventy-first Congress, Record, p. 3481.

[2] Nicholas Longworth, of Ohio, Speaker.

578. Charges that Members of a committee were holding secret meetings or excluding other Members from the committee conferences were held not to involve a question of privilege.

A question of the privilege of the House may not be presented except by resolution.

On July 2, 1913,[1] Mr. Charles A Lindbergh, of Minnesota, claimed the floor for a question of personal privilege on the ground that the majority members of the Committee on Banking and Currency, of which he was a member, were holding meetings from day to day from which he was excluded.

A point of order by Mr. Thomas W. Hardwick, of Georgia, that no question of privilege was involved, was sustained by the Speaker .[2]

Mr. Lindbergh then submitted that the holding of secret meetings of a committee from which other members of the committee were excluded infringed upon the privilege of the House.

Mr. James R. Mann, of Illinois, said:

Mr. Speaker, I make the point of order that no matter is before the House at the present time. A matter of personal privilege can be brought before the House without a preliminary resolution, but a matter involving the privileges of the House, a matter of high privilege, must be brought before the House in the form of a resolution, not in the form of a statement.

The Speaker sustained the point of order.

Thereupon Mr. Lindbergh sent to the desk a preamble and resolution providing for the appointment of a committee to investigate and report if such meetings were being held.

Mr. John J. Fitzgerald made the point of order that the resolution did not present a question of privilege.

The Speaker said:

And the Chair rules that there is no question of privilege of any character in it whatsoever.

579. An alleged violation of the rule relating to admission to the floor presents a question of privilege.

The privileges of the floor do not extend to departmental employees assisting committees in the preparation of bills.

On December 10, 1924,[3] when the House concluded the consideration of the bill (H. R. 2688) reported by the Committee on Naval Affairs and providing for sundry matters affecting the naval service, Mr. Tom Connally, of Texas, claiming the floor for a question of privilege, said:

I have just been informed that this afternoon in the course of the deliberation on this bill the Naval Committee has had an admiral of the Navy here on the floor of the House advising, helping, and directing this legislation, and I want to inquire if that is true if the rules do not——

The Speaker[4] said:

The Chair is responsible for it. The Naval Committee asked the Chair if they could bring—the Chair did not know it was an officer of the Navy, but a civilian—somebody familiar with the

[1] First session, Sixty-third Congress, Record, p. 2307.

[2] Champ Clark, of Missouri, Speaker.

[3] Second session Sixty-eighth Congress, Record, p. 433.

[4] Frederick H. Gillett, of Massachusetts, Speaker.

bill on the floor. The Chair said they could. The Chair think it is the custom of a committee to bring somebody who is familiar——

Mr. CONNALLY interposed:

I was not talking about a civilian, but an admiral of the Navy and my understanding is the Judge Advocate of the Navy has been here this afternoon.

Mr. Fred. A. Britten, of Illinois, from the Committee on Naval Affairs, explained:

By direction of the committee on yesterday I asked the Speaker of the House if that committee might have the services of a civilian employee of the Navy Department to help us in the consideration and passage of the reserve bill, which is a very complicated bill, and the Speaker said that if we did not have a clerk on the floor we were entitled to bring in a Government employee.

The following colloquy was had:

Mr. CONNALLY of Texas. I ask the gentleman if he knows whether or not Admiral Latimer has not been here on the floor during the progress of this naval bill this afternoon?

Mr. BRITTEN. He has not.

Mr. CONNALLY of Texas. He was in the cloakroom?

Mr. BRITTEN. Yes; he was called up twice on my account.

Mr. CONNALLY of Texas. That is part of the floor of the House.

Mr. BRITTEN. A gentleman on that side asked if an amendment he had prepared would be acceptable to me. I said I thought the language of the bill was best but that I would ask the Judge Advocate General of the Navy, Admiral Latimer.

Mr. CONNALLY of Texas. He is not a civilian?

Mr. BRITTEN. No.

Mr. CONNALLY of Texas. That is not the man to whom the Speaker referred. I am not objecting to a civilian, but I am talking about admirals being on the floor of the House. My information is that one of the employees of this House said he was on the floor and in the cloakroom——

Mr. BRITTEN. He was in the cloakroom, but not on the floor or the aisles of the floor.

Mr. CONNALLY of Texas. The cloakroom is generally recognized as part of the Chamber.

Mr. Finis J. Garrett, of Tennessee, submitted:

Mr. Speaker, of course it was a violation of the rules of the House for anyone to be in the cloakroom as much as to be upon the floor, because the rule applies to the cloakroom just as it applies to the floor of the House.

The Speaker said:

The Chair was asked yesterday by one of the members of the committee if they could have on the floor a civilian employee of the Navy who had aided them in drafting the bill. The Chair, not remembering that that was contrary to the rules and knowing that it had often been done, said it could be done here. But hereafter, if it is the desire of the House, the Chair will undertake to enforce that rule strictly.

580. A resolution charging conspiracy to influence Members of Congress improperly was considered as a matter of privilege.

In presenting a question of the privilege of the House, a Member is required to submit a resolution and may not proceed in debate until the resolution has been read at the desk.

A decision by the Speaker defining the term "representative capacity."

Mere criticism of a Member, even though in his representative capacity, does not present a question of privilege.

On March 1, 1910,[1] Mr. Halvor Steenerson, of Minnesota, claiming the floor for a question of privilege, sent to the desk a newspaper article, saying:

I think it will be necessary, in order to understand the charge made, to read the part of the article that I have marked. I have marked some parts, and other parts I have marked out. For instance, there is a table of wages. I have marked that out. Of course I can insert the whole thing in the Record, and I will refer to each charge in my remarks, but I think it has already appeared unquestionably that this attacks me in my capacity as a Member of Congress and as a member of the Committee on the Post Office and Post Roads, and my official fidelity and honesty is questioned.

Mr. Sereno E. Payne, of New York, made the point of order that a question of privilege was not involved. On suggestion of Mr. Payne, the matter was deferred until March 3,[2] when the Speaker[3] rendered the following decision:

On Tuesday last the gentleman from Minnesota, Mr. Steenerson, arose to a question of personal privilege, and after some discussion, by unanimous consent, the matters involved in the alleged question of personal privilege were printed in the Record of Tuesday. The gentleman from New York, Mr. Payne, interposed the point of order that the matter therein contained does not constitute a question of personal privilege. In the meantime the Chair has very carefully examined in the Record the statements or allegations covering the alleged question of personal privilege, and the Chair is ready to rule upon that question.

The rule of the House defines questions of personal privilege as those affecting—"the rights, reputation, and conduct of Members, individually, in their representative capacity only."

The meaning of the words "representative capacity" involves the whole question at issue. Is a letter, written by a Member to a private individual to explain acts of the Member in his "representative capacity," itself an act in that capacity? If it is, then any other act of his in explanation outside the House, as a campaign speech in his district, is an act in the "representative capacity." It seems to the Chair that to extend the right to occupy the floor of the House as to so wide a range of controversy as that between the Member and the newspapers or between the Member and the public generally as to his letters or his addresses outside the House would vastly encumber the proceedings of the House.

As to the portions of the article in question referring to acts of the gentleman from Minnesota, Mr. Steenerson, in his "representative capacity"—that is, in relation to his acts on the floor or in a committee—it seems to the Chair that there is nothing which goes further than a mere criticism of such acts. There is no charge, so far as the Chair finds, which amuses the gentleman from Minnesota of corrupt acts or any other conduct implying more than error of judgment.

The precedent of 1890, to which the gentleman from Minnesota referred the Chair, appears, on examination, to have been a case wherein a Member read in Committee of the Whole a letter from a citizen assailing other Members for words spoken in debate. The Chair held that one of the assailed Members was entitled to the floor on a question of privilege. That case was therefore very different from that presented by the gentleman from Minnesota.

The Chair now holds that the gentleman from Minnesota does not present a question of personal privilege.

Whereupon Mr. Steenerson charged that an organization was attempting to influence Members of Congress improperly in favor of ship subsidies.

The Speaker said:

So far as the gentleman has proceeded he is stating a question that might affect the House generally, but a question of general privilege is not a question of personal privilege. And in such

[1] Second session Sixty-first Congress, Record, p. 2555.

[2] Journal, p. 871; Record, p. 2681.

[3] Joseph U. Cannon, of Illinois, Speaker.

cases the practice of the House has been that the gentleman should present to the House a written proposition for action.

Mr. Steenerson stated that he would submit a resolution at the close of his remarks and was proceeding in debate.

The Speaker interposed:

And the Chair will suggest that the gentleman would withhold until he is prepared to so present the matter.

Mr. Steenerson said:

The gentleman is prepared to submit a resolution at the end of his remarks. This not only affects the House generally but it affects me individually as a Member of this House and my action upon legislation pending herein.

The Speaker ruled:

The gentleman, under rules of the House, in the opinion of the Chair, before he makes his remarks touching a question of general privilege should send to the Clerk's desk and have read the foundation therefor. The gentleman will at once on mere suggestion see the propriety of that well-established practice.

Thereupon Mr. Steenerson submitted a preamble and resolution thereon.

Mr. James R. Mann, of Illinois, made the point of order that the resolution did not present a question of privilege.

The Speaker held:

While the written statement which has been read at the Clerk's desk is exceedingly general, upon allegation, "it is alleged," and so forth, amounting, perhaps, to common rumor, yet there is one allegation in this statement, as follows:

"And whereas it is charged in the publications purporting to be issued by said Merchant Marine League, and also in the Texas Farmer, a newspaper published at Dallas, in the State of Texas, that large sums of money and corruption funds have been raised by foreign shipowners and ship companies, for the purpose of corrupting and influencing Members of Congress against said ship-subsidy legislation, and which sums and funds are now being used to improperly influence Members of Congress on said subjects"—

And so forth. Then follows the proposed resolution. It may be true, as suggested by the gentleman from Wisconsin, Mr. Cooper, that if there be a conspiracy either upon the part of foreign shipowners or the Merchant Marine League to affect legislation, if such conspiracy in fact existed, the courts of law would have jurisdiction to proceed against parties who had formed the conspiracy, yet the allegation here is that these actions, on the one hand by the foreign shipowners for one purpose, and the Merchant Marine League for another purpose, as indicated in the statement. The most specific allegation is touching the foreign shipowners.

In a later practice the Chair has made a preliminary decision, and then the House, upon that decision, has taken such action touching further inquiry or investigation as it deemed proper, and therefore the Chair overrules the point of order.

581. A resolution for the investigation of an organization alleged to have raised money to influence legislation was considered as a matter of privilege.

On December 22, 1913,[1] Mr. S. F. Prouty, of Iowa, submitted, as presenting a question of privilege, the following preamble and resolution:

Whereas on Saturday, December 20, 1913, there appeared in the Washington Times, a paper published in the city of Washington and having a very large circulation throughout the United States, an article headed in large type clear across the front page, the following:

"NATION-WIDE FIGHT ON CRISP-BILL BACKERS—DISTRICT CHAMPIONS UNITE IN EFFORT TO PREVENT REELECTION.

"Plans for a concerted fight against the reelection of the Members who voted for the measure are already under way. Their respective districts will be flooded with letters protesting against their unpatriotic stand toward the National Capital. Voters throughout the country will be appealed to in the hope that Congressmen will be urged to take the welfare of this District at heart and aid in making the capital city of the United States the queen metropolis of the world. Members of the executive committee of the joint committee of Chamber of Commerce, the Board of Trade, and the Retail Merchants' Association have been notified by Chairman William H. Singleton of the committee that they must be ready at a moment's notice to answer a call to meet and determine on some concerted action immediately;" and

Whereas said alleged threat, if carried into effect, would menace the freedom of action of the Members of this body in the discharge of their legislative duties: Therefore be it

Resolved by the House of Representatives, That the Committee on the District of Columbia, or a subcommittee thereof appointed by the chairman, be instructed and empowered to make a full and thorough investigation of the truth of the facts set out and alleged in said article.

That said committee or subcommittee be instructed and empowered to ascertain whether there is now or at any time in the past has been any organization in the District of Columbia or elsewhere that has or has had as its purpose or object the securing or preventing of legislation affecting the relation between the Federal Government and the District of Columbia or the citizens or institutions thereof;

That said committee or subcommittee be instructed and empowered to ascertain whether there is now being raised or whether at any time in the past there has been raised any money by the citizens, residents, property owners, corporations, or organizations of Washington or the District of Columbia for the purpose of influencing, either directly or indirectly, legislation; and if such money has been raised in the past, to ascertain for what purpose and in what manner it has been used; and if any money is now being raised for that purpose the committee or subcommittee shall ascertain in what manner it is proposed to use the same;

The said committee or subcommittee be instructed and empowered to ascertain whether there is now or in the past has been maintained a lobby in the city of Washington for the purpose of influencing or affecting legislation or appropriation for and on behalf of the District of Columbia or the people, corporations, or institutions thereof, and said committee or subcommittee will ascertain methods and agencies employed for the purpose of affecting said legislation;

That said committee or subcommittee be, and is hereby, authorized to issue subpoenas and call for books, papers, and records; that the chairman of said committee, or any member thereof in his absence, is hereby authorized to administer oaths and to compel the attendance upon the committee of any person or persons whom said committee may wish to interrogate relative to the matters set out in this resolution;

That said committee or subcommittee in conducting this investigation is authorized to use the official committee stenographers.

Upon the conclusion of its investigation the said committee shall report fully to this House the results of its investigation and findings thereon.

Mr. James R. Mann, of Illinois, made the point of order that the resolution did not involve a question of privilege.

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[1] Second session Sixty-third Congress, Record, p. 1370.

The Speaker [1] overruled the point of order.

On motion of Mr. John J. Fitzgerald, of New York, the resolution was referred to the Committee on Rules, yeas 171, noes 86.

582. A resolution charging that a Member's action in his representative capacity had been influenced by support received in his election to the House was presented as a question of privilege.

A resolution reflecting on the official conduct of a Member of the House was expunged from the Record.

Proceedings expunged from the Record by order of the House are not journalized.

On August 24, 1922,[2] Mr. George Holden Tinkham, of Massachusetts, submitted, as involving the privilege of the House, a resolution and preamble charging Mr. Andrew J. Volstead, of Minnesota, with having received support in his campaign for election to the House from the Anti-Saloon League and having in return supported legislation in which that organization was interested. The resolution requested Mr. Volstead's resignation as chairman of the Committee on the Judiciary, and provided that in event of his failure to resign within 10 days the chairmanship should be considered vacant.

During the reading of the resolution by the Clerk, Mr. Leonidas C. Dyer, of Missouri, made the point of order that the resolution was not privileged. The reading was continued and was completed, and Mr. Dyer moved to expunge the resolution from the Record.

Mr. James R. Mann, of Illinois, inquired if an order expunging proceedings from the Congressional Record operated to expunge such proceedings from the Journal of the House.

The Speaker [3] said:

> The Chair is informed by the Journal clerk that when the House has ordered anything to be expunged from the Record it is not carried in the Journal.

The question being taken on the motion of Mr. Dyer to expunge the resolution from the Record, on division, it was decided in the affirmative, yeas 141, noes 3.

583. Charges that Members do not vote in accordance with their personal views do not present a question of privilege.

A motion to strike from the Record remarks made in order is not privileged.

On July 15, 1919,[4] Mr. Thomas L. Blanton, of Texas, rising to a question of privilege of the House, said:

> Mr. Speaker, I rise to a question of privilege, the highest privilege of the House. During the debate yesterday on the prohibition enforcement bill, the gentleman from Massachusetts, Mr. Gallivan, used the following language:
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> "I am opposed to this amendment unless the gentleman from Kentucky will provide that the inspector and agents visit the House Office Building. I shall ask that every Member of

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[1] Champ Clark, of Missouri, Speaker.

[2] Second session Sixty-seventh Congress, Journal, p. 515; Record, p. 11758.

[3] Frederick H. Gillett, of Massachusetts, Speaker.

[4] First session Sixty-sixth Congress, Record, p. 2637.

Congress who votes dry on this proposition be honest to his country and his conscience and that he place in the Congressional Record the amount of liquor that he has saved up for himself either in his home or in his office. * * * I have heard, Mr. Chairman, of Members of this House who have said that they have in their private wine cellars enough liquor to take care of them and their friends for 20 years."

Mr. Speaker, this is a reflection upon the integrity and the standing of every Member of this Congress. I submit that it is an unwarranted aspersion upon the standing and the integrity and dignity of this House, whose Members are as strictly sober as any 435 men with whom I have ever been associated before.

The Speaker [1] held that a question of privilege was not involved.

Thereupon Mr. Blanton proposed a motion to strike the language quoted from the Record.

The Speaker held the motion was not privileged and declined to recognize Mr. Blanton to offer it.

584. A Senator in debate in the Senate having assailed the Speaker, a resolution declaring the language of the Senator a breach of the privilege of the House was treated as a matter of privilege.

A Member assailed outside the House may reply outside the House without limitation and may reply from the floor of the House if personalities are avoided.

On March 24, 1924,[2] Mr. Allen T. Treadway, of Massachusetts, rose to a question of privilege and said:

Mr. Speaker, I rise to a question of privilege. The question of privilege is one affecting the rights of the House in its safety, dignity, and integrity, under Rule IX.

In response to a request of the Speaker that the resolution be withdrawn, Mr. Treadway said:

I realize the attitude of the Speaker, and at the same time I do not feel that the membership of the House should yield to his personal wishes. It affects the dignity of the House rather than the individuality of the Speaker, and I claim the right to present the resolution. I regret I can not accept the Speaker's request.

The Speaker [3] announced:

The Chair has requested the gentleman to withdraw his question of privilege. The gentleman refuses and the Chair lays the resolution before the House.

After debate, Mr. Treadway withdrew the resolution, and the Speaker, calling a Member to the chair, addressed the House.

At the conclusion of his remarks, in response to a parliamentary inquiry from Mr. John E. Rankin, of Mississippi, the Speaker said:

Well, the Chair thinks, no matter what a person says outside, a Member attacked has a right outside to say what he pleases and has a right also on the floor of the House to answer any argument or attack, provided he does not violate the rule as to personalities. As to them the Chair thinks the rules apply, no matter what the provocation may be.

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[1] Frederick H. Gillett, of Massachusetts, Speaker.

[2] First session Sixty-eighth Congress, Record, p. 4813.

[3] Frederick H. Gillett, of Massachusetts, Speaker.

585. Instance wherein permission was given the clerk of a committee and the Clerk of the House, to respond to subpoena or subpoena duces tecum. and to make deposition with proviso that they should take with them none of the files.

On August 23, 1921,[1] Mr. Bertrand H. Snell, of New York, from the Committee on Rules, by direction of that committee, reported, as privileged, the following preamble and resolution:

Resolved, That immediately upon the adoption of this resolution the House shall proceed to the consideration of the following resolution, to wit:

"Whereas in a case of libel now pending in the Circuit Court of Putnam County, Tenn., at Cookeville, styled Cordell Hull against Oscar Clark and Wynne F. Clouse, in which among other questions, the vote of the said Cordell Hull, who was a Member of the Sixty-sixth and prior Congresses, with respect to proposed bonus legislation for the benefit of certain American ex-soldiers and sailors of the World War is involved; and in which also it is the contention of defendants that the vote or votes of said Cordell Hull as a member of the Ways and Means Committee of said House during the second session of the Sixty-sixth Congress in the executive sessions of said committee with respect to the said proposed soldier and sailor bonus legislation, and particularly with reference to the consideration and reporting out by said committee of H. R. 14089, is material to the issues raised in the above-styled case; and in which it is the contention of the plaintiff that if testimony as to his said votes in the executive sessions of said committee is offered it then becomes material for the entire context to be shown in evidence, viz, the various motions, bills considered, questions arising on each, and votes of each member of said committee thereon with respect to all of the amid proposed soldier and sailor bonus legislation and tax measures to pay for same pending before the said committee during the said Sixty-sixth Congress: Now, therefore be it

"Resolved, That the clerk of the Ways and Means Committee of the House of Representatives of the Sixty-sixth and Sixty-seventh Congresses of the United States and the Clerk of the House of Representatives be authorized to respond to any subpoena or subpoena duces tecum, or to appear before any person authorized by law to take depositions, at the instance of either party to the above-styled case, but neither of said clerks shall take with him any book, document, or paper on file in his office or under his control or in his possession as such clerk;

"That either of the parties to the above-styled lawsuit have full permission to take the depositions of either or both of the said clerks in respect to any and all phases of the executive and other proceedings of the said Ways and Means Committee in connection with its consideration of each and all the proposed soldier and sailor bonus measures referred to said committee under H. Res. 470 during the Sixty-sixth Congress, including evidence as to all motions made, questions arising, measures considered, and votes of each member thereon, the purpose and effect of each, and to this end permission to either party to the lawsuit aforesaid is given to take copies of any documents or papers in possession or control of either of said clerks so as, however, the possession of said documents and papers by the said clerk or clerks shall not be disturbed, or the same shall not be removed from their place of custody under said clerk or clerks."

And the previous question shall be considered as ordered on the resolution to final adoption.

Mr. Snell said:

There are several precedents for action of this kind in the House. I shall not take the time to call attention to more than one. This one seems to be exactly the same as what is desired to do at this time. That was in the Forty-second Congress, and it ran as follows:

"Resolved, That the clerk of the Committee on the Public Lands be authorized to attach to any deposition he may be required to give in the case of Hovey *v.* Valentine, now pending in the district court at San Francisco, Calif., a copy of the minutes of the proceedings of the Committee on the Public Lands on House bill 1024 (Forty-second Congress), for the relief of Thomas B. Valentine."

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[1] First session sixty-seventh Congress, Journal, p. 452; Record, p. 5572.

Therefore the committee thought it was entirely proper to present this resolution at this time.

After discussing the precedent created, the resolution was agreed to—yeas 151, noes 45.

586. A Member, being summoned before a Federal grand jury, presented the matter to the House as a question of personal privilege, expressing readiness to respond in event formal permission was granted by the House.

On May 3, 1926,[1] Mr. Fiorello H. LaGuardia, of New York, rose to a question of personal privilege and said:

Mr. Speaker, on March 24 of this year, during the present session of Congress, I made certain statements on the floor of this House in reference to the enforcement of law in the State of Ohio and in the State of Indiana. Since then there have been some informal statements made to the press, and on my return to my office this morning I found what purports to be a subpoena duces tecum addressed to me calling on me to respond on the 5th of May, 1926, before the United States court in the city of Indianapolis, in violation of my privileges as a Member of this House and in violation of the protection of the House guaranteed under the Constitution of the United States.

This is what I found on my desk to-day, and I ask the Clerk to read it.

There being no objection, the Clerk read:

SUBPOENA TICKET—DUCES TECUM, DISTRICT OF COLUMBIA

TO FIORELLA H. LAGUARDIA,

Room 150, House Office Building.

By virtue of a subpoena issued out of the United States court you are required to be and appear before the said court at Indianapolis at 9 o'clock a.m. on the 5th day of May, 1926, then and there to testify on behalf of the United States in the case of United States grand jury and not to depart without leave.

If you fail to obey such subpoena, you may be fined and imprisoned, as the court may direct.

E. C. SNYDER, *United States Marshal.*

Mr. LaGuardia continued:

I can not obey that subpoena without the permission of this House. I will say that there is not a person in the Department of Justice here in Washington from the Attorney General down who will say I have information which is not in the possession of the authorities in Indianapolis, and from which they can obtain primary evidence, or that my presence in Indianapolis is required. If any Member of the House introduces a resolution granting me permission to go, I will not resist it.

No resolution was offered and no further record appears.

587. No officer or employee of the House may produce before a court, either voluntarily or in obedience to a subpoena duces tecum, any paper from the files without permission of the House first obtained.

The Clerk of the House having been subpoened to produce before the Supreme Court of the District of Columbia certain papers from the files, reported to the House, and failing to receive permission disregarded the order of the court.

A resolution authorizing the Clerk of the House to produce papers requested in a subpoena duces tecum is presented as a matter of privilege,

[1] First session Sixty-ninth Congress, Record, p. 8606.

but such privilege is destroyed by incorporation in the resolution of extraneous and unprivileged matter.

A motion may be withdrawn pending action thereon.

On February 17, 1927,[1] the Speaker laid before the House the following communication:

HOUSE OF REPRESENTATIVES,
CLERK'S OFFICE
Washington, D.C., February 16,1927.

HON. NICHOLAS LONGWORTH.

House of Representatives.

My DEAR MR. SPEAKER: I beg to inform you that I have received from the Supreme Court of the District of Columbia subpoenas duces tecuin directed to me as Clerk of the House of Representatives commanding me to appear before Circuit Court, Division No. 1, on the 15th and 16th days of February, 1927, at 10 o'clock a.m., as a witness in the case of Charles B. Brewer *v.* A. S. Abell Co. (No. 70158 at Law), and to bring with me certain and sundry papers, documents, books, and testimony, therein described, in the files of the House of Representatives.

The papers, documents, books, and testimony in question were adduced in evidence before the select committee appointed under House Resolution 231, Sixty-eighth Congress, to investigate the preparation, distribution, sale, payment, retirement, surrender, cancellation, and destruction of Government bonds and other securities, and are now in possession of the House of Representatives in the custody of the Clerk.

Your attention and that of the House is respectfully invited to a resolution of the House adopted in the Forty-sixth Congress, first session (Congressional Record, p. 680), upon the recommendation of the Committee on the Judiciary, as follows:

"Resolved, That no officer or employee of the House of Representatives has the right, either voluntarily or in obedience to a subpoena duces tecum, to produce any document, paper, or book belonging to the files of the House before any court or officer, nor to furnish any copy of any testimony given or paper filed in any investigation before the House or any of its committees, or of any other paper belonging to the files of the House except such as may be authorized by statute to be copied, and such as the House itself may have made public, to be taken without the consent of the House first obtained."

And a resolution adopted by the House in the Forty-ninth Congress, first session (Congressional Record, p. 1295), from which the following is quoted:

"Resolved, That by the privilege of this House no evidence of a documentary character under the control and in possession of the House of Representatives can, by the mandate or process of the ordinary courts of justice, be taken from such control or possession but by its permission.

"That when it appears by the order of a court or of the judge thereof, or of any legal officer charged with the administration of the orders of such court or judge, that documentary evidence in the possession and under the control of the House is needful for use in any court of justice or before any judge or such legal officer for the promotion of justice, this House will take such order thereon as will promote the ends of justice consistently with the privileges and rights of this House."

These resolutions resulted from the issuance of subpoenas duces tecum. upon the Clerk of the House to produce certain original papers in the files of the House.

Permission to remove from their place of file or custody any documents or papers was denied by the House, but the court was afforded facilities for making certified copies. This seems to have been the uniform practice in respect to subpoenas duces tecuin issued by a court upon the Clerk of the House to produce in court original papers from the files of the House.

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[1] Second session Sixty-ninth Congress, Record, p. 4031.

The subpoenas in question are herewith attached and the matter is presented for such action as the House in its wisdom may see fit to take.

Very respectfully,

WM. TYLER PAGE,
Clerk of the House of Representatives.

Thereupon, Mr. John Q. Tilson, of Connecticut, offered as privileged the following resolution:

Whereas in the case of Charles B. Brewer *v.* A. S. Abell Co. (No. 70158 at Law) pending in circuit court, division No. 1, Supreme Court of the District of Columbia subpcenas duces tecum. were issued by the Chief Justice of the Supreme Court of the District of Columbia and addressed to William Tyler Page, Clerk of the House of Representatives, directing him to appear as a witness before circuit court, division No. 1, on the 15th and 16th days of February, 1927, and to bring with him certain and sundry original papers, documents, books, and testimony in the possession and under the control of the House of Representatives: Therefore,

Resolved, That by the privilege of this House no evidence of a documentary character under the control and in the possession of the House of Representatives can, by the mandate or process of the ordinary courts of justice, be taken from such control or possession but by its permission.

Resolved, That when it appears by the order of the court or of the judge thereof, or of any legal officer charged with the administration of the orders of such court or judge, that documentary evidence in the possession and under the control of the House is needful for use in any court of justice or before any judge or such legal officer, for the promotion of justice, this House will take such order thereon as will promote the ends of justice consistently with the privileges and rights of this House.

Resolved, That William Tyler Page, Clerk of the House, be authorized to appear at the place and before the officer named in the subpoenas duces tecum before mentioned, but shall not take with him any paper or document on file in his office or under his control or in his possession as Clerk of the House.

Resolved, That the said court, through any of its officers or agents, have full permission to attend with all proper parties to the proceeding, and then always at any place under the orders and control of this House, and take copies of any documents or papers in possession or control of said Clerk, and any evidence of witnesses in respect thereto which the court or other proper officer thereof shall desire, so as, however, the possession of said documents and papers by the said Clerk shall not be disturbed, or the same shall not be removed from their place of file or custody under said Clerk.

Resolved, That a copy of these resolutions be transmitted to the said court as a respectful answer to the subpoenas aforementioned.

Resolved, That when the court before mentioned shall have disposed of the aforesaid case of Charles B. Brewer against A. S. Abell Co., the Clerk of the House of Representatives is hereby directed to return to the Treasury Department, taking receipt therefor, the original records, documents, books, and papers, inventoried, which were adduced as evidence before the select committee appointed under House Resolution No. 231, Sixty-eighth Congress, and by that committee turned over to the files of the House to accompany its report.

Mr. Thomas L. Blanton, of Texas, submitted that the last paragraph was subject to a point of order for the reason that it was not privileged for consideration at the time.

The Speaker[1] acquiesced and stated that if the point of order was pressed it would be sustained and would carry y with it the entire resolution.

Mr. Blanton suggested that the resolution be reoffered without the concluding paragraph and insisted on the point of order. Whereupon, Mr. Tilson withdrew the resolution and no further action appears of record until the Seventy-first

[1] Longworth, of Ohio, Speaker.

Congress,[1] when the last paragraph was offered as an independent resolution and agreed to by the House.

588. The constitutional privilege of Members in the matter of arrest has been construed to exempt from subpoena, during sessions of Congress.

A Senator being subpoenaed to appear before the grand jury of the District of Columbia, announced in the Senate that he would disregard it.

A Senator declining to heed a summons to appear and testify before a Federal grand jury, the court held that if he failed to obey the subpoena voluntarily the court was without power to compel his attendance.

On December 5, 1929[2] Mr. Coleman L. Blease, of South Carolina, exhibited in the Senate and caused to be printed in the Record a subpoena issued by the Supreme Court of the District of Columbia directing him to attend and testify before a session of the grand jury.

Mr. Blease announced that he would disregard the summons, and on the same day the grand jury of the District of Columbia reported:

TO THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE DISTRICT OF COLUMBIA:

The grand jury of the Supreme Court of the District of Columbia for the October term, A. D. 1929, begs to report to the Court as follows:

"Upon information coming to the attention of the grand jury of the District of Columbia that Ron. Coleman L. Blease, United States Senator from the State of South Carolina, had certain knowledge with regard to the facts and circumstances relating to the death of Detective Sergeant Arthur B. Scrivener on October 13, 1926, the grand jury directed the issuance of a subpoena on December 4, 1929, commanding the Said Ron. Coleman L. Blease to appear before the grand jury at 10 a. In. on December 5, 1929.

"That said subpoena was issued in due course and served personally upon the said Ron. Coleman L. Blease in the city of Washington on December 4, 1929, by Deputy Marshal J. J. Clarkson.

"That the said Ron. Coleman L. Blease did not appear before the grand jury of the District of Columbia on December 5, 1929, at 10 a. In. as commanded by such subpoena and has not up to the time of the filing of this report so appeared."

Wherefore, the grand jury of the District of Columbia for the October term, A. D. 1929, reports the facts aforesaid to the honorable court for such action as the court may deem lawful and proper in the premises.

For the grand jury:

(Signed) JAMES N. FITZPATRICK, JR.,
Foreman of the Grand Jury.

On receipt of the report Justice Peyton Gordon, of the court, addressed the grand jury and said:

The Congress of the United States is now in session, and until yesterday I never heard of a precedent to this procedure in an instance of this kind.

Section 6, Article I, of the Constitution of the United States, gives immunity to arrest to the Members of Congress while that body is in session. It does not say that they are privileged from subpoena, but if they do not obey, the only step the court could take would be to issue an attachment for their arrest. Since the Constitution provides immunity from arrest, in my opinion they are not subject to such action.

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[1] Second session Seventy-first Congress, Record, p. 11639.

[2] Second session Seventy-first Congress, Record, p. 109.

Justice Gordon then reviews a Pennsylvania case decided in 1800, holding that the court knew of no exception to the immunity of Members of Congress from the service of subpoenas, and concluded:

> Unless the gentlemen see fit to obey the subpoenas, this court at the present time has no power to compel them to do so.

Chapter CCV.[1]

PRIVILEGE OF THE MEMBER.

1. Arrest in going to or returning from sessions. Section 589.
2. Charges against Members in the Record, etc. Sections 590–603.
3. Charges against Members in newspapers, etc. Sections 604–622.

589. All criminal offenses are comprehended by the terms "treason, felony, and breach of the peace," as used in the Constitution, excepting these cases from the operation of the privilege from arrest therein conferred upon Senators and Representatives during their attendance at the sessions of their respective Houses, and in going to and returning from the same.

The words "treason, felony, and breach of the peace," as applied to the parliamentary privilege, is construed as understood in England and as excluding from the privilege all arrests and prosecutions for criminal offenses, and confining the privilege alone to arrests in civil cases.

Writ of error has been sustained for arrest of a Member while Congress was not in session.

Writ of error not dismissed because the Congress of which defendant was a Member has ceased to exist.

On February 11, 1905[2] Mr. John N. Williamson, of Oregon, was indicted for the violation of certain statutes in proceedings for the purchase of public land. The defendant was found guilty in the month of September, 1905. On October 14, 1905, when the court was about to pronounce sentence, he protested on the ground that thereby he would be deprived of his constitutional right to attend the ensuing session of Congress. The objection was overruled and he was sentenced to imprisonment for 10 months.

Exceptions were taken and the case reached the Supreme Court of the United States. The opinion of the court was delivered by Mr. Justice White at the October term, 1907.

This opinion passes upon the argument advanced by the Government that the immunity of Members of Congress from arrest, even if applicable to criminal cases, operates only during a session of Congress, as follows:

It is said, however, that this ease differs from the Burton case[3] because there the trial and conviction was had during a session of the Senate, while here, at the time of the trial, conviction,

[1] Supplementary to Chapter LXXXII.

[2] Williamson v. United States, 207 U. S. 425.

[3] Burton v. United States. 196. U. S. 283.

and sentence Congress was not in session, and therefore to assert the protection of the constitutional provision is to reduce the claim "to the point of frivolousness." This, however, but assumes that even if the constitutional privilege embraces the arrest and sentence of a Member of Congress for a crime like the one here involved, it is frivolous to assert that the privilege could possibly apply to an arrest and sentence at any other time than during a session of Congress, even although the inevitable result of such arrest and sentence might be an imprisonment which would preclude the possibility of the Member attending an approaching session. We can not give our assent to the proposition. Indeed, we think, if it be conceded that the privilege which the Constitution creates extends to an arrest for any criminal offense, such privilege would embrace exemption from any exertion of power by way of arrest and prosecution for the commission of crime, the effect of which exertion of power would be to prevent a Congressman from attending a future as well as a pending session of Congress. The contention that although there may have been merit in the claim of privilege when asserted it is now frivolous because of a change in the situation, is based upon the fact that at this time the Congress of which the accused was a Member has ceased to exist, and, therefore, even if the sentence was illegal when imposed, such illegality has been cured by the cessation of the constitutional privilege. But, even if the proposition be conceded, it affords no ground for dismissing the writ of error, since our jurisdiction depends upon the existence of a constitutional question at the time when the writ of error was sued out, and such jurisdiction, as we have previously said, carries with it the duty of reviewing any errors material to the determination of the validity of the conviction. It hence follows that, even if the constitutional question as asserted is now "a mere abstraction," that fact would not avail to relieve us of the duty of reviewing the whole case, and hence disposing of the assignments of error which are addressed to other than the constitutional question. Besides, we do not consider the proposition well founded, for, if at the time the sentence was imposed it was illegal because in conflict with the constitutional privilege of the accused, we fail to perceive how the mere expiration of the term of Congress for which the Member was elected has operated to render that valid which was void because repugnant to the Constitution.

As to the contention that the privilege of immunity under the Constitution extends to civil arrests on1v and does not apply to indictable offenses, the opinion holds:

We come, then, to consider the clause of the Constitution relied upon in order to determine whether the accused, because he was a Member of Congress, was privileged from arrest and trial for the crime in question, or, upon conviction, was in any event privileged from sentence, which would prevent his attendance at an existing or approaching session of Congress.

The full text of the first clause of section 6, Article I, of the Constitution is this:

"SEC. 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place."

If the words extending the privilege to all cases were unqualified, and therefore embraced the arrest of a Member of Congress for the commission of any crime, we think, as we have previously said, they would not only include such an arrest as operated to prevent the Member from going to and returning from a pending session, but would also extend to prohibiting a court during an interim of a session of Congress from imposing a sentence of imprisonment which would prevent him from attending a session of Congress in the future. But the question is not what would be the scope of the words "all cases" if those words embraced all crimes, but, is, what is the scope of the qualifying clause—that is, the exception from the privilege of "treason, felony, and breach of the peace." The conflicting contentions are substantially these: It is insisted by the plaintiff in error that the privilege applied because the offense in question is confessedly not technically the crime of treason or felony and is not embraced within the words "breach of the peace," as found

in the exception, because "the phrase 'breach of the peace' means only actual breaches of the peace, offenses involving violence or public disturbance." This restricted meaning, it is said, is necessary in order to give effect to the whole of the excepting clause, since, if the words "breach of the peace" be broadly interpreted so as to cause them to embrace all crimes, then the words treason and felony will become superfluous. On the other hand, the Government insists that the words "breach of the peace" should not be narrowly construed, but should be held to embrace substantially all crimes, and therefore, as in effect, confining the parliamentary privilege exclusively to arrest in civil cases. And this is based not merely upon the ordinary acceptation of the meaning of the words, but upon the contention that the words "treason, felony, and breach of the peace," as applied to parliamentary privilege, were commonly used in England prior to the Revolution and were there well understood as excluding from the parliamentary privilege all arrests and prosecutions for criminal offenses; in other words, as confining the privilege alone to arrests in civil cases, the deduction being that when the framers of the Constitution adopted the phrase in question they necessarily must be held to have intended that it should receive its well understood and accepted meaning. If the premise upon which this argument proceeds be well-founded, we think there can be no doubt of the correctness of the conclusion based upon it. Before, therefore, coming to elucidate the text by the ordinary principles of interpretation we proceed to trace the origin of the phrase "treason, felony, and breach of the peace," as applied to parliamentary privilege, and to fix the meaning of those words as understood in this country and in England prior to and at the time of the adoption of the Constitution.

After citing English precedents construing the terms "treason," "felony," and "breach of the peace," as applied to parliamentary privilege, the opinion concludes:

Since from the foregoing it follows that the terms "treason," "felony," and "breach of the peace," as used in the constitutional provision relied upon, excepts from the operation of the privilege all criminal offenses, the conclusion results that the claim of privilege of exemption from arrest and sentence was without merit.

590. The reading on the floor of a newspaper interview and a letter written by another Member, the authenticity of which was not denied, was held not to present a question of privilege.

On February 3, 1910,[1] Mr. Charles A. Crow, of Missouri, claimed the floor for a question of privilege touching a letter written by Mr. Crow to a constituent, and a newspaper article relating thereto. The letter promised appointment as census enumerator on condition that a political census not connected with the official census be taken simultaneously.

The interview and the letter, the authenticity of which Mr. Crow conceded, had been read during debate on the previous day by Mr. Joseph T. Robinson, of Arkansas.

Mr. Oscar W. Underwood, of Alabama, made the point of order that a question of privilege was not involved.

The Speaker[2] Sustained the point of order.

591. The making of mere misstatements does not give rise to a question of privilege.

Statements which, if published in a newspaper, would give rise to a question of privilege do not present a question of privilege when read from a private letter.

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[1] Second session Sixty-first Congress, Record, p. 1443.

[2] Joseph G. Cannon, of Illinois, Speaker.

On July 31, 1911,[1] Mr. Carl C. Anderson, of Ohio, submitted, as involving a question of personal privilege, the statement that he had introduced a motion to discharge the Committee on Invalid Pensions from the further consideration of the bill (H. R. 767) in a "sneaky, foxlike" manner.

Mr. Anderson then read from a personal letter addressed to him by Gen. S. S. Burdett, chairman of the pensions committee of the Grand Army of the Republic.

A point of order by Mr. Finis J. Garrett, of Tennessee, that a question of privilege was not presented was sustained by the Speaker.

Thereupon Mr. Joseph G. Cannon, of Illinois, submitted:

Mr. Speaker, one word upon the point of order. Of course, the statement of the gentleman from Ohio, Mr. Anderson, without reading the article to the effect that it had been said that he had in a sneaking, underhanded way placed the motion upon the calendar, seems to me would present a question of privilege.

The Speaker[2] said:

There is no question in the world but that the statement of the gentleman from Illinois [Mr. Cannon] is absolutely true. The Chair stated to the gentleman from Ohio [Mr. Anderson] that if he had any newspaper article of that kind he might read it, but he did not read it, but read a private letter.

Whereupon Mr. Isaac R. Sherwood, of Ohio, claimed the floor for a question of privilege, saying:

Mr. Chairman, I rise to a question of personal privilege for the purpose of correcting some statements. I want to correct some misstatements made by the gentleman from Ohio, Mr. Anderson, in regard to the attitude of Gen. S. S. Burdett, chairman of the pensions committee of the Grand Army of the Republic.

Mr. John J. Fitzgerald, of New York, raised the point of order that mere misstatements made by another Member on the floor did not give rise to a question of privilege.

The Speaker sustained the point of order.

592. Charges that a Member has employed unworthy men without intimation that he did so knowingly do not give rise to a question of privilege.

On March 1, 1921,[3] Mr. Royal C. Johnson, of South Dakota, submitted, as presenting a question of privilege, a photostatic copy of a letter from the Secretary of War, and said:

Mr. Speaker, of course the Secretary of Wax had no personal information of the matter, and it came undoubtedly through the Military Intelligence of the War Department. They bring my name into it as having hired investigators whom they claim to be blackmailers. They based that claim upon this photostatic copy of an alleged letter, which they do not now have. They bring it before this House with the idea of casting aspersions upon me as chairman of the committee.

Mr. Warren Gard, of Ohio, made the point of order that the matter presented did not involve a question of privilege.

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[1] First session Sixty-second Congress, Record, p. 3396.

[2] Champ Clark, of Missouri, Speaker.

[3] Third session Sixty sixth Congress, Record, p. 4194.

The Speaker [1] said:

The Chair does not think that the gentleman has made out a case of personal privilege. The most the gentleman can claim, it seems to the Chair, is that there is a charge that he has employed men who are unworthy, but there is no intimation that the gentleman did so knowingly. The Chair does not think the gentleman makes out a case of personal privilege.

593. Expression of opinion reflecting on a Member or his State, however offensive, if not directed against the Member in his representative capacity, do not involve a question of privilege.

On May 28, 1912,[2] Mr. J. Thomas Heffin, of Alabama, claimed the floor for a question of privilege, and said:

Mr. Speaker, on yesterday the gentleman from Pennsylvania, Mr. Focht, in referring to me said:

"Now, my friend from Alabama, Mr. Heffin, has undertaken, I think, to do something that does not become him, and, in view of the record of his own State, which is indefensible."

In another place he says:

"Mr. Chairman, in substantiation of what I have read, in response to what the gentleman from Alabama, Mr. Hellin, has said in his assaults on the North and labor conditions there, and to the shame of the State of Alabama, I want to show you the evidence of the inhumanity, brutality, and cruelty of his State."

This is a question of privilege, Mr. Speaker, and reflects upon me and my service here, and charges something that is not true, namely, that I had assaulted the North, and I desire to address the House upon the question of personal privilege.

Mr. John Dalzell, of Pennsylvania, submitted that a question of privilege was not involved.

The Speaker [3] said:

The Chair is inclined to think that that point is well taken. Of course, men might stand up here and abuse Alabama or Missouri or any other State until they were black in the face without laying the foundation for a question of personal privilege. The rule is that the question of privilege rests upon something that affects a man injuriously or sandalously in his representative capacity. The Chair can understand very well how the gentleman from Alabama would feel outraged in his feelings if somebody assaults the State of Alabama, but that does not make a question of personal privilege. That was just simply in that gentleman's opinion.

594. Statements on the floor reflecting on the conduct of a Member in official capacity, whether made directly or in quotation, involve a question of privilege.

On January 25, 1910,[4] Mr. William S. Bennet, of New York, as a question of personal privilege, read from the Record the following statement made by Mr. Robert B. Macon, of Arkansas, on the previous day:

The Members who went abroad were accompanied by their families and two of the secretaries of the commission. In fact all of the members of the commission, except Burnett and Howell of New Jersey, took a private secretary along to do such work as was absolutely necessary to be done while they, the commission, had fun. I understand that Mr. Bennet of New York and his secretary had been abroad several times at the expense of the commission.

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[1] Frederick H. Gillett, of Massachusetts, Speaker.

[2] Second session Sixty-second Congress, Record, p. 7323.

[3] Champ Clark, of Missouri, Speaker.

[4] Secend session Sixty-first Congress, Record, p. 963.

Mr. Macon called attention to the fact that he had not made the assertion on his own responsibility but had said that he was so informed.

The Speaker [1] recognized Mr. Bennet to present the question of privilege.

595. A question of privilege supersedes consideration of the original question and must first be disposed of.

An expression of opinion characterizing actions of a Member without reflecting upon him in his representative capacity do not give rise to a question of privilege.

On September 5, 1919,[2] Mr. Lemuel P. Padgett, of Tennessee, asked unanimous consent to insert certain matter in the Record, when Mr. Champ Clark, of Missouri, said:

The other day the gentleman from Iowa, Mr. Boies, got three long telegrams inserted in the Record, nothing but circular letters—no one knew what was in them, and they thought it might be something important; but it turned out that they were of no importance whatever. So a Member may hesitate about preventing a Member from putting matter into the Record.

Whereupon Mr. William D. Boies, of Iowa, demanded the floor on a question of privilege predicated on the statement by Mr. Clark.

Mr. Padgett made the point of order that his request was pending and should first be disposed of.

The Speaker [3] said:

A question of personal privilege is always in order. The gentleman will state his question of privilege.

The Speaker then ruled that a question of privilege had not been presented.

596. A question of privilege may not be predicated on words which have been stricken from the Record.

Inferences charging treason present a question of privilege.

On October 3, 1917 [4] Mr. William E. Mason, of Illinois, claiming the floor for a question of privilege, said:

A Member of this House, during my absence, charged me with being guilty of treason. He stated that I was absent, and he said, "Let them come and defend themselves," referring to my colleague, Mr. Britten, and myself. Having named us, he said, "I think they are out stirring up opposition to the war, to the selective draft, and to getting Germans to hold meetings, and asking that they be exempt from service."

He charges in the statement published in the Record substantially the same thing. It is a charge against my personal loyalty to my Government.

Mr. Garrett, of Tennessee, called attention to the fact that the language complained of had been stricken from the Record by vote of the House.

Mr. Mason then submitted further:

What I will read is in the Record.

"It is true that the gentleman from Illinois, Mr. Mason, in his position here does not speak the views of the people of that State."

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[1] Joseph G. Cannon of Illinois, Speaker.

[2] First session Sixty-sixth Congress, Record, p. 4917.

[3] Frederick H. Gillett, of Massachusetts, Speaker.

[4] First session Sixty-fifth Congress, Journal, p. 427; Record, p. 7711.

"Emma Goldman has been arrested and Berkman has been arrested. If I was President, I would point out some others who belong in the claw with them."

I charge that there again in the printed record he charges me and classes me with Emma Goldman and people who are anarchists.

The Speaker [1] said:

It seems to the Chair that if the words are struck out by action of the House, they can not be complained of. On a question of privilege the Chair thinks that the gentleman from Illinois has a fair question of privilege on the part that was printed in the Record, because by fair inference from those remarks the gentleman from Alabama [Mr. Heflin] has yoked up the gentleman with Emma Goldman, Berkman, and other anarchists, and by inference charges the gentleman with treason.

597. A statement in the Record charging a Member with class discrimination was held to present a question of privilege.

Remarks stricken from the Record by order of the House may not be read in debate.

On November 1, 1919,[2] Mr. Thomas L. Blanton, of Texas, claiming the floor for a question of personal privilege, proposed to read from the Record, when Frank C. Reavis, of Nebraska, made the point of order that the matter about to be read had been stricken from the Record by order of the House.

The Speaker [3] said:

That is not in order.

Mr. Blanton replied that the matter to which he referred had not been stricken from the Record, and read the following:

I ask unanimous consent, Mr. Speaker, to extend in the Congressional Record at this point a telegram dated October 30, 1919, to the Secretary of Labor, Mr. Wilson, from John L. Lewis, president of the United Mine Workers of America.

Mr. BLANTON. I object, Mr. Speaker.

Mr. KING. I expected the gentleman would object. The gentleman has said that he would hang them as high as Haman. I would recommend to the gentleman to read the history of Robespierre, of France, and his ending. The gentleman would hang all the laboring people.

The Speaker said:

The Chair is ready to rule. The Chair thinks that the statement to the effect that the gentleman would hang all the laboring people does raise a question of personal privilege, and the Chair recognizes the gentleman.

598. Inference that a Member is actuated by ulterior motives in official conduct presents a question of privilege.

On June 21, 1916,[4] Mr. Augustus P. Gardner, of Massachusetts, as a question of privilege, called attention to a statement included in remarks inserted in the Record on May 29 by Mr. Oscar Callaway, of Texas, under leave to print. In referring to Mr. Gardner the statement said: "The fear that disturbs the peace of mind of the gentleman from Massachusetts is not that our homes will be invaded, our cities bombarded, or our coasts laid waste, but that stocks will shrink."

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[1] Champ Clark, of Missouri, Speaker.

[2] First session, Sixty-sixth Congress, Record, p. 7845.

[3] Frederick H. Gillett, of Massachusetts, Speaker.

[4] First session Sixty-fourth Congress, Record, p. 9702.

Mr. James B. Aswell, of Louisiana, raised the point of order that a question of privilege was not involved.

The Speaker [1] overruled the point of order and recognized Mr. Gardner.

599. On August 2, 1916,[2] Mr. Charles J. Linthicum, of Maryland, rising to a question of privilege, read from a speech by Mr. Michael E. Burke, of Wisconsin, as printed in the Record of July 19, under leave to extend remarks, the following:

Yet it was but a short time before the real purposes of the same and the hypocrisy which prompted the introduction of this resolution were indirectly exposed in this House by a speech made by the gentleman from Maryland, Mr. Linthicum, delivered on the 1st day of April, 1916.

In various parts of the speech of the gentleman from Maryland can be found positive evidence that such resolution was introduced and is being urged for passage not by those who are unselfishly interested in the promotion and maintenance of the public health by preventing the sale and distribution of insanitary dairy products. Certain remarks of the gentleman and quotations from certain alleged dairy and farm papers show conclusively to the friends of dairymen that the main purpose behind such resolution is to attack, to degrade, and to prejudice butter in the minds of the consuming public.

Mr. Linthicum asked unanimous consent to address the House on the subject.

The Speaker [1] held that Mr. Linthicum had the right to speak on the question as a matter of personal privilege, and unanimous consent was unnecessary.

600. Intimation of lack of veracity on the part of a Member was held to give rise to a question. of privilege.

In presenting a question of privilege the Member is required to submit the exact language on which he bases the question and not a statement as to its nature or import.

In the presentation of a question of privilege a Member is restricted to a defense of himself and may not attack another.

In debate a Member should not address another in the second person or refer to him by name or call upon him to answer.

On February 4, 1918,[3] Mr. Thomas L. Blanton, of Texas, rose to a question of personal privilege and said:

Mr. Speaker, on the 31st day of January the gentleman from Texas, Mr. Wilson, just before the dose of the session on that day, obtained unanimous consent to extend his remarks in the Record. Following that permission he had published in the Record a five-page article, every portion of which was in violation of the custom of this House under the rule as to extending remarks. He attacked my integrity, my veracity, and standing as a gentleman and a Member of this House.

The Speaker [1] said:

In what language did he attack it?

Mr. Blanton continued, when the Speaker again interrupted and inquired:

Is that what he said, or is that the inference?

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[1] Champ Clark, of Missouri, Speaker.

[2] First session Sixty-fourth Congress, Record, p. 11987.

[3] Second session Sixty-fifth Congress, Record, p. 1657.

Mr. Wilson made the point of order that no question of personal privilege had been stated.

The Speaker said:

Will the gentleman from Texas please quote the language and not state what he thinks is the language? The Chair does not want to hear any remarks about what the article says, but he wants the gentleman to read the particular language that he says constitutes a question of personal privilege.

Mr. Blanton then read from the Record, and the Speaker said:

The Chair thinks that the gentleman from Texas, Mr. Blanton, has a question of privilege; not very well defined, but in three or four places, as far as read, the intimation of the lack of veracity is very plain, and the gentleman will proceed.

During Mr. Blanton's discussion of the question of privilege Mr. Wilson again raised a point of order, and inquired if a Member in debating a question of personal privilege was at liberty to attack another Member.

The Speaker held that a Member speaking to a question of personal privilege should confine his remarks to matters personal to himself, and admonished Mr. Blanton to keep within the limits prescribed by the rule.

During the debate Mr. Blanton, in addressing remarks to Mr. Wilson, used the pronoun "you" instead of referring to him as "the gentleman from Texas."

Mr. Martin B. Madden, of Illinois, made the point of order that Members should not address each other in the second person.

The Speaker sustained the point of order, and said:

The gentleman must not address his colleague by name or in the second person; it is against the rule.

In the further course of debate Mr. Blanton said:

Mr. Speaker, the gentleman from Oklahoma, Mr. Chandler, is present, and I would like to call on him to state, at this time to the House——

The Speaker said:

It is a very bad practice for one Member to call on another sitting in his seat. The Chair saw that done in the Senate once, but does not think it ought to be followed in the House.

601. A resolution that a Member has violated a promise relating to the transaction of official business presents a question of privilege.

On June 7, 1912,[1] Mr. Ralph W. Moss, of Indiana, rose to a question of privilege and read the following resolution (11. Res. 570) introduced by Mr. Theron Akin, of New York:

Whereas the present chairman of the Committee on Expenditures in the Department of Agriculture of this House promised, in April, 1911, that there would be a rigid investigation of the Weather Bureau "at an early date," which promise has not been kept, etc.

The Speaker[2] recognized Mr. Moss on a question of personal privilege.

602. Statements in the Record that a Member charged with absenteeism was thereby "defrauding the Government" were held to present a question of privilege.

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[1] Second session Sixty-second Congress, Record, p. 7301.

[2] Champ Clark, of Missouri, Speaker.

To sustain a question of privilege it is not necessary that the Member referred to be designated by name. It is sufficient if the description is such as to be generally recognized.

On October 13, 1913,[1] Mr. Richmond Pearson Hobson, of Alabama, claimed the floor for a question of privilege predicated on the following remarks by Mr. Jeremiah Donovan, of Connecticut, appearing in the Record of October 10, and widely copied in the public press.

When that great naval constructor, so to speak, who thinks he is fit to be President of these United States, has taken himself away from his duties in this House when we have sent out an order by the way of the Sergeant at Arms—

When a Congressman runs away from his work and is consistently and frequently absent from the scene of his duties, he defrauds the people of that which he agreed to give them.

Mr. James R. Mann, of Illinois, made the point of order that a question of privilege had not been stated.

The Speaker[2] said:

The Chair thinks that the gentleman from Alabama, Mr. Hobson, has stated a question of personal privilege. The charge is made almost in the language of the rule itself. The charge goes to the conduct of the gentleman from Alabama in his representative capacity, and that is the language of the rule. Now, if the Washington Post or any newspaper in the country wanted to attack any Member of this House for things done in his personal capacity rather than his representative capacity, that would not furnish any question of privilege; but the offense charged against the gentleman from Alabama, both by the gentleman from Connecticut, Mr. Donovan, and by these newspapers, is that he is derelict in his duty as a member of the House and is defrauding the Government out of his salary; and if that does not raise a question of privilege, the Chair can not understand what would raise one.

Mr. Mann raised the further point of order that the gentleman from Alabama was not named, and the charges might apply to a number of Members of the House.

The Speaker said:

He is in this different situation from the other Members. While the gentleman from Connecticut did not say "Richmond P. Hobson," or "the gentleman from Alabama, Mr. Hobson," he described him. If a Member were to get up in this House and not say anything except to call for the naval constructor who is a Member of this House, everybody would know that it was Captain Hobson whom he was talking about.

603. Charges that a Member serves interests conflicting with his official duties involve a question of privilege.

On August 3, 1914,[3] Mr. George J. Kindel, of Colorado, rose to a question of privilege and read remarks by Mr. Edward Keating, of Colorado, appearing in the Record and reprinted in various newspapers declaring that Mr. Kindel, was "an employed agent of the express companies."

The Speaker[2] held that a question of privilege was presented.

604. To come within the rule, a question of privilege must relate to the conduct of Members in their representative capacity.

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[1] First session Sixty-third Congress, Record, p. 5637.

[2] Champ Clark of Missouri, Speaker.

[3] Second session Sixty-third Congress, Record, p. 13166.

The validity of a question of privilege is determined by the Speaker, and newspaper articles upon which the alleged question is based are not necessarily laid before the House.

On February 8, 1923,[1] Mr. Manuel Herrick, of Oklahoma, claimed the floor for a question of personal privilege and said:

Mr. Speaker, I rise to a question of personal privilege. I base it on the slanderous and libelous article from the Washington Herald of February 6, which I send to the Clerk's desk and ask to be read.

The Speaker[2] examined the article without laying it before the House and said:

The Chair very clearly thinks that this simply criticizes the gentleman personally. The Chair does not see anything in it attacking the House or attacking the gentleman in his representative capacity. The Chair thinks the gentleman does not bring himself within the rule, and the Chair does not see that any question of personal privilege is raised.

Mr. Frank Clark, of Florida, requested that the newspaper article which Mr. Herrick submitted be read to the House.

The Speaker declined to lay the article before the House.

605. Charges made through the newspapers by a Member reflecting on the efficiency of another Member in his representative capacity do not support a question of privilege.

On February 29, 1912,[3] Mr. J. Hampton Moore, of Pennsylvania, claimed the floor and sent to the desk, as involving a question of privilege, the following communication addressed by Mr. Michael Donohoe, of Pennsylvania, to a newspaper:

To the EDITOR OF THE PUBLIC LEDGER.

SIR: Representative Moore did not appear before the Rivers and Harbors Committee yesterday nor at any time to urge increase for Delaware River, and had absolutely nothing to do with increasing the amount.

MICHAEL DONOHOE.

WASHINGTON, D. C., *February 27.*

Mr. Charles L. Bartlett, of Georgia, raised the point that a question of privilege had not been submitted.

The Speaker[4] sustained the point of order.

606. Charge that a Member has used his immunity as Representative to circulate libels was held to constitute a question of privilege.

In discussing a question of privilege a Member is confined to charges reflecting on him in his capacity as a Representative and may not digress to charges reflecting on him in a business capacity.

A Member may read in full a newspaper article which has been held to sustain a question of privilege.

Time consumed in discussion of incidental points of order is not taken from time allotted for debate under the rule.

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[1] Fourth session Sixty-seventh Congress, Record, p. 3265.

[2] Frederick H. Gillett, of Massachusetts, Speaker.

[3] Second session Sixty-second Congress, Record, p. 2610.

[4] Champ Clark, of Missouri, Speaker.

On March 3, 1919,[1] Mr. Louis T. McFadden, of Pennsylvania, claimed the floor and read, as involving a question of privilege, the following excerpt from a statement issued to the press by the Comptroller of the Currency:

These facts stated briefly as possible explain definitely why Representative McFadden would like to see the comptroller's office abolished. The whole record shows that you acted in exact accord with your career as a banker when as a representative of the people you used your privilege to avail yourself of your immunity to circulate the libels for which you produced no author and which you do not dare present when challenged, defied, and invited where they could be placed and exposed as absolutely unfounded and basely and viciously false.

The Speaker[2] said: The Chair thinks the gentleman has submitted a question of privilege.

Mr. McFadden, being recognized, proceeded to read the entire statement from which the excerpt was taken, when Mr. Otis Wingo, of Arkansas, made the point of order that portions of the statement being read did not relate to the question of privilege.

The Speaker held that Member rising to a question of privilege is entitled to read the entire article on which the question is based.

During debate on the several points of order Mr. Martin B. Madden, of Illinois, inquired if the time consumed in discussion of points of order was taken from the time allowed for the discussion of the question of privilege. The Speaker replied that it was not.

In the course of his remarks Mr. McFadden quoted and proposed to discuss the following paragraph from the article:

The comptroller calls attention to the fact that the capital of the bank in Pennsylvania, of which Representative McFadden has been continuously cashier and president, shows no change in the last 10 years, but has remained at $100,000, while its surplus and undivided profits have shrunk approximately 25 per cent, while the surplus and profits of all other national bank in the country have increased 62 per cent.

Mr. Finis J. Garrett, of Tennessee, made the point of order that this paragraph related to conduct of the Member in a business capacity rather than in his capacity as Representative and discussion of it was therefore out of order.

The Speaker sustained the point of order.

607. Statements charging falsehood in debate involve a question of privilege.

Quotations by newspapers of statements made on the floor may not be made the basis of a question of privilege.

Aspersions upon a Member unnamed may be made the basis of a question of privilege if it is obvious to whom application was intended.

On August 8, 1919,[3] Mr. Thomas L. Blanton, of Texas, claimed the floor for a question of privilege, quoting a remark made on a previous day by Mr. William J. Burke, of Pennsylvania, as follows:

Mr. BURKE. I hope I shall be given time asked for to reply to the false statements just made here.

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[1] Third session Sixty-fifth Congress, Record, p. 4917.

[2] Champ Clark, of Missouri, Speaker.

[3] First session Sixty-sixth Congress, Record, p. 3722.

The Speaker [1] said:

The rulings and decisions on the subject are quite clear. The Chair is disposed to think that the newspaper statement would hardly raise the question of privilege, because it has been held that where a newspaper simply quotes what a Member has said on the floor it does not of itself constitute a question of privilege. There is a precedent exactly in point, however, decided by Mr. Speaker Carlisle, where one gentleman in the House accused another of having made a false statement. The Speaker then held that that did raise a question of personal privilege. The Chair is disposed to think that the question of personal privilege is raised here.

Mr. Loren E. Wheeler, of Illinois, submitted that no name was mentioned in the passage quoted.

The Speaker said:

The Chair is disposed to think the Record shows very clearly to whom the gentleman from Pennsylvania referred. The gentleman from Texas is entitled to the floor.

608. Newspaper statements that a Member voted for or against certain measures, although false, do not give rise to a question of privilege.

Charges implying disloyalty were hold to involve a question of privilege.

In speaking to a question of privilege, a Member is restricted to discussion of those specific charges on which his question is based and may not discuss collateral issues.

On February 19, 1920,[2] Mr. James A. Frear, of Wisconsin, claimed the floor for a question of privilege and branded as false, statements in a newspaper Clipping which he read as follows:

The chairman of the subcommittee was Representative James A. Frear, of Wisconsin, and the Democratic national committee charges he favored the McLemore resolution forbidding Americans to take passage on ocean liners, as well as a resolution favoring an embargo an the sale of munitions to the Allies.

It is further charged by the Democratic national committee that Mr. Frear voted against war with Germany, against conscription, against the espionage act, and against the first war-revenue bill, "among others."

Mr. John N. Garner, of Texas, made the point of order that a question of privilege was not involved.

The Speaker [1] said:

The Chair understands that this article claims that the gentleman voted for the McLemore resolution and voted against the war with Germany, against conscription, against the espionage act, and against the first war-revenue bill. The Chair understands that the gentleman himself does not claim that the charge that he voted for or against bills, which charges were false, gives him the right to raise a question of privilege. The only remaining question, as the Chair understands it, is that this makes charges which are not true. The only insinuation the Chair can see is—and perhaps it would be a fair inference from the article—that it amounts to a charge that the gentleman was pro-German in his sympathies. At the same time, of course, a great many Members of the House did vote for all these bills, and the Chair thinks the Members who did vote that way would certainly resent the inference that they were pro-German. The Chair is disposed to rule that this does not raise a question of privilege.

[1] Frederick H. Gillett, of Massachusetts, Speaker.

[2] Second session Sixty-sixth Congress, Record, p. 3136.

Mr. Frear thereupon further submitted:

Mr. Speaker, I rise to another question of personal privilege. In an article quoted from John D. Ryan, of New York, appears the following:

"The chairman of the subcommittee having, as shown by the record in Congress, assumed a position hostile to the assertion of American rights during the pre-war period, and having voted against the declaration of war with Germany, can not now, I am sure, influence public opinion by submitting a report based on an investigation so thoroughly discredited as the one which he conducted."

Mr. Otis Wingo, of Arkansas, made a point of order against the privilege of the question submitted:

The Speaker held:

The gentleman is charged with having been hostile to the assertion of American rights and with having voted against the war. The Chair thinks the gentleman can deny that. It does not seem to the Chair that he can take up every bill that came before the House and go into the merits of a bill, as to whether each bill was patriotic or not. The gentleman from Wisconsin will proceed.

609. Newspaper articles misstating or misconstruing the purport or effect of legislative measures supported by a Member do not give rise to a question of privilege.

On January 14, 1908,[1] Mr. Madison R. Smith, of Missouri, rose to a question of privilege and read the following paragraph from a local newspaper characterizing. it as a misstatement of the effect and purport of bill referred to.

A delegate from the bookbinders said a bill had been introduced in Congress by Congressman Smith, of Missouri, which made it a penal offense for members of a labor union to. strike, and provided a penalty—a fine of not more than $5,000, or imprisonment for ten years.

Mr. Sereno E. Payne, of New York, made the point of order that a question of privilege was not presented.

The Speaker[2] sustained the point of order.

610. Matters transpiring in committee were held to relate to a Member in his representative capacity.

On April 8, 1908,[3] Mr. Joseph H. Gaines, of West Virginia, rose to a question of privilege and said:

Mr. Speaker, the newspapers of this morning very generally report that upon yesterday in the Committee on Election of President, Vice-President, and Representatives in Congress there occurred a personal difficulty between members of the committee. I will read but one sentence from a newspaper of this morning, as follows:

"Statesmen forgot their dignity and made violent efforts to do bodily injury to other statesmen."

Mr. John J. Fitzgerald, of New York, made the point of order that the article did not reflect on the gentleman in his representative capacity.

The Speaker[2] said:

It seems to the Chair that it does, or that it may, if it be a difficulty, as alleged, over the public business by a committee of the House. The gentleman from West Virginia is recognized.

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[1] First session Sixtieth Congress, Record, p. 685.

[2] Joseph G. Cannon, of Illinois, Speaker.

[3] First session Sixtieth Congress, Record, p. 4504.

611. Wide latitude is allowed the press in the criticism of Members of Congress, and such criticism, unless reflecting on a Member in his representative capacity, does not present a question of privilege.

On May 17, 1909,[1] Mr. David A. Hollingsworth, of Ohio, claimed the floor for a question of privilege and sent to the desk a newspaper editorial including the following:

The Ohio Congressman who got up in the House the other day and raised all manner of sand about the picture of Jefferson Davis being put on the silver service presented by the State to the battleship *Mississippi* ought to be informed that nobody cares what he says about it. A politically prejudiced gas bag from Ohio can no more cast a reflection upon the life and character of Jefferson Davis than a mangy, flea-bitten, bobtailed cur dog can insult the moon by getting up at 2 o'clock in the morning and barking himself to death at that pale-faced luminary.

Mr. Charles L. Bartlett, of Georgia, made the point of order that the matter submitted did not present a question of privilege.

The Speaker[2] said:

The Chair has listened with as careful attention as practicable, and while there were many things in the editorials that the Chair can conceive were unpleasant to the gentleman from Ohio, and possibly unpleasant to gentlemen on both sides of the House, yet great latitude is sometimes taken and at all times allowed to the press. Severe denunciation constantly abounds, sometimes against all the Members of the House, sometimes against the minority of the House, and sometimes against the majority of the House, and sometimes against various individual Members of the House. If in any communication in the public prints or otherwise an attack is made on a Member in his representative capacity, that would present a question of personal privilege. But after listening to these editorials that have been read, the Chair, following the precedents, and there is a long line of them, is inclined to the opinion that they do not reflect upon the gentleman from Ohio in his representative capacity. Therefore the Chair sustains the point of order.

612. Misrepresentations in newspaper reports of remarks in the House do not maintain a question of privilege.

Charges against a Member not connected with his representative capacity do not involve a question of privilege.

On January 23, 1913,[3] Mr. Frank Clark, of Florida, sent to the desk, as involving a question of privilege, a newspaper article which he charged misrepresented remarks made by him on the floor of the House and which referred to him as a "member of the Ananias Club."

Mr. John J. Fitzgerald made the point of order that misrepresentations of remarks delivered on the floor do not give rise to a question of privilege, and the reference to the gentleman as a member of the Ananias Club was not in connection with his representative capacity.

The Speaker[4] said:

This Speaker has been very liberal about questions of privilege. The Chair does not think, upon a consultation of the decisions, that the truth or untruth of these newspaper charges constitutes a question of personal privilege if they are not made about the gentleman from Florida

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[1] First session Sixty-first Congress, Record, p. 2117.

[2] Joseph G. Cannon, of Illinois, Speaker.

[3] Third session Sixty-second Congress, Record, p. 1926.

[4] Champ Clark, of Missouri, Speaker.

in his representative capacity; and that is the rule—that the charge must be made against him in his representative capacity.

613. Newspaper charges impugning the veracity of a Member in statements made on the floor support a question of privilege.

A question of privilege takes precedence of business in order on Calendar Wednesday.

On Wednesday, February 5, 1913,[1] Mr. Thetus W. Sims, of Tennessee, claimed the floor for a question of privilege and read an interview printed in various newspapers charging that statements made by him on the floor were "absolute and unqualified falsehoods."

Mr. Joseph G. Cannon, of Illinois, made the point of order that the day was Calendar Wednesday, set apart under the rule for a special order of business which could not be interrupted by the presentation of a question of privilege.

The Speaker[2] held that a question of privilege took precedence of business in order under the rule.

Mr. Phillip P. Campbell, of Kansas, submitted that a question of privilege was not presented.

The Speaker overruled the point of order.

614. A newspaper statement that a Member obstructed legislation, without implying moral turpitude, does not sustain a question of privilege.

On February 16, 1921,[3] Mr. Thomas L. Blanton, of Texas, claimed the floor for a question of privilege based on a newspaper statement that he had "blocked" a resolution to investigate the escape from a military prison of Grover Cleveland Bergdoll.

Mr. James R. Mann, of Illinois, made the point of order that a question of privilege was not submitted.

The Speaker[4] sustained the point of order.

615. Newspaper charges that a Member had used departmental employees while in the service of the Government in a political campaign were held to reflect on him in his representative capacity.

On February 16, 1912,[5] Mr. John H. Small, of North Carolina, rose to a question of privilege and read a newspaper article charging that he had taken employees of the Department of Agriculture with him on a political campaign through his congressional district.

Mr. Marlin E. Olmsted, of Pennsylvania, made the point of order that a question of privilege was not presented.

The Speaker[2] said.

The gravamen of the charge is that the gentleman from North Carolina imported these agricultural agents into his district for the purpose of helping to reelect him to Congress; and in a political campaign. The Chair thinks it is a question of privilege, as it reflects on the gentleman from North Carolina in his representative capacity.

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[1] Third session Sixty-second Congress, Record, p. 2609.

[2] Champ Clark, of Missouri, Speaker.

[3] Third session Sixty-sixth Congress, Record, p. 3263.

[4] Frederick H. Gillett, of Massachusetts, Speaker.

[5] Second session Sixty-second Congress, Record, p. 2122.

616. Newspaper assertions that statements made on the floor are false do not give rise to a question of privilege unless imputing dishonorable motives.

Although a newspaper article reflecting on a Member may not mention him by name, yet if from the implication the identity of the Member referred to is unmistakable it is sufficient to warrant recognition on a question of privilege.

On April 22, 1916 [1] Mr. Thomas L. Blanton, of Texas, submitted, as involving a question of privilege, the following headline from a Washington newspaper:

Colladay denies jail or indictment charge. Republican committeeman says Blanton statement in House false.

Mr. Bertrand H. Snell, of New York, having interposed a point of order, the Speaker [2] ruled:

The Chair does not think that is sufficient. The Chair thinks the statement would have to go further than the mere statement that the charge made was false. The Chair thinks it would have to go to the extent of imputing some dishonorable motive or purpose on the part of the gentleman. The Chair does not see that in either the headlines or the body of the letter.

The only question for the Chair to decide is whether this statement in the newspaper affected the gentleman in his capacity as a Member of the House or imputed motives to him which were improper. The Chair does not see that at all. It is a mere denial of the facts stated by the gentleman from Texas with no imputation of any improper motive. The Chair can not fail to sustain the point of order.

Whereupon, Mr. Blanton submitted a further excerpt from a Washington newspaper as supporting a question of privilege.

Mr. Snell objected on the ground that Mr. Blanton's name was not mentioned in the article.

The Speaker said:

The Chair will read what he thinks is the ground, if there is a ground, on which the gentleman bases his question of personal privilege. This is a part of a resolution adopted by the Northwestern Suburban Citizens' Association.

The resolution declares:

"It has happened, not often, but too frequently for a broad-minded, dignified body of men who should be, or and to be, an example for the intelligent people in all the world to follow, that men of honor and great repute who have climbed the ladder of success by faithful and dignified service, who have been respected by all right-thinking people who have known them, and are acceptably occupying an exalted position by the wish of the people whom they represent, have been shamelessly and in a cowardly, unpatriotic way maligned by those who so far forgot themselves as to insult the dignity of the House of Representatives, as well as to insult the entire citizenry of the United States, by squandering the time and patience of all fair-minded Americans, whose high ambition is for fair play and justice, and who are waiting for legislation that should be enacted, rather than listen to the rantings of a barn-storming political demagogue.

"We deplore and denounce as un-American, unpatriotic, and opposed to all the laws of justice and equity this plan to defame, from the Halls of Congress, to the whole world the character and integrity of our highly esteemed and worthy honorable commissioner, Col. Frederick A. Fenning, whom certain ones am trying to immolate without a fair and just opportunity to be allowed a hearing, a persecution that is despleasing to all fair-minded Americans."

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[1] First session Sixty-ninth Congress, Record, p. 7983.

[2] Nicholas Longworth, of Ohio, Speaker.

The Chair thinks that, while the gentleman from Texas is not mentioned specifically, it is the plain intention to charge that any Member of the House of Representatives who made these charges, whether they are true in fact or not, was un-patriotic and insulted the dignity of the House. The Chair thinks that founds a question of privilege.

617. It is not essential that a newspaper editorial mention a Member's name in order to present a question of privilege and it is sufficient if the reference is accurate enough to identify him.

Statements impugning motives prompting Members in the discharge of their official duties sustain a question of personal privilege.

Instance wherein the Speaker submitted to the House the question as to whether a statement objected to in debate was in order.

The motion to strike from the Record is not debatable.

A ruling that the House by voting on a motion to strike a statement from the Record decided simultaneously whether the language objected to was in order and only the one vote was required.

A Member recognized to debate a question of personal privilege may not yield to another to propound irrelevant questions or inject extraneous subjects.

On June 3, 1926,[1] Mr. John B. Sosnowski, of Michigan rose to a question of privilege and asked that the Clerk read an editorial from a Chicago newspaper which included the following:

"It is like the Chicago gunman who is let out on parole and who hurries to gather as much ill-gotten gain as he can before the mills of justice grind out retribution upon him, "says the embattled foreigner who represents Detroit. That is not the voice of a man arguing the merits of a proposed appropriation. The words are inspired by envy and malice. They can not be answered with reason because there is no reason in them.

Mr. Martin B. Madden, of Illinois, objected that the article did not refer to any Member by name.

The Speaker[2] said:

The article states "the embattled foreigner who represents Detroit." The Chair is quite clear in his mind that an imputation that the action of a Member of the House is dictated by envy and malice clearly raises a question of personal privilege. The Chair thinks the gentleman from Michigan has founded a question of personal privilege.

Mr. Sosnowski was proceeding in debate when interrupted by a demand from Mr. Madden that his words be taken down.

Mr. John E. Rankin, of Mississippi, submitted that it was the duty of the Speaker to decide whether the words objected to were in order.

The Speaker said:

The gentleman from Illinois demands that the words be taken down.
It is for the House to decide, and the motion is not debatable.

Subsequently Mr. Sosnowski said:

If being opposed to the Chicago steal is a reflection, then again my companions are millions.

and Mr. Madden moved that the words be stricken out.

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[1] First session Sixty-ninth Congress Record, p. 10623.

[2] Nicholas Longworth, of Ohio, Speaker.

Mr. Carl E. Mapes, of Michigan, raised the issue that the words were not subject to a point of order, and could not be stricken from the Record.

The Speaker said:

The gentleman from Michigan makes the point of order that the language complained of is not out of order. The Chair is aware of the fact that the precedents differ somewhat as to whether it is within the province of the Chair to make that decision or not. The present occupant of the chair thinks that in these cases it is better for the House to decide, and the vote of the House to strike out certain language should be based on the proposition that the words are not in order. The Chair in effect leaves to the House to determine whether the words were in order or not.

The question is whether in a parliamentary sense the words are in order or not.

Later in his discussion Mr. Sosnowski used this language:

The Chicago diversion, in my humble opinion, is a "steal," a moral as well as economic wrong against the rights of millions of people.

Mr. Rankin having moved that the language be stricken from the Record, the Speaker repeated:

As the Chair announced a few moments ago, he does not believe it is properly within the province of the Chair to determine whether the language complained of is or is not in order. The gentleman from Mississippi moved that the words be stricken out, and the House, in acting upon that, will determine the question of order.

The rule does not provide that the Speaker shall determine that question, and in this case the Chair has declared that he would prefer not to determine it. The Chair thinks that the motion to strike out the words will be determined by the House on a motion, either that they are out of order or are in order.

Mr. Cassius C. Dowell, of Iowa, took the position that if the question was to be submitted to the House it would require two votes, one to determine whether the language was in order and the other on the question of striking it from the Record.

The Speaker dissented and said:

No; the Chair thinks that the question is determined by one vote, and that is it not necessary to have two votes.

The sole question raised by the gentleman from Iowa is whether in the event the Speaker has not ruled on the question it is necessary for the House to vote twice on the same proposition. The Chair does not think that is necessary. The rule has nothing to say about anything after the House shall have determined, but only when the Speaker shall have determined.

The motion made by the gentleman from Mississippi is not debatable. The Chair holds, as he held before, that he does not feel it within the proper province of the Chair to rule on these questions; that it is for the House to determine whether or not the language complained of is in order; and that the vote taken by the House is the vote determining whether or not it is in order. Gentlemen voting for the motion of the gentleman from Mississippi will vote that the words are not in order and should be stricken out, and gentlemen voting the other way will express their opinion that the words are in order and should not be stricken out.

In closing his remarks Mr. Sosnowski yielded to Mr. W.W. Chalmers, of Ohio, who propounded an irrelevant question and proceeded to read a newspaper editorial pertaining to the merits of the bill to which reference had been made rather than to the question of privilege.

Mr. Otis Wingo, of Arkansas, raised a question of order and the Speaker ruled:

The Chair thinks that the rule is as stated by the gentleman from Arkansas. The gentleman from Michigan must confine himself strictly to the question of personal privilege, and if he yields

to another gentleman that gentleman is also bound within the same limits. If the matter be brought to his attention again, the Chair will hold that anything read by the gentleman from Ohio that is not strictly pertinent to the point at issue is out of order.

618. A pamphlet charging falsehood in connection with statements made in debate was held to support a question of personal privilege.—On March 28, 1928,[1] Mr. Vincent L. Palmisano, of Maryland, rose to a question of personal privilege and submitted as the basis for his remarks the following excerpt from a pamphlet issued in reply to a speech which he had delivered on the floor on February 21:

I do not know Judge Coleman; I have never met him; I hate to use a sharp word, but if Mr. Palmisano said that, he was guilty of a common, ordinary. cheap he. Of course, Mr. Palmisano was given the nomination with the idea that John Philip Hill was to beat him. The more he talks the better off our cause will be.

The Speaker[2] held that the statement gave rise to a question of personal privilege.

619. Newspaper charges attributing to a Member dishonorable action in connection with matters not related to his official duties were held to sustain a question of personal privilege.

In speaking to a question of personal privilege a Member is required to confine his remarks to the question involved, but is entitled to enter into a discussion of related matters showing motives which prompted the charges giving rise to the question of privilege.

On April 9, 1928,[3] Mr. Thomas L. Blanton, of Texas, rose to a question of privilege and stated that Washington newspapers had erroneously reported him as being arrested for violations of the traffic law and had falsely charged in headlines that "Blanton made cop sign false paper."

The Speaker,[2] expressed himself as doubting whether the erroneous reports of arrest were sufficient to support a question of privilege, but that the charges of coercing police officials in securing signatures to false statements were sufficient to warrant recognition.

In debating the question Mr. Blanton referred to a recent police trial in which he had participated and Mr. John C. Schafer, of Wisconsin, having raised a point of order that the matter was irrelevant, the Speaker ruled:

The Chair thinks the gentleman has strayed from the subject of privilege. The Chair thinks the gentleman has the right to show the motives that might have actuated persons in making this accusation, but he does not think the gentleman should discuss a police trial.

Later in his remarks, Mr. Blanton discussed charges which he previously had made against officials of the police department.

Mr. Carl R. Chindblom, of Illinois, having made a point of order that he should confine himself to the question of privilege, the Speaker ruled:

The Chair would think that if the gentleman from Texas is undertaking to supply some connecting link between the chief of police or others in giving out or circulating the report that the gentleman from Texas compelled a policeman to sign a false statement, the gentleman is entitled to do that.

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[1] First session Seventieth Congress, Record, p. 5530.

[2] Nicholas Longworth, of Ohio, Speaker.

[3] First session Seventieth Congress, Journal, p. 1015; Record, p. 6105.

620. An error in the printing of the Record, attributing to a Member remarks which he did not make, was held to sustain a question of personal privilege.—On April 3, 1933,[1] Mr. Thomas L. Blanton, of Texas, rising to a question of personal privilege, called attention to the Record of the previous day in which remarks by Mr. Patrick J. Boland, of Pennsylvania, had been attributed erroneously to him.

Mr. Blanton said:

My unalterable position against intoxicating liquor, against repeal, against beer, and against removing present restrictions from medicinal whisky are so well known this error on the part of the Government Printing Office has placed me in an inconsistent attitude from one side of the United States to the other. I do not want to be placed in that attitude, and therefore I ask recognition under the question of personal privilege.

The Speaker[2] said:

The gentleman is recognized.

621. A newspaper reference to "Rascally Leadership" as attributed to a Member was held to justify recognition on a question of personal privilege.

A Member addressing the House on a question of personal privilege is required to confine himself to the question of privilege.

A general indictment of the House does not give rise to a question of personal privilege.

On May 6, 1932,[3] Mr. John E. Rankin, of Mississippi, based a request for recognition to discuss a question of personal privilege on the following statement from a newspaper editorial:

An act of sheer treason to the Republic was committed by yesterday's vote in the House.

Under the rascally leadership of Rankin, of Mississippi, the Members suspended the rules, choked off debate, and, by the overwhelming vote of 316 to 16, plumped for a bill pensioning widows and orphans of World War veterans.

The Speaker[4] held that the statement supported a question of privilege and recognized Mr. Rankin for one hour.

In the course of Mr. Rankin's discussion, Mr. Albert Johnson, of Washington, interrupted and made the point of order that the gentleman was discussing matters extraneous to the question of privilege

The Speaker said:

The gentleman from Mississippi must confine himself to the question of personal privilege.

After further debate, the Speaker amplified his ruling:

Let the Chair make a statement. The gentleman from Mississippi is speaking to a question of personal privilege, where the Members of the House are charged with treason and the gentleman from Mississippi is charged with being a rascal and leading them. The question before the House is whether it is a treasonable House and whether or not the gentleman from Mississippi is a rascal.

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[1] First session Seventy-third Congress, Record, p. 1132.

[2] Henry T. Rainey, of Illinois, Speaker.

[3] First session Seventy-second Congress, Record, p. 9715.

[4] John N. Garner, of Texas, Speaker.

Mr. Robert Luce, of Massachusetts, inquired if language denouncing the Congress generally warranted a question of personal privilege.

The Speaker replied:

No. The Chair did not say that. A general indictment against the membership of the House is not a question of personal privilege.

622. A newspaper characterization of a Member as alien in mind and lacking in loyalty to our form of government was held to give rise to a question of personal privilege.—On March 23, 1932,[1] Mr. Fiorello H. LaGuardia, of New York, submitted as basis for a question of personal privilege, on which he asked recognition, the following excerpt from a daily newspaper:

LaGuardia, who is alien in mind and spirit from Americanism, who has no loyalty to our form of government, and shows every indication that he is wining to destroy it.

The Speaker said:[2]

The Chair thinks the gentleman has clearly stated a question of personal privilege. The Chair has looked up the precedents and there are a number of instances not as strong as the one here presented which were held by Mr. Speaker Clark and Mr. Speaker Longworth to be questions of personal privilege.

The gentleman from New York is recognized for one hour.

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[1] First session Seventy-second Congress, Record, p. 6731.

[2] John N. Garner, of Texas, Speaker.

Chapter CCVI.[1]

THE JOURNAL AND ITS APPROVAL.

1. Reading and approval. Sections 623–628.
2. Business not transacted before approval. Sections 629, 630.
3. Motions to amend, especially as to records of votes. Sections 631–633.
4. Changes as related to actual facts. Section 634.

623. During the interim preceding the election of Speaker and adoption of rules the Journal of the proceedings is read and approved daily.

Before the completion of the organization of the House in 1923 the Clerk decided questions of order and enforced, in as far as applicable, the rules of the preceding Congress.

Members may not approach the desk during the call of the roll or the counting of ballots.

On December 4, 1923[2] during the organization of the House and before the election of Speaker or adoption of rules, the Clerk directed the reading of the Journal of the proceedings of the previous day, when Mr. Finis J. Garrett, of Tennessee, inquired if the reading of the Journal prior to the organization of the House was in accordance with the precedents.

The Clerk[3] said:

The Clerk will state to the gentleman from Tennessee that the precedent seems to have been established in the Fifty-second Congress when upon the opening day the House did not organize and on the day subsequently the Journal was read and approved. It was approved before the organization on the second day just preceding the vote being taken upon the election of a Speaker. And the Clerk will also state that such was the case before organization in the Thirty-fourth Congress. The question recurs upon the election of a Speaker, and the tellers will please come forward and take their places.

The Clerk[3] thereupon caused clause 7 of Rule XIV to be read and said:

Before the roll is called the Clerk asks the indulgence of the House while he reads a portion of clause 7, Rule XIV, of the rules of the last House:

"While the Speaker is putting a question or addressing the House no Member shall walk out of or across the Hall, nor, when a Member is speaking, pass between him and the Chair; and during the session of the House no Member shall wear his hat or remain by the Clerk's desk during the call of the roll or the counting of ballots, etc."

While this rule is persuasive only under the present circumstances, yet the Clerk invokes its spirit and requests the cooperation of the Members and employees in its application.

The Clerk requests all persons not officially connected with the taking of the vote to remain away from the Clerk's desk, and would suggest, respectfully, to the Members that when they desire to know whether or how they have been recorded their requests be made known in an audible tone from their accustomed places on the floor, to which the Clerk will respond. Thus

[1] Supplementary to Chapter LXXXIII.

[2] First session, Sixty-eighth Congress, Journal, p. 7; Record, p. 11.

[3] William Tyler Page of Maryland, Clerk.

Members' rights will be safeguarded, and such procedure will make for decorum and for accuracy in the taking of the vote. The Clerk will call the roll.

624. The reading of the Journal may be interrupted by a parliamentary inquiry.

The point of no quorum may be made while the Journal is being read.

A quorum is always presumed to be present unless otherwise disclosed.

It is not the duty of the Speaker to take cognizance of the absence of a quorum unless disclosed by a yea-and-nay vote or questioned by a point of order.

On April 6, 1910,[1] while the Journal of the proceedings of the previous day was being read by the Clerk, Mr. Robert L. Henry, of Texas, rose and interrupted the reading to submit a parliamentary inquiry.

Having been recognized by the Speaker for that purpose, Mr. Henry inquired if it was not mandatory upon the Speaker, under the rule, to ascertain the presence of a quorum before the reading and approval of the Journal.

The Speaker[2] said:

It is within the power of any Member, including the Speaker, being a Member of the House, to make the point that no quorum is present, whether there is in fact a quorum present or not. Under the practice of the House, under all Speakers, it has always been the usage, as is now well known, that a quorum is presumed to be present unless a point of order is made by some Member, or unless a record vote by yeas and nays fails to disclose the presence of a quorum; and, so far as the Chair recollects, no Speaker has ever felt called upon to make the point of no quorum, looking into the faces of many Members who are quite as responsible for the business of the House as is the Speaker, unless in case wherein a record vote discloses the absence of a quorum. Does the gentleman make the point that no quorum is present?

The Clerk proceeded with the reading of the Journal, when Mr. Henry again addressed the Chair and made the point of order that a quorum was not present.

A quorum not being present, a call of the House was ordered, and the roll was called.

The Speaker announced that 276 Members had answered to their names, a quorum, and the reading of the Journal was resumed and completed.

625. If a question as to a quorum is raised before the reading of the Journal, a quorum should be ascertained to be present before the reading begins.

The reading of the Journal may be dispensed with by unanimous consent.

The granting by the House of unanimous consent to dispense with the reading of the Journal implies unanimous consent to its approval.

On March 2, 1915,[3] the Speaker[4] directed the Clerk to read the Journal of the previous day, when Mr. James R. Mann, of Illinois, made the point of order that no quorum was present.

The Speaker having ascertained that a quorum was not present, a call of the House was made. A quorum having appeared, Mr. Oscar W. Underwood, of

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[1] Second session, Sixty-first Congress, Record, p. 4325.

[2] Joseph G. Cannon, of Illinois, Speaker.

[3] Third session, Sixty-third Congress, Record, p. 5177.

[4] Champ Clark, of Missouri, Speaker.

Alabama, asked unanimous consent that the reading of the Journal be dispensed with. There was no objection.

An inquiry by Mr. Mann if the action of the House in dispensing with the reading of the Journal implied its approval, was answered in the affirmative.

626. While the Journal must be read in full on the demand of any Member such demand comes too late after the Journal has been approved.

The duty of preliminary approval of the Journal, the reference of bills to committees and calendars, and similar matters of clerical routine are largely delegated by the Speaker to the Clerk at the Speaker's table.

On February 21, 1910,[1] following the reading and approval of the Journal, in response to a parliamentary inquiry by Mr. Victor Murdock, of Kansas, the Speaker[2] said:

> The Chair will reply, in answer not strictly to a parliamentary inquiry, but as to a question of fact. The rules of the House require the Speaker to refer to the various committees bills which are introduced under the rules. There have already been introduced in this House over 20,000 bills. The rules require the Speaker to examine the Journal and to refer reports to the calendars. Now, with the duties of the Speaker it would be a matter of impossibility that he should read every particular bill; that he should watch the Journal; but the House in its wisdom has given a Journal clerk, reading clerks, an assistant to the Journal clerk, a clerk to the Speaker's table, an assistant to the Speaker, and, in addition, it has commissioned 391 Representatives whose duty and privilege it is to be as vigilant as the Speaker is required to be under the rule.
>
> The Journal is brought to the Speaker for a preliminary approval, as the Chair is reminded by the Clerk to the Speaker's table. This gentleman has been for many years Clerk to the Speaker's table, known to the membership as being far more competent as to the procedure under the rules than the Speaker, or any Speaker, I will say, with whom I have served. The Journal is brought by the Journal clerk to the Speaker's room every morning, inspected by the clerk to the Speaker's table, and if any question of doubt arises it is referred to the Speaker. That was done this morning.
>
> The Journal gives the names of the absentees when the Committee of the Whole reports as it did Saturday, and the Journal just approved has that list of absentees. But in the practice of the House ordinarily there is not a demand made that the names should be read when the Journal is read for approval. At any rate, it is too late now, because the Journal has been approved. If the gentleman was anxious to have the names read, he makes his inquiry too late. He sat in his seat until the Journal was approved, and under a parliamentary inquiry the colloquy between him and the Chair has occurred.

627. On the demand of any Member, the reading of the Journal must be in full.

On January 23, 1913,[3] while the Journal was being read, Mr. James R. Mann, of Illinois, called attention to the fact that the Clerk was not reading the proceedings of the previous day in full, and was omitting that portion of the Journal relating to the introduction of bills and petitions.

By direction of the Speaker[4] the Journal was read in full.

628. The reading of the Journal must be in full when demanded by a Member.

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[1] Second session Sixty-first Congress, Record, p. 2169.

[2] Joseph G. Cannon, of Illinois, Speaker.

[3] Third session Sixty-second Congress, Record, pp. 1921, 1922.

[4] Champ Clark, of Missouri, Speaker.

The Speaker declined to entertain a motion to approve the Journal without reading in full.

On May 28, 1920,[1] during the reading of the Journal of the previous day's proceedings, the Clerk omitted, as customary, the reading in full of resolutions and roll calls, when Mr. Frank Murphy, of Ohio, demanded that the Journal be read in full.

The Clerk proceeded to read the Journal in full, when Mr. Frank W. Mondell, of Wyoming, moved that the Journal stand approved without further reading.

The Speaker[2] held that the motion was not in order.

629. The transaction of business is not in order before the reading and approval of the Journal.

The Journal may not be approved until a quorum has appeared.

On September 30, 1918,[3] after the reading of the Journal and pending its approval, Mr. Thetus W. Sims, of Tennessee, submitted a request to take from the Speaker's table, for the purpose of sending to conference, the water-power bill with Senate amendments.

Mr. Finis J. Garrett, of Tennessee, inquired if business could be transacted before the approval of the Journal.

The Speaker[4] pro tempore said:

> The Chair would like to state that in his opinion the first order of business is the approval of the Journal.

Mr. Joseph Walsh, of Massachusetts, made the point of order that a quorum was not present.

The Speaker pro tempore, having ascertained the absence of a quorum, the approval of the Journal was deferred pending a call of the House.

630. The transaction of business, however highly privileged, is not in order before the reading and approval of the Journal.

On January 23, 1913,[5] immediately after prayer by the Chaplain and before the Journal had been read, Mr. James R. Mann, of Illinois, made the point of order that a quorum was not present. A call of the House was ordered, and a quorum having appeared, Mr. Augustus P. Gardner, of Massachusetts, proposed to present a conference report.

The Speaker[6] ruled that no business was in order until the Journal had been read and approved.

631. While correction of the Record to conform with actual facts is by right, such correction of the journal is by motion or unanimous consent.

On March 22, 1910,[7] Mr. Frank Plumley, of Vermont, rising to a question of personal privilege, called attention to an error in the record of his vote on the preceding Saturday, and asked unanimous consent that the Record and the Journal be corrected to conform to the actual facts.

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[1] Second session Sixty-sixth Congress, Record, p. 7805.

[2] Frederick H. Gillett, of Massachusetts, Speaker.

[3] Second session Sixty-fifth Congress, Journal, p. 585; Record, p. 10954.

[4] Martin D. Foster, of Illinois, Speaker pro tempore.

[5] Third session Sixty-second Congress, Record, p. 1921.

[6] Champ Clark, of Missouri, Speaker.

[7] Second session Sixty-first Congress, Record, p. 3549.

The Speaker[1] announced that correction of the Record was a matter of right and consent was not required, but that correction of the Journal was made on motion or by unanimous consent. The Speaker then submitted Mr. Plumley's request for the correction of the Journal.

632. After the Journal had been printed it was held to be too late to amend it.

On December 9, 1920,[2] Mr. Philip P. Campbell, of Kansas, asked unanimous consent that the Journal be amended to record, nunc pro tunc, the adoption of an amendment to section 7 of Rule I proposed by Mr. Finis J. Garrett, of Tennessee, during the previous session of Congress and inadvertently omitted in the preparation and approval of the Journal for that day.

The Speaker[3] held that as the Journal for the preceding session had been printed it was not subject to amendment.

633. The motion to amend the Journal takes precedence of the motion to approve it, but the motion to amend is not admitted after the previous question has been demanded on the motion to approve.

On January 23, 1913,[4] when the reading of the Journal of the previous day's proceedings had been concluded, Mr. John J. Fitzgerald, of New York, moved that the Journal be approved, and on that motion demanded the previous question.

Mr. James R. Mann, of Illinois, offered, as preferential, a motion to amend the Journal.

The Speaker[5] held that while the motion to amend the Journal was preferential and took precedence over the motion to approve it, the previous question having been demanded, no motion to amend was in order.

634. In amending the Journal the House may decide as to what are proceedings, even to the extent of omitting things actually done or of recording things not done.

On August 16, 1912,[6] Mr. James R. Mann, of Illinois, having been recognized for a parliamentary inquiry, called attention to the fact that while the special order, reported by the Committee on Rules the previous day making in order a motion to send to conference the post office appropriation bill, had been agreed to, the formality of making the motion thus provided for had not been observed and the bill had been sent to conference without authorization.

The Speaker[5] said:

> There are two ways out of it. The Journal can be corrected by common consent to make it show that the actual thing was done, or the Chair can again put the question.

Mr. Mann objected that the Journal could not be corrected to record proceedings which had not actually taken place

The Speaker said:

> Mr. Speaker Cannon ruled a number of times that by unanimous consent anything can be done, and the Chair thinks he was right.

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[1] Joseph G. Cannon, of Illinois, Speaker.

[2] Third session Sixty-sixth Congress, Record, p. 145.

[3] Frederick H. Gillett, of Massachusetts, Speaker.

[4] Third session Sixty-second Congress, Journal. p. 160; Record. p. 1922.

[5] Champ Clark, of Missouri, Speaker.

[6] Second session Sixty-second Congress, Record, p. 11085.

Chapter CCVII.[1]

THE MAKING OF THE JOURNAL.

1. **Proceedings only are recorded. Sections 635, 636.**
2. **Record of votes and roll calls. Section 637.**

635. The Journal records proceedings subsequently vacated.

On August 10, 1912,[2] at the conclusion of the reading of the Journal, Mr. James R. Mann, of Illinois, said:

Mr. Speaker, before the Journal is approved I desire to say that in the reading of the Journal I did not hear whether it showed that last night at the evening session a point of no quorum was made and that the proceedings respecting that point of order were afterwards vacated. A point of no quorum was made and the Chair, after counting, declared that no quorum was present. The Record shows that subsequently some one asked unanimous consent that all proceedings should be vacated. I am not very particular about what the Journal shows, but I wish to emphatically dissent from the idea that when the House finds itself without a quorum, the Chair having counted and declared there was no quorum present, thereafter by unanimous consent that finding may be set aside until a quorum does appear.

Inquiry disclosed that the Journal, as written, did not record the vacating of the proceedings referred to, and the Speaker[3] said:

The gentleman is entirely correct. The Chair thinks the Journal ought to show what occurred, because the Chair has been as particular as could be about not doing anything at all after the fact has appeared that there is no quorum present. The Chair has always believed that the Record itself ought to show exactly what happens in this House and what is said in the House and nothing else. The Journal will be corrected accordingly.

636. The Journal and the Record record proceedings vacated under the rules.—On December 23, 1932,[4] the Journal of the preceding day having been read, Mr. Carl E. Mapes, of Michigan, objected to its approval for the reason that it failed to record the roll call and attendant proceedings vacated under the rule[5] when the House adjourned without a quorum on the preceding day.

The Speaker[6] explained that the proceedings referred to were not recorded because vacated, and were omitted pursuant to the rule which he read as follows:

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[1] Supplementary to Chapter LXXXIV.

[2] Second session Sixty-second Congress, Record, p. 10678.

[3] Champ Clark, of Missouri, Speaker.

[4] Second session, Seventy-second Congress, Record, p. 980.

[5] Section 4 of Rule XV.

[6] John N. Garner, of Texas, Speaker.

At any time after the roll call has been completed, the Speaker may entertain a motion to adjourn, if seconded, by a majority of those present, to be ascertained by actual count by the Speaker; and if the House adjourns, all proceedings under this section shall be vacated.

The Speaker continued:

The Chair does not know what this language can mean unless it means that where a quorum failed on an automatic roll call and the House adjourned the entire proceedings relating to the call shall be vacated. What can it possibly mean other than to vacate the proceedings? And that, of course, includes the roll call.

The gentleman from Alabama called attention to the definition of "vacate" found in Webster's Dictionary. The Parliamentarian calls the Chair's attention to the definition appearing in Bouvier's Law Dictionary, which is:

"To render null and void; to vacate an entry which has been made on a record."

That is exactly what was done in this case.

Let the Chair suggest to the gentleman from New York that we can adjourn, if the House desires, at the present time, and the Chair will recognize the gentleman from New York on next Tuesday to move to correct the Journal of the proceedings of yesterday.

Whereupon, the House adjourned, and on the next legislative day,[1] on motion of Mr. Bertrand H. Snell, of New York, by unanimous consent, both the Journal and the Record were amended to include the omitted proceedings.

Thereupon, Mr. Mapes inquired if the action of the House in agreeing to the motion incorporating a record of the vacated proceedings in the Journal and Record was to be taken as a precedent, and if such proceedings would be included in full when a similar occasion should again arise.

The Speaker said:

Yes. If the same question arises again, the names will be included in the Journal and the Record.

637. No business is in order until the Journal has been approved. The Journal does not record the names of Members not voting.

On January 15,1909,[2] pending the approval of the Journal, Mr. John W. Gaines, of Tennessee, submitted as a parliamentary inquiry:

Mr. Speaker, a parliamentary inquiry. I notice that on the roll call on yesterday Mr. George L. Lilley, of the State of Connecticut, was called as a Member of this House. Now, I want to ask the Speaker if he is any longer a Member of this House, having been sworn in as and being now Governor of the State of Connecticut? I think his name ought not to be on the roll.

The Speaker[3] said:

The Chair is informed by the Clerk that the Journal makes no mention of the name of the gentleman from Connecticut, Mr. Lilley. The gentleman reads from the Record. The Record is one thing and the Journal is another. The Journal does not, the Chair is informed, record the name of the gentleman "not voting." It records only the yeas and nays and those answering "present."

Whereupon Mr. Gaines claimed the floor for a question of privilege.

The Speaker said:

It is not customary to dispose of questions of privilege not involved in the order of the House pending the approval of the Journal.

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[1] Record, p. 986.

[2] Second session Sixtieth Congress, Record, p. 951.

[3] Joseph G. Cannon, of Illinois, Speaker.

Chapter CCVIII.[1]

THE QUORUM.

638. While once ruled that a quorum consists of one more than a majority, it is now, held that after the House is organized the quorum consists of a majority of those Members chosen, sworn, and living, whose membership has not been terminated by resignation or by action of the House.

Instance wherein the House authorized the Speaker to issue warrant for the arrest of absentees.

On May 9, 1913,[2] during the consideration of the bill (H. R. 32) to provide for the appointment of an additional circuit judge, the House found itself without a quorum and a call of the House was ordered.

Mr. Oscar W. Underwood, of Alabama, moved that the Speaker be authorized to issue warrants for the arrest of absentees.

The question being taken, the Speaker announced:

Two hundred and eighteen Members have responded to their names—a quorum; 216 Members constitute a quorum.

Mr. James R. Mann, of Illinois, submitted that 216 did not constitute a quorum of the House.

The Speaker[3] said:

Two hundred and sixteen Members constitute a quorum. Four hundred and thirty-five Members constitute the whole membership of the House; but one is dead and three have never been sworn in. The Chair does not know whether their names are carried on the roll or not.

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[1] Supplementary to Chapter LXXXV.

[2] First session Sixty-third Congress, Record, p. 1457.

[3] Champ Clark, of Missouri, Speaker.

They ought not to be. This matter was in a good deal of doubt for a long time until Speaker Henderson rendered a very elaborate written opinion in which he defined what constitutes a quorum as being one more than a majority of Members elect sworn in and living who have neither resigned nor been expelled.

639. The quorum required in the "House as in Committee of the Whole" is a quorum of the House and not a quorum of the Committee of the Whole.

The only distinction between consideration in the House and consideration in the House as in Committee of the Whole is that in the latter, debate proceeds under the five-minute rule and there is no general debate.

The motion for the previous question is in order in the House as in Committee of the Whole and operates as in the House.

On January 7, 1928,[1] the House had under consideration the joint resolution (H. J. Res. 131) providing for a commission to investigate and report upon the facts connected with the sinking of the submarine *S–4,* when Mr. Bertrand H. Snell, of New York, asked unanimous consent that the resolution be considered in the House as in Committee of the Whole.

Mr. Eugene Black, of Texas, submitted a parliamentary inquiry as to the number of Members constituting a quorum in the House as in the Committee of the Whole, and the Speaker answered tentatively, but later in the day ruled:

The Chair desires to correct a statement he made this morning in answer to a parliamentary inquiry by the gentleman from Texas. At the time the Chair had not had much opportunity to consider the question. In response to the question of the gentlemen from Texas as to what would constitute a quorum of the House when the House was considering a bill in the House as in Committee of the Whole, the Chair said:

"The Chair thinks a quorum would be 100, as in the case in the Committee of the Whole House on the state of the Union."

After some consideration and examination of the precedents, the Chair thinks that he was in error. The Chair quotes from the decision by Mr. Speaker Cannon, rendered February 28, 1905, to be found in Hinds' Precedents, section 4925, volume 4. The question arose as to whether a motion to order the previous question was in order in the House while sitting as in Committee of the Whole. Mr. Speaker Cannon said:

"The Chair is informed that under prior rulings, under similar orders, when a bill is in the House as in Committee of the Whole the consideration of it proceeds under the five-minute rule, but that the House does not lose its control by a majority over the bill, and that it is in the power of the House to order the previous question upon the bill and amendments pending, if there be any."

When a bill is being considered in the House as in Committee of the Whole, the Chair is of opinion that the only difference between that consideration and the consideration of the bill in the House is that the former consideration proceeds under the five-minute rule and there is no general debate. The Chair thinks that all of the rules of the House, except those two, govern bills that are considered as this resolution is being considered. Under these circumstances a quorum of the House, considering a bill or resolution as in Committee of the Whole House on the state of the Union, would not be 100, but would be 218.

The Chair thinks it important that there should be a definite understanding of the situation, and that the only difference between considering a bill as this resolution has been considered and considering a bill in the House, is that in the former instance we proceed under the five-minute rule and that there is no general debate.

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[1] First session Seventieth Congress, Record, p. 1142.

In answer to a further inquiry from Mr. Carl R. Chindblom, of Illinois, on the method of closing debate in the House as in Committee of the Whole, the Speaker added:

The Chair thinks the previous question operates precisely as it does in the House.

640. Construction of the rule providing for counting a quorum.

Members voted as present under section 3 of Rule XV may be permitted to vote after the calling of the roll is concluded.

On February 23, 1911,[1] on a motion to suspend the rules and pass the bill (H. R. 32080) leasing coal lands in Alaska, the vote failed to disclose a quorum responding.

The Speaker pro tempore noted as present certain Members who had not responded, who thereupon voted and were recorded.

The Speaker pro tempore [2] announced:

Upon this yea-and-nay vote the roll was called and then the names of those failing to respond were again called in alphabetical order. Less than a quorum having answered, the Chair is authorized by clause 3 of Rule XV to cause Members in the Hall who did not vote to be noted as "present." Under clause 1 of the same rule a Member whose name has thus been noted under clause 3 may then vote.

641. In ascertaining the presence of a quorum on a vote by tellers in Committee of the Whole the Chairman notes those present and not voting.

On December 16, 1922,[3] during the consideration of the naval appropriation bill in the Committee of the Whole House on the state of the Union, Mr. Otis Wingo, of Arkansas, made the point of order that a quorum was not present.

Mr. Patrick H. Kelley, of Michigan, moved that the committee rise, and on that motion demanded tellers. Tellers were ordered and, the vote being taken, the tellers reported yeas 1, nays 95; not a quorum.

The Chairman [4] announced:

On this vote the ayes are 1 and the nays are 95; 5 are present and not voting. A quorum is present. The noes have it, and the committee refuses to rise.

642. It is not incumbent upon the Chair to announce the names of Members present and not voting but counted to make a quorum.

On February 27, 1923,[5] the House being in the Committee of the Whole House on the state of the Union considering the bill (S. 4197) for leasing certain oil lands, a point of no quorum was made, and Mr. Nicholas J. Sinnott, of Oregon, moved that the committee rise. Tellers were ordered and reported that the yeas were 3, nays 86, a quorum not having voted.

The Chairman [6] said:

On this vote the tellers report that the ayes are 3 and the noes are 86. There are 11 gentlemen present who did not pass between the tellers. A quorum is present, and the committee refuses to rise.

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[1] Third session Sixty-first Congress, Record, p. 3243.

[2] Marlin E. Olmsted, of Pennsylvania, Speaker pro tempore.

[3] Fourth session Sixty-seventh Congress, Record, p. 588.

[4] J. N. Tincher, of Kansas, Chairman.

[5] Fourth session Sixty-seventh Congress, Record, p. 4816.

[6] James W. Husted, of New York, Chairman.

Mr. Tilman B. Parks, of Arkansas, made the point of order that the names of the additional 11 Members counted by the Chairman to make a quorum should be announced.

The Chairman overruled the point of order.

643. In the Senate the presence of a quorum was held to be necessary during debate.

On July 20,1914,[1] in the Senate, the river and harbor bill was under consideration when Mr. William Alden Smith, of Michigan, moved that the Senate adjourn.

At the conclusion of the roll call on the motion to adjourn the Vice President announced that 37 Senators had answered; not a quorum.

Mr. Jacob H. Gallinger, of New Hampshire, addressed the Chair and was proceeding in debate when Mr. Nathan P. Bryan, of Florida, made the point of order that debate was not in order in the absence of a quorum.

The Vice President[2] sustained the point of order and said:

The Chair must sustain the point of order. In the absence of a quorum nothing can be done except to adjourn.

644. While the precedents are not uniform, the practice of the Senate is to permit the withdrawal of suggestions that a quorum is not present prior to ascertainment and announcement by the Chair.

On May 27, 1918,[3] in the Senate, Mr. William Saulsbury, of Delaware, moved that the Senate proceed to the consideration of the conference report on the joint resolution to prevent rent profiteering in the District of Columbia.

Mr. Duncan U. Fletcher, of Florida, suggested the absence of a quorum, but withdrew the suggestion before the Vice President had made ascertainment. There was no objection.

645. While the practice in the Senate has varied, the weight of precedent seems to warrant the counting of those present and not voting in ascertaining the presence of a quorum.

On June 4, 1912[4] the Senate was considering a committee amendment to the legislative, executive, and judicial, appropriation bill.

The question on agreeing to the amendment having been taken, the Vice President[5] announced:

On the question of agreeing to the committee amendment the yeas are 33 and the nays 13 The Senator from Texas, Mr. Bailey, the Senator from Maine, Mr. Gardner, the Senator from Arizona, Mr. Smith, the Senator from Mississippi, Mr. Williams, the Senator from North Carolina, Mr. Simmons, having announced their pairs and that they refrained from voting, because of being paired, it makes a quorum; the yeas have it, and the amendment is agreed to.

646. On July 3, 1914,[6] in the Senate, on a motion to proceed to the consideration of the river and harbor bill, there were yeas 34, nays 14, not a quorum.

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[1] Second session Sixty-third Congress, Record, p. 12367.

[2] Thomas R. Marshall, of Indiana, Vice President.

[3] Second session Sixty-fifth Congress, Record, p. 7112.

[4] Second session Sixty-second Congress, Record, p. 7620.

[5] James S. Sherman, of New York, Vice President.

[6] Second session Sixty-third Congress, Record, p. 11586.

The Vice President [1] said:

We might as well settle this question now as at any other time. There am three Senators in the Chamber, Senators Gallinger, Townsend, and Catron, who have announced their pairs. Counting them would more than make a quorum. The Chair is about to make a ruling, and will let the Senate settle it definitely. On the roll call there are 34 yeas and 14 nays. There are three Senators in the Senate Chamber who have announced their pairs. With the vote and the announced pairs there is a quorum present. If those who announced their pairs should vote in the negative, the motion would still prevail. In order that the question may be definitely settled, the Chair rules that the motion does prevail, and will be glad to have an appeal from the decision of the Chair.

647. The Speaker's count in ascertaining the presence of a quorum is not subject to verification by tellers.

On January 20, 1910 [2] Mr. James T. Lloyd, of Missouri, addressed the Speaker and proposed to tender his resignation from a select committee to investigate the Interior Department and Bureau of Forestry.

In the course of the ensuing debate Mr. Albert Douglas, of Ohio, made the point of order that no quorum was present.

The Speaker counted and announced that 150 Members were present, not a quorum.

Mr. Oscar W. Underwood, of Alabama, asked for tellers on the question of the presence of a quorum.

The Speaker [3] said:

The Chair will state that under the practice of the House there is no right to demand tellers, on the count of the Chair for a quorum.

648. On July 19, 1919,[4] while the House was in the Committee of the Whole House on the state of the Union considering the prohibition enforcement bill, Mr. William L. Igoe, of Missouri, made the point of no quorum.

After ascertaining, the Chairman announced that 95 Members were present and the Committee was without a quorum.

Several Members asked for tellers.

The Chairman [5] held that it was not in order to demand tellers on the count by the Chair to ascertain the presence of a quorum.

649. On October 27, 1919,[6] the House being in the Committee of the Whole House on the state of the Union for the consideration of the bill (S. 2775) to promote the mining of coal, phosphates, oil, gas, and sodium on the public domain, Mr. Sydney Anderson, of Minnesota, made the point of order that a quorum was not present.

After counting, the Chairman announced that 101 Members were present, a quorum.

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[1] Thomas R. Marshall, of Indiana, Vice President.

[2] Second session Sixty-first Congress, Record, p. 857.

[3] Joseph G. Cannon, of Illinois, Speaker.

[4] First session Sixty-sixth Congress, Record, p. 2890.

[5] James W. Good, of Iowa, Chairman.

[6] First session Sixty-sixth Congress, Record, p. 7600

Mr. Anderson demanded tellers for the purpose of verifying the count of the Chairman.

The Chairman [1] said:

The gentleman is not entitled to tellers for the purpose of determining a quorum.

650. On January 7, 1921, the [2] House Was considering the sundry civil appropriation bill, when Mr. James A. Gallivan, of Massachusetts, made the point of order that no quorum was present.

The Speaker, after counting announced that 226 Members were present, a quorum.

Mr. Gallivan demanded tellers for the purpose of verifying the count made by the Speaker.

Mr. James R. Mann, of Illinois, submitted:

There is no authority for tellers. The rule provides that the Speaker shall count. If you can demand tellers, that would be a matter of interminable delay if you wanted to filibuster.

The Speaker [3] sustained Mr. Mann's contention and declined to order tellers.

651. On May 4, 1933,[4] the Committee of the Whole House on the state of the Union was considering the deficiency appropriation bill when Mr. Jeff Busby, of Mississippi, made the point of order that there was not a quorum present.

After counting, the Chairman [5] announced that a quorum was present.

Mr. Busby demanded tellers to verify the count of the Chair.

Mr. Edward W. Goss, of Connecticut, made the point of order that the count of the Chair was not subject to verification.

The Chairman said:

It is only necessary for the Chair to announce the number present. The point of order is sustained, and the gentleman will proceed.

652. It is the duty of the Speaker to announce the absence of a quorum without unnecessary delay.

On February 14, 1917,[6] during prolonged obstruction to the consideration of the joint resolution (H. J. Res. 335) for the appointment of four members of the Board of Managers for the National Home for Disabled Volunteer Soldiers, Mr. Ashton C. Shallenberger, of Nebraska, moved the previous question on the resolution and all amendments thereto to final passage.

The yeas and nays being ordered, the roll was called twice, and a quorum failing to appear, the Speaker delayed the announcement of the result until a quorum should have answered.

Mr. James R. Mann, of Illinois, demanded as a matter of right, that the result of the vote be announced.

Thereupon the Speaker [7] announced that the yeas were 123, nays 77, not a quorum, and, on motion of Mr. Shallenberger, a call of the House was ordered.

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[1] Martin B. Madden, of Illinois, Chairman.

[2] Third session Sixty-sixth Congress, Record, p. 1120.

[3] Frederick H. Gillett, of Massachusetts, Speaker.

[4] First session Seventy-third Congress, Record, p. 2894.

[5] S. D. McReynolds, of Tennessee, chairman.

[6] Second session Sixty-fourth Congress, Record, p. 3314.

[7] Champ Clark, of Missouri, Speaker.

653. A point of no quorum may be made at any time, even though another Member have the floor.

On August 7, 1919,[1] Mr. Thomas L. Blanton, of Texas, claimed the floor for a question of privilege and was recognized by the Speaker.

While Mr. Blanton was addressing the House, Mr. John I. Nolan, of California, interrupted and made the point of order that a quorum was not present.

Mr. Blanton contended that he had the floor on a question of high privilege and could not be interrupted by a point of no quorum.

The, Speaker[2] said:

That certainly is a high privilege, and the Chair will recognize the gentleman from Texas, Mr. Blanton. On the other hand, the point of no quorum can always be made before any business can be transacted. If the gentleman from California, Mr. Nolan, insists on his point of no quorum, the Chair must recognize him.

654. On March 29, 1928[3] the House had under consideration the joint resolution (S.J. Res. 113) to amend the immigration act. Mr. Sam D. McReynolds, of Tennessee, had been recognized and was proceeding in debate when Mr. Thomas L. Blanton, of Texas, demanded recognition on a point of order that there was no quorum present.

Mr. McReynolds protested that he had not yielded for an interruption and could not be taken off his feet with a point of no quorum.

The Speaker[4] ruled:

The point of order of no quorum can be made while the gentleman is speaking. The gentleman from Texas makes the point of order that there is no quorum present. The Chair will count.

655. An action having been completed, it is too late to make the point of order that a quorum was not present when it was taken.

On December 9, 1913,[5] Mr. Finis J. Garrett, of Tennessee, from the select committee appointed to investigate charges against certain Members of the House, submitted the report of that committee recommending the adoption of accompanying resolutions.

After debate, on motion of Mr. Garrett, the resolutions were referred to the Committee on the Judiciary.

Subsequently Mr. William J. MacDonald, of Michigan, made the point of order that a quorum was not present when the resolutions were acted upon.

Mr. Oscar W. Underwood, of Alabama, made the point of order that it was then too late to raise the question of a quorum on the vote by which the resolutions had been referred.

The Speaker[6] sustained the point of order.

656. The point of no quorum may be withdrawn prior to ascertainment and announcement by the Chair.

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[1] First session Sixty-sixth Congress, Record, p. 3701.

[2] Frederick H. Gillett, of Massachusetts, Speaker.

[3] First session Seventieth Congress, Record, p. 5578.

[4] Nicholas Longworth, of Ohio, Speaker.

[5] Second session Sixty-third Congress, Journal, p. 32; Record, p. 586.

[6] Champ Clark, of Missouri, Speaker.

On June 30, 1911,[1] in the Senate, during the consideration of the bill to promote reciprocal trade relations with Canada, Mr. William E. Borah, of Idaho, suggested the absence of a quorum.

Before opportunity had been afforded to pass upon the question Mr. Borah withdrew the suggestion.

Mr. Weldon B. Heyburn, of Idaho, raised. the question as to whether the suggestion, once made, was subject to withdrawal.

The Vice President[2] said:

> The Chair sees no reason why it can not be withdrawn. It seems to the Chair. that any Senator, possibly immediately after suggesting the absence of a quorum, might discover that he did not wish to make the suggestion, and withdraw it. The Senator might by observation conclude a quorum was present. The Chair had not ordered the roll to be called.

657. The point of no quorum may not be withdrawn after the absence of a quorum has been ascertained and announced.

On April 14, 1914,[3] while the House was considering the legislative, executive, and judicial appropriation bill in the Committee of the Whole House on the state of the Union, Mr. Frank Buchanan, of Illinois, made the point of no quorum.

The Chairman, after counting, announced that 71 Members were present, not a quorum.

Thereupon Mr. Buchanan withdrew the point of no quorum and the Chairman announced the withdrawal.

Mr. James R. Mann, of Illinois, submitted that after announcement by the Chair that a quorum was not present it was too late to withdraw the point.

The Chairman[4] sustained Mr. Mann's contention, and directed the Clerk to call the roll.

658. On June 27, 1918,[5] the House was considering the conference report on the Post Office appropriation bill.

Mr. Martin B. Madden made the point that there was not a quorum present.

The Speaker,[6] after counting, announced that 127 Members were present, not a quorum.

Mr. Madden then proposed to withdraw the point of no quorum, but the Speaker held that as the absence of a quorum had been ascertained, and announced, it was too late to withdraw the point of order.

659. The absence of a quorum being ascertained, debate is not in order.

On February 17, 1911,[7] while the House was considering the omnibus claims bill, Mr. James R. Mann, of Illinois, made the point of order that no quorum was present.

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[1] First session Sixty-second Congress, Senate Journal, p. 113; Record, p. 2599.

[2] James S. Sherman, of New York, Vice President.

[3] Second session Sixty-third Congress, Record, p. 6686.

[4] John N. Garner, of Texas, chairman.

[5] Second session Sixty-fifth Congress, Record, p. 8384.

[6] Champ Clark, of Missouri, Speaker.

[7] Third session Sixty-first Congress, Record, p. 2807.

A quorum failing to appear on a call of the House, Mr. William W. Rucker, of Missouri, addressed the Chair and was proceeding in debate. Mr. Mann demanded the regular order, and the Speaker pro tempore [1] ruled that in the absence of a quorum debate was not in order.

660. In the absence of a quorum no business may be transacted, even by unanimous consent.

On March 16, 1908 [2] Mr. Elmer A. Morse, of Wisconsin moved to suspend the rules and pass the bill (S. 4046) to authorize the cutting of timber on Indian reservations. After debate, the House found itself without a quorum.

Thereupon Mr. John W. Gaines, of Tennessee, asked unanimous consent to extend remarks in the Record.

The Speaker [3] held that in the absence of a quorum no business could be transacted, even by unanimous consent, and entertained a motion to adjourn.

661. On February 27, 1919,[4] after the Journal had been approved, Mr. Scott Ferris, of Oklahoma, made a point of order that there was not a quorum present. The Speaker, upon counting, found 97 Members present, not a quorum.

Whereupon Mr. Louis C. Cramton, of Michigan, proposed to submit a parliamentary inquiry.

The Speaker [5] held that a parliamentary inquiry could not be entertained in the absence of a quorum.

162. No business, however highly privileged, may be transacted in the absence of a quorum.

On June 27, 1918,[6] Mr. Halvor Steenerson, of Minnesota, claimed the floor on a question of the privilege of the House.

Mr. John N. Garner made the point of order that a quorum was not present.

A quorum not being present, the Speaker [7] declined to recognize Mr. Steenerson to present a question of privilege.

663. Prayer by the Chaplain at the opening of the daily session is not business requiring the presence of a quorum, and the Speaker declines to entertain a point of no quorum before prayer is offered.

On February 4, 1921,[8] the Speaker called the House to order and announced that the Chaplain would offer prayer.

Mr. James V. McClintic, of Oklahoma, made the point of order that a quorum was not present.

The Speaker [9] said:

A few days ago when the gentleman from Oklahoma, Mr. Mcclintic, before the Chaplain's prayer, raised the point of no quorum the gentleman from Pennsylvania, Mr. Watson, argued

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[1] Marlin E. Olmsted, of Pennsylvania, Speaker pro tempore.

[2] First session Sixtieth Congress, Record, p. 3414.

[3] Joseph G. Cannon, of Illinois, Speaker.

[4] Third session Sixty-fifth Congress, Record, p. 4482.

[5] Champ Clark, of Missouri, Speaker.

[6] Second session Sixty-fifth Congress, Record, p. 8390.

[7] Champ Clark, of Missouri, Speaker.

[8] Third session Sixty-sixth Congress, Journal, p. 158; Record, p. 2592.

[9] Frederick H. Gillett, of Massachusetts, Speaker.

that the gentleman from Oklahoma had no right to make it at that stage of the proceedings. The Chair at the time sustained the right of the gentleman from Oklahoma. Since then the Chair has been considering the matter and has concluded he was mistaken in his decision, and that the Member from Oklahoma has no right to make the point of no quorum before the Chaplain offers prayer. Rule VIII provides that—

"The Chaplain shall attend at the commencement of each day's sitting of the House and open the same with prayer."

Obviously that provides that the opening exercise of the House shall be prayer by the Chaplain. The Chair thinks that is not a matter of business, but that it is a matter of ceremony, of devotion, and that its appeal is not to the duty of Members to hear it but to their sense of reverence. Presence of Members is not compulsory. Rule I provides that the Speaker shall take the chair and call the Members to order, and on the appearance of a quorum cause the Journal to be read. There it specifically says that for the reading of the Journal, which is the first business after prayer by the Chaplain, a quorum shall appear. By indirection that would indicate that the prayer does not require the presence of a quorum, inasmuch as the rule particularly says that it does require a quorum to read the Journal.

The Chair therefore is disposed to think that the offering of prayer by the Chaplain is not business of the House that requires a quorum, and that regardless of any gentleman's sense of reverence or propriety it is not in order to make the point of order that there is no quorum present.

The Chaplain will offer prayer.

An appeal by Mr. McClintic from the decision of the Chair was, on motion of Mr. Ernest R. Ackerman, of New Jersey, laid on the table, yeas 233, nays 70.

664. The hour fixed by special order for a recess having arrived, the Speaker held the House to be in recess although a quorum was not present.

The House having recessed after finding itself without a quorum, at the expiration of the recess the Speaker announced the absence of a quorum and entertained a motion for a call of the House.

A recess differs from an adjournment in its effect upon pending business and the House resumes consideration of unfinished business under conditions obtaining at the time recess was taken.

On June 4, 1920,[1] Mr. Philip P. Campbell, of Kansas, from the Committee on Rules, submitted a privileged report from that committee providing for the consideration of a resolution to investigate the escape of Grover Cleveland Bergdoll.

Mr. Thomas L. Blanton, of Texas, made the point of order that there was no quorum present. After ascertainment that a quorum was not present, the Speaker, under an order previously made by the House, declared the House in recess until 8 o'clock p.m.

The recess having expired, the Speaker, upon calling the House to order, announced that in the absence of a quorum at the time recess was taken, the absence of a quorum must be presumed upon expiration of the recess, and thereupon entertained a motion for a call of the House.

Mr. Blanton submitted that a recess left the House in the same position as if adjournment had been taken and that a quorum was presumed to be present until otherwise disclosed.

The Speaker[2] said:

The Chair thinks not. The Chair thinks a recess is not the same as an adjournment. We resume where we left off at the time of recess. Without objection, a call of the House is ordered.

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[1] Second session Sixty-sixth Congress, Record, p. 8588

[2] Frederick H. Gillett, of Massachusetts, Speaker.

The doorkeeper will close the doors, the Sergeant of Arms will notify the absentees, and the clerk will call the roll.

665. Following a motion to resolve into Committee of the Whole and pending a request for unanimous consent to fix control of time for debate, a point of no quorum may be raised and no business is in order until the presence of a quorum is ascertained.

Following a roll call on resolving into Committee of the Whole precipitated by a point of no quorum, and before the announcement of the result, the Speaker may entertain a unanimous-consent request to limit or control time for debate, but after the result of the vote has been announced the House resolves at once into Committee of the Whole and no request relating to time for debate or other intermediate business is in order.

On January 31, 1928,[1] Mr. Henry E. Barbour, of California, moved that the House resolve itself into the Committee of the Whole House on the state of the Union for the consideration of the War Department appropriation bill, and pending that motion had presented a unanimous-consent request to limit and control time for general debate. Mr. Thomas L. Blanton, of Texas, raised the question of a quorum.

There being no quorum present, the Speaker[2] directed a call of the House on the pending question, and the vote having been taken, said:

On this vote 328 Members are recorded—a quorum. But before announcing the result of the vote the Chair will again put the request of the gentlemen from California that the general debate on this bill be limited to 10 hours, one-half the time to be controlled by himself and one-half controlled by the gentleman from Virginia, Mr. Harrison. Is there objection?

There was no objection and the Speaker announced:

Upon this question the yeas are 328 and the nays none.
The motion is agreed to.

666. A point of no quorum is always in order and may be made when the Committee of the Whole rises and before the report of the Chairman has been received.

On December 13, 1924,[3] the Committee of the Whole House, having concluded the consideration of a bill on the Private Calendar, rose with instructions to the Chairman to report the bill back to the House with amendments and with the recommendation that the amendments be agreed to and the bill as amended be passed.

The Speaker[4] resumed the chair, but before the Chairman could report Mr. Thomas L. Blanton, of Texas, made a point of no quorum.

Mr. Finis J. Garrett, of Tennessee, made the point of order that the House had received no official knowledge of the fact that the committee had risen, and a point of no quorum could not be entertained until the Chairman had reported.

The Speaker overruled the point of order and, having ascertained that a quorum was not present, entertained a motion for a call of the House.

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[1] First session Seventieth Congress, Record, p. 2259.

[2] Nicholas Longworth, of Ohio, Speaker.

[3] Second session Sixty-eighth Congress, Journal, p. 408; Record, p. 624.

[4] Frederick H. Gillett, Massachusetts Speaker.

667. On February 5, 1921,[1] the Speaker took the chair to receive a report from the Committee of the Whole House on the state of the Union, which had been considering the Army appropriation bill, and had risen with direction to its Chairman to report the bill to the House with favorable recommendation.

Mr. George Huddleston, of Alabama, made the point of order that a quorum of the House was not present.

The Speaker suggested that the report of the Chairman of the Committee of the Whole be first received.

Mr. Huddleston declined to delay the point of order and the Speaker,[2] having ascertained the absence of a quorum, recognized Mr. Frank W. Mondell, of Wyoming, to move a call of the House.

668. While formerly the roll was called but once on failure of a quorum in the Committee of the Whole, the recent practice is to call the roll twice, as in the House.

On December 20, 1913,[3] the House was considering the District of Columbia appropriation bill in the Committee of the Whole House on the state of the Union. The committee finding itself without a quorum the roll was called. At the conclusion of the first roll call and after a quorum had appeared, the Clerk, as usual, proceeded to call a second time the names of Members failing to respond on the first roll call.

Mr. William H. Stafford, of Wisconsin, said:

Mr. Chairman, I understand this is a call of the names of Members who failed to answer on the first call. I wish to direct the attention of the Chairman to the fact that when a quorum appears in committee but one call of the roll is necessary, and I cite to the Chair the fourth volume of Hinds Precedents.

The Chairman[4] ruled:

It has been the practice of the House, without objection on the part of anyone, to call the names of those who failed to respond the first time.

669. On October 15, 1919,[5] while the immigration bill was under consideration in the Committee of the Whole House on the state of the Union, the committee found itself without a quorum, and the roll was called. A quorum having appeared on the first roll call, the Chairman directed that the roll be not called a second time.

Mr. Otis Wingo, of Arkansas, made the point of order that names of those who had failed to answer on the first call should be called a second time.

The Chairman[6] overruled the point of order and declined to entertain an appeal by Mr. Wingo from that decision.

On the next day,[7] immediately following the reading and approval of the Journal, Mr. Wingo, addressing the House by unanimous consent, said:

Mr. Speaker, the rules of the House provide that the rules of the House shall control the action in the Committee of the Whole and the Committee of the Whole House on the state of

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[1] Third session Sixty-sixth Congress, Record, p. 2683.

[2] Frederick H. Gillett, of Massachusetts, Speaker.

[3] Second session Sixty-third Congress, Record, p. 1318.

[4] Cordell Hull, of Tennessee, Chairman.

[5] First session Sixty-sixth Congress, Record, p. 6983.

[6] Simeon D. Fess, of Ohio, Chairman.

[7] Record, p. 7015.

the Union wherever applicable. The rules of the House specifically provide that after the roll has been once called, the Clerk shall call the names of Members not answering on the first roll call. Now, the chairman based his decision upon the decision of Mr. Speaker Crisp in 1894. If Members of the House will investigate that decision, they will find that Mr. Speaker Crisp rendered that opinion offhand. It was not challenged. It was immaterial at the time, and there has not been any discussion I have been able to find, for the reason that this is the only time that I know of that it has ever been raised. Now, I have investigated, the older Members of the House having helped, as to when the custom first grew up. In 1880 the insistence of Members was such that Mr. Blackburn, of Kentucky, chairman of the Committee on Rules, brought in certain amendments to the rules, including one which provided for this second roll call. He suggests that the second call is only upon a "call of the House." The rule is very clear, Mr. Speaker; it says upon "every roll call." That includes any roll call, because there is no rule of the House governing the call of rolls in the committee other than the rule that the rules of the House shall control. The experience of the House has shown that it is infinitely wiser, it saves time, to permit the Clerk to call the roll as provided by the rule, of those who failed to answer upon the first roll call; that it is more orderly and less productive of confusion and takes less time than to permit Members to gather around as they did yesterday afternoon in the pit of the House and let the Clerk call them one at a time. I am content to drop the matter, as I am assured that the rules in this regard will be respected in the future.

670. A quorum having voted on a motion to rise, made after the Committee of the Whole had found itself without a quorum and before the roll was called, the committee resumed its session.

On May 13, 1916,[1] while the House in the Committee of the Whole House on the state of the Union was considering the rural credits bill a point of no quorum was made. The Chairman announced that 82 Members were present, not a quorum, and directed the Clerk to call the roll. The Clerk called the first name on the roll, when Mr. James R. Mann, of Illinois, moved that the committee rise. On a division, demanded by Mr. Mann, the yeas were 27, nays 40, a quorum not having voted. Tellers were ordered and the committee again divided. The Chairman announced that the yeas were 2, nays 101, a quorum had voted, and the motion was not agreed to.

Mr. J. Hampton Moore, of Pennsylvania, made the point of order that after the Chairman had directed the roll to be called and the Clerk had called the first name a motion to rise was not in order.

Mr. Mann said:

The Clerk called the name of Mr. Abercrombie while I was making that motion, and on my feet for that purpose, and the Chair could not out me out from making that motion by the activity of the Clerk. This rule has been frequently construed in the same way, and the Chair has always held heretofore that when on a motion to rise the presence of a quorum was developed, there was no roll call required because there was a quorum present.

The Chairman[2] overruled the point of order.

671. When the Committee of the Whole finds itself without a quorum, the motion to rise is privileged.

In ascertaining the presence of a quorum in the Committee of the Whole the Chairman counts Members in the Chamber failing to vote on an incidental motion to rise.

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[1] First session Sixty-fourth Congress, Record, p. 7906.

[2] John N. Garner, of Texas, Chairman.

A quorum having voted on a motion to rise, following the announcement by the Chairman that a quorum was not present, the committee resumed consideration of interrupted business.

On January 10, 1931,[1] the War Department appropriation bill was under consideration in the Committee of the Whole House on the state of the Union.

Mr. Tilman B. Parks, of Arkansas, raised a point of no quorum and the Chairman, after counting, announced that a quorum was not present.

Mr. William H. Stafford, of Wisconsin, moved that the committee rise, and on that motion demanded tellers.

The question being taken, the tellers reported yeas 2, nays 87.

Whereupon, the Chairman[2] said:

The Chair will count. [After counting.] The Chair has been able to count over 20 members in the Chamber who did not pass between the tellers. A quorum is present.

Mr. Parks submitted that the total number reported as present was 11 short of a quorum.

The Chairman said:

It is not a quorum, but the Chair counted more than 20 Members who did not pass between the tellers. There are more than 100 Members present in the Chamber at this moment by the count of the Chair. A quorum is present, and the gentleman from Mississippi is recognized.

672. The Committee of the Whole, rising to report the lack of quorum, resumes its sitting upon the appearance of a quorum without intervening motion or debate.

On June 20, 1922,[3] the Committee of the Whole House on the state of the Union rose and reported to the House that during its consideration of the bill (H. R. 12022) relative to naturalization and citizenship of married women, it had found itself without a quorum, and the roll being called 239 Members responded to their names, a quorum, and a list of absentees was submitted for entry in the Journal.

Thereupon Mr. Rufus Hardy, of Texas, addressed the Speaker and asked leave to extend his remarks in the Record.

The Speaker[4] said:

The Chair has no right to consider any such request. The committee has risen temporarily and the Speaker has resumed the chair only to receive a report. The Chair has no right to recognize the gentleman. The committee will resume its session.

673. The Committee of the Whole having risen and reported that finding itself without a quorum the roll was called under the rule and a quorum had appeared, the Speaker declined to entertain a motion to adjourn, and the committee resumed its sitting.

On June 20, 1914,[5] the Committee of the Whole House on the state of the Union, having under consideration the sundry civil appropriation bill, rose and reported

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[1] Third session Seventy-first Congress, Record, p. 1946.

[2] John Q. Tilson, of Connecticut, Chairman.

[3] Second session Sixty-seventh Congress, Record, p. 9045.

[4] Frederick H. Gillett, of Massachusetts, Speaker.

[5] Second session Sixty-third Congress, Journal. p. 677; Record, p. 10819.

that, in the absence of a quorum, the roll had been called and 162 Members answered to their names, a quorum.

Whereupon, Mr. James R. Mann, of Illinois, moved that the House do now adjourn.

Mr. Oscar W. Underwood, of Alabama, made a point of order that the motion to adjourn was not in order at such time.

After debate, the Speaker [1] said:

The precedents are very vague. In the one the gentleman from Illinois, Mr. Mann, cited there was a motion made to adjourn in a situation similar to the present one, but nobody raised the point. About six weeks ago the point was raised, but before that on two occasions when the Chair was inclined to transact some small business that was on the Speaker's table, the gentleman from Illinois himself raised the point that we could not do anything except go back into the committee. About six weeks ago the gentleman from Massachusetts, Mr. Gardner, made a motion—the Chair thinks it was a motion to adjourn—and the Chair overruled him and he appealed from the decision of the Chair, and we had a roll call on it by which the Chair was sustained. While the roll was being called the Chair had time to study the question. And there is no precedent of very great light on the subject. But the performance that the House went through that evening demonstrated that if motions of one kind and another be made after the committee rises for lack of a quorum or after a quorum is ascertained it affords means for filibustering. The House for some time has frowned on filibustering, and in this case the Chair would rather rely on his own opinion, delivered in May, which was positive and clear, whether right or wrong, than to depend on this vague case cited by the gentleman from Illinois. And the Chair sustains the point of order.

The Speaker declined to entertain an appeal from this decision on the ground that the rule was mandatory and that to entertain an appeal would be to defeat the purpose of the rule.

674. While the Committee of the Whole, rising to report the lack of a quorum, resumes its sitting on the appearance of a quorum, the rule does not so provide if a quorum fails to appear, and in such event a quorum of the House is required.

On February 18, 1911,[2] the Committee of the Whole House rose, and the Chairman reported that it had had under consideration bills on the Private Calendar, and finding itself without a quorum, he had caused the roll to be called, and that less than a quorum had answered to their names.

A call of the House was ordered, and when 100 Members had answered to their names, Mr. Frank Clark, of Florida, made the point of order that a quorum of the committee having appeared, under the rule the Committee of the Whole House should resume its sitting without waiting until a quorum of the House appeared.

The Speaker pro tempore [3] ruled:

Reference has been made to paragraph 2 of Rule XXIII, which provides:

"Whenever a Committee of the Whole House or of the Whole House on the state of the Union finds itself without a quorum, which shall consist of 100 Members, the Chairman shall cause the roll to be called, and thereupon the committee shall rise, and the Chairman shall report the names of the absentees to the House, which shall be entered on the Journal; but if on such call a

[1] Champ Clark, of Missouri, Speaker.

[2] Third session Sixty-first Congress, Record, p. 2865.

[3] Marlin E. Olmsted, of Pennsylvania, Speaker pro tempore.

quorum shall appear, the committee shall thereupon resume its sitting without further order of the House."

That event has happened several times during this legislative day. The present occupant of the chair has upon several occasions, when the Chairman of the Committee of the Whole House has reported a roll call in that committee and more than 100 Members appeared upon that call, directed the Committee of the Whole to resume its sitting without any motion or order of the House.

The rule permits that to be done when a quorum of 100 has appeared on the roll call in the Committee of the Whole House. That is what is referred to when the rule says "if on such call a quorum shall appear, the committee shall resume its sitting." But in this instance, on the last roll call in the Committee of the Whole, no quorum appeared; only 98 gentlemen answered to their names. Therefore the rule loses its authority. It does not apply. It gives to the Speaker no authority to direct the committee to resume its session or to declare that the House shall be in Committee of the Whole, except upon its vote.

Since that report was made by the Chairman of the Committee of the Whole there has been made and voted upon a motion to adjourn. After that a call of the House was ordered. We are now proceeding under that call. The roll call in Committee of the Whole is to ascertain if a quorum of that committee is present; 100 is sufficient for that call; but this is a call of the House ordered by the House. It is not such a call as that referred to in the rule. The Chair is clearly of the opinion that when a quorum of the House appears the House may order the committee to resume its session, but that under the rule, in the absence of a quorum, it is beyond the power of the Speaker to make such an order, and therefore there is nothing to do but wait until we have a quorum of the House.

675. Ascertainment of the absence of a quorum invalidates proceeding on which the point of no quorum was raised.

On February 22, 1924,[1] during the consideration of the revenue bill in the Committee of the Whole House on the state of the Union, Mr. Marvin Jones, of Texas, offered an amendment to a pending amendment submitted by Mr. Eugene Black, of Texas. The question being taken, resulted yeas 21, noes 61, when Mr. Jones made the point of order that a quorum was not present.

The Chairman announced that no quorum was present and the committee determined to rise.

On the following day, when the committee was again in session, the Chairman announced:

When the committee rose the question was on the amendment of the gentleman from Texas, Mr. Jones, to the amendment of the gentleman from Texas, Mr. Black. There being no quorum present, the proceedings in that matter were nullified. The question now is on agreeing to the Jones amendment.

Mr. Thomas L. Blanton, of Texas, proposed to offer a substitute for the pending amendment.

The Chairman[2] said.

The Chair will state his understanding of the parliamentary situation. The Chair examined the Record on this matter last night quite carefully. There had been a vote and the number of votes on each side is recorded in the Record, but there had been no decision; therefore, the committee was dividing at the time the point of order was made. Now the gentleman from Texas [Mr. Blanton] seeks to offer a substitute. The Chair does not think it is in order at this time because of the fact that it was not offered before the committee divided. A substitute will be in order after the vote on the Jones amendment.

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[1] First session Sixty-eighth Congress, Record, p. 2994.

[2] William J. Graham, of Illinois, Chairman.

676. No quorum being present when a vote is taken in the Committee of the Whole, and the committee having risen before a quorum appeared, such vote is invalid, and the question on which it was taken is pending when the committee again resumes its session.

On December 5, 1919,[1] the House resolved itself into the Committee of the Whole House on the state of the Union for the further consideration of the bill to establish standard weights and measures.

The bill was read by title, when Mr. Warren Gard, of Ohio, rose to a parliamentary inquiry and asked if an amendment was pending to section 1.

The Chairman[2] said:

The Chair will state that last night, immediately before the committee rose, the gentleman from Arkansas, Mr. Wingo, offered an amendment to the section. A divisional vote being asked for and taken, the lack of a quorum was disclosed, whereupon the gentleman from Arkansas made the point of order that no quorum was present; thereupon the committee rose. Under Rule XXIII, section 8, it provides that "the rules of proceeding in the House shall be observed in Committee of the Whole so far as they may be applicable."

Paragraph 503, Jefferson's Manual, provides that "when from counting the House on a division it appears that there is not a quorum, the matter continues exactly in the state in which it was before the division and must be resumed at that point at any future day." Were it necessary to further fortify the Chair's ruling, he would refer to volume 4 of Hinds, paragraph 2974, where in a similar case it was decided that the vote was made invalid on the establishment of a point of no quorum. The Chair rules that the vote now comes upon the amendment offered by the gentleman from Arkansas.

677. On March 13, 1920,[3] while the House was considering the Army reorganization bill in the Committee of the Whole House on the state of the Union, tellers were demanded on the question of agreeing to an amendment offered by Mr. Tom Connally, of Texas. Mr. Warren Gard, of Ohio, made the point of order that a quorum was not present. Before the point of order could be decided the committee determined to rise, and the Chairman reported to the House that the committee had come to no resolution.

On March 16 the House again resolved itself into the Committee of the Whole for the consideration of this bill. The amendment offered by Mr. Connally was again read and the Chairman again put the question on agreeing to the amendment, for a viva voce vote.

Mr. Finis J. Garrett, of Tennessee, submitted that the question should be on the ordering of tellers, as the committee had risen from its previous session before the Chairman could determine the absence of a quorum.

Mr. James R. Mann, of Illinois, said:

No; the point of no quorum being made, the committee rose, and the committee could not by that action require that the vote that was taken should be decisive. The demand for tellers passed away when the point of no quorum was made and invariably returns to the viva voce vote. A demand for the yeas and nays today might not be insisted upon tomorrow. The committee by rising could not determine a quorum was here, because it does not require a quorum to rise.

According to that contention, 25 men in the House could carry an amendment against the point of no quorum. The gentleman will see that if the committee could rise, thereby preventing

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[1] Second session Sixty-sixth Congress, Record, p. 194.

[2] Frederick C. Hicks, of New York, Chairman.

[3] Second session Sixty-sixth Congress, Record p. 4401.

the Chair from counting a quorum, a small minority of a quorum could agree to an amendment although the point of no quorum was made. I have frequently seen the case, where the vote was taken, the demand for the yeas and nays was made, a point of no quorum was made, and the House adjourned, while the gentleman from Missouri was Speaker, and then when the House met it paid no attention to the demand for the yens and nays, but took the vote over again, viva voce sometimes, with no demand for the yeas and nays being made at all. It has been the invariable practice of the House, and it is for the convenience of the House. No one can possibly lose any right by a technical construction of the proposition.

The Chairman[1] held that, the committee having risen after the point of no quorum was made and without determining the presence of a quorum, the vote recurred on the original question of agreeing to the amendment and not on the question of ordering tellers.

[1] John Q. Tilson, of Connecticut, Chairman

Chapter CCIX.[1]

THE CALL OF THE HOUSE.

1. House may under all circumstances compel the attendance of absent Members. Sections 678–680.
2. Motions in order during a call. Sections 681, 682.
3. Procedure during a call. Section 683.
4. Arrest of Members. Sections 684–688.
5. Dispensing with proceedings under call. Section 689.
6. The later rule combining the vote with a call. Sections 690–701.
7. Arrest of Members and Speaker's warrant. Section 702.
8. Motions and procedure under later rule. Sections 703–705.
9. Application to vote on seconding a motion. Sections 706–707.

678. When a quorum fails on a yea-and-nay vote the call of the House is automatic under the rule, and the Speaker directs the roll to be called without motion from the floor.

On December 19, 1921,[2] the House was considering a resolution reported by Mr. Philip P. Campbell, of Kansas, from the Committee on Rules, providing for the consideration of the anti-lynching bill. The result of a vote by yeas and nays on ordering the previous question was announced by the Speaker as follows:

On this vote the yeas are 169, the nays 37, and present 5–211 Members present, not a quorum. The Doorkeeper will close the doors, the Sergeant at Arms will notify the absent Members, and the Chair will issue his warrant to the Sergeant at Arms to bring in the absent Members. The Clerk will call the roll.

Mr. Finis J. Garrett, of Tennessee, inquired[3] if it was a de novo vote or if the number voting would be added to the number voting on the previous roll call.

The Speaker[4] replied that it was an automatic vote, as provided by rule on the failure of a quorum, and was, therefore, a new vote.

679. When a vote by yeas and nays shows no quorum the Chair takes cognizance of the fact, and, unless the House adjourns, orders a call under the rule without suggestion from the floor.

In the absence of the Sergeant at Arms, the duties of his office are discharged by sworn deputies, and the Speaker issues directions as if he were present in person.

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[1] Supplementary to Chapter LXXXVI.

[2] Second session Sixty-seventh Congress, Record, p. 556.

[3] Record, p. 558.

[4] Frederick H. Gillett of Massachusetts, Speaker.

On December 20, 1921,[1] Mr. Andrew J. Volstead, of Minnesota, moved that the House resolve itself into the Committee of the Whole House on the state of the Union for the consideration of the anti-lynching bill.

The question being taken by yeas and nays, the Speaker announced:

On this vote the yeas axe 174, the nays 7, present 2, a total of 183, not a quorum. The Chair takes note of the fact that a quorum is not present. The Doorkeeper win close the doors, the Sergeant at Arms will bring in absent Members, and the Clerk will call the roll.

Mr. Finis J. Garrett, of Tennessee, made the point of order that, under the rule, the Speaker was without authority to order a roll call and direct that absentees be brought in, without action by the House.

The Speaker[2] said:

The Chair overrules the point of order. Section 4 of the rule says:

"Whenever a quorum fails to vote on any question, and a quorum is not present and objection is made for that cause, unless the House shall adjourn there shall be a call of the House, and the Sergeant at Arms shall forthwith proceed to bring in absent Members',—

A quorum has failed to vote, and it is clear that a quorum is not present. It is the duty of the Chair on a roll call to take note of the fact that a quorum does not respond, and the Chair has the right immediately to order another roll call. Of course this whole rule was adopted for the purpose of preventing obstruction. A glance will show whether there is now an attempt at obstruction or not. It is clear that there is, and the Chair has the right, following the purpose of the rule, to take note of the fact that a quorum is not present and for that cause to order a call of the House, and that the doors shall be closed, and that the Sergeant at Arms shall bring in absent Members.

Mr. Garrett raised the further point of order that the Sergeant at Arms was absent and no sworn deputies were in the city, and that it would be necessary for the House to proceed to the selection of a Sergeant at Arms before absentees could be apprehended.

The Speaker held:[3]

The Chair knows that the Sergeant at Arms is at present attending the funeral of a Member of the House, but the Chair does not suppose that necessarily means that the office of the Sergeant at Arms here is vacant or defunct. The Chair thinks that the going away of one individual officer on the duty of the House does not necessarily mean that that whole office is ineffective. The Chair is informed that there is a sworn Deputy Sergeant at Arms here. The Doorkeeper will close the doors, the Sergeant at Arms will bring in absent Members, and the Clerk will call the roll.

680. On the failure of a quorum no business is in order and no motion will be entertained except for a call of the House or to adjourn.

The lack of a quorum being disclosed, in the absence of any motion the Speaker will issue warrants to bring in absent Members.

The Speaker declines to entertain unanimous consent requests in the absence of a quorum.

On February 23, 1921[4] during the consideration of the Post Office appropriation bill with Senate amendments, a quorum failed to respond on a yea-and-nay

[1] Second session Sixty-seventh Congress, Record, p. 602.

[2] Frederick H. Gillett, of Massachusetts, Speaker.

[3] Record, p. 603.

[4] Third session Sixty-sixth Congress, Record, p. 3722.

vote on a motion by Mr. Martin B. Madden, of Illinois, to recede and concur in Senate amendment No. 12.

Thereupon Mr. Madden asked unanimous consent that when the House adjourned it adjourn to meet at 11 o'clock the following day.

The Speaker [1] declined to entertain the request in the absence of a quorum.

Mr. Otis Wingo, of Arkansas, proposed that a recess be taken until an hour certain.

The Speaker stated that no motion was in order but for a call of the House or to adjourn, and that in the absence of any motion the Chair would issue warrants to bring in absent Members.

681. A quorum is not required on motions incidental to a call of the House.

A motion directing the Speaker to issue warrant for arrest of absentees may be entertained during proceedings to secure the attendance of a quorum.

The House having agreed to a motion directing the issuance of a warrant for arrest of absentees during proceedings to secure a quorum, the Speaker disregarded the direction and declined to sign the warrant.

An appeal from the decision of the Chair is in order during a call of the House.

Instance wherein the House designated a minority employee as Assistant Sergeant at Arms.

On March 18, 1910,[2] Mr. George W. Norris, of Nebraska, offered as privileged, a resolution (H. Res. 502) amending the rules. Mr. John Dalzell, of Pennsylvania, made the point of order that the resolution was not privileged. Pending the Speaker's decision on the point of order, it developed that a quorum was not present and, on motion of Mr. Oscar W. Underwood, of Alabama, a call of the House was ordered. The Sergeant at Arms was long delayed in bringing in absentees, and Mr. Thomas W. Hardwick, of Georgia, moved that:

"The House appoint Mr. Joseph Sinnott as Assistant Sergeant at Arms, with such force as he may employ to assist him, to execute the mandate of this House previously made in this case and force attendance of the absent Members."

The Speaker pro tempore [3] said:

The Chair would call attention to the fact that this is not concerning a call of the House. This is a clear out-and-out proposition to increase the officers of the House. Now, it seems to the Chair that the error of the position assumed by the gentleman from Georgia is that he gives to less than a quorum the power that belongs to a quorum of the House. Now, under the constitutional provision, which was cited, the House enacted section 2 of Rule XV and prescribed the manner in which Members should be compelled to attend upon a call of the House, and specifically provide that it must be by order of a majority of those present; to be sent for and arrested, wherever they may be found, by officers to be appointed by the Sergeant-at-Arms for that purpose. There is no doubt about the power of the House to call to the bar of the House the Sergeant-at-Arms, or to discharge the Sergeant-at-Arms, for that matter, when the House is in

[1] Frederick H. Gillett, of Massachusetts, Speaker.

[2] Second session Sixty-first Congress, Record, p. 3398.

[3] John Dalzell, of Pennsylvania, Speaker pro tempore.

possession of its powers, having a quorum; but it is not in the power of less than a quorum to add to the officers of the House, especially in view of the fact that the rules specifically provide how this power of the House shall be exercised. Now, the Chair would like to suggest to those gentlemen who have been here a number of years, the older Members of the House, that this is no unusual experience. It has always been found impossible, so far as the Chair's recollection goes, to obtain a quorum upon a call of the House at a very late hour, especially after midnight, and the Chair thinks it is not in order to entertain the motion.

From this decision Mr. Hardwick appealed, and, the question being submitted to the House, the decision of the Chair was overruled.

Thereupon Mr. Hardwick moved that a warrant for the arrest of absentees issue in the name of the Speaker and be delivered to the Assistant Sergeant at Arms appointed under the motion just agreed to.

The Speaker pro tempore held that the motion was not in order in the absence of a quorum, and, on appeal, that decision was overruled by the House.

Subsequently, Mr. Albert S. Burleson, of Texas, inquired:

With due respect to the Speaker, I desire to propound this query: Has the Speaker signed the warrants to be intrusted to Joe Sinnott, as ordered by the House?

The Speaker [1] said:

The Speaker has no knowledge of Joe Sinnott, and the Speaker desires to say nothing further until a quorum of the House appears. The Speaker is under the constraint that he is bound by a rule of the House adopted, when it had a quorum; and acting in this ministerial capacity, will be bound by that rule, and not by a request of the gentleman or a request of less than a quorum.

682. With the exception of the motion to adjourn, no motion is in order in the absence of a quorum except in furtherance of the effort to secure a quorum, and since a motion to withhold pay of absentees would not contribute to this result, such motion can not be entertained.

On February 18, 1911,[2] the Committee of the Whole House, engaged in the consideration of bills on the Private Calendar, rose and reported the lack of a quorum. During the ensuing proceedings to secure a quorum, Mr. Thetus W. Sims, of Tennessee, moved:

"That the Sergeant at Arms be instructed to execute the provision of the law requiring the salaries of Members of the House to be deducted for all such days as they are absent, except for sickness of themselves or of members of their family, and that it be executed for this day and the rest of the session."

The Speaker pro tempore [3] ruled:

The Chair desires to rule upon the motion of the gentleman from Tennessee. The House is now without a quorum. We are in the midst of a call of the House. The only motion which can be entertained in the absence of a quorum is the motion to adjourn, or some motion which has for its manifest, plain purpose merely the bringing in of Members, so as to compel attendance and secure a quorum. Such a motion has been adopted, and the order of the House is now in process of execution. The Chair is of opinion that a motion to enforce a penalty against absent Members by deducting something from their salaries at the end of the month would not help to secure a quorum this evening, although it might insure more faithful attendance in future,

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[1] Joseph G. Cannon, of Illinois, Speaker.

[2] Third session Sixty-first Congress, Record, p. 2868.

[3] Marlin E. Olmsted, of Pennsylvania, Speaker pro tempore.

and that the motion is of such nature that it can not be entertained at this time, when no quorum is present.

683. A motion for a call of the House is not debatable.

On October 14, 1913,[1] before the Journal had been read, Mr. James R. Mann, of Illinois, made the point of order that a quorum was not present. A quorum not being present, Mr. Oscar W. Underwood, of Alabama, moved a call of the House.

Mr. Mann inquired if the motion was debatable.

The Speaker[2] said:

The Chair would hold, as a matter of ordinary common sense, that it is not debatable. It is one of the those motions that is intended to expedite business like a motion for the previous question. It is on all fours with a motion to table, with a motion for the previous question, and those other motions that are intended to expedite business. It is a summary process.

684. The former practice of presenting Members at the bar during a call of the House is obsolete, and Members now report to the Clerk and are recorded without being formally excused unless brought in under compulsion.

Form of resolution for directing the Sergeant at Arms to arrest absent Members.

On March 18, 1910,[3] in the course of dilatory proceedings attending the consideration of the resolution (H. Res. 502) to amend the rules, a call of the House was ordered. A quorum failing to respond, Mr. Oscar Underwood, of Alabama, proposed:

Mr. Speaker, I move that the Sergeant at Arms be instructed to arrest absentees and bring them to the bar of the House.

The Speaker[4] said:

The order usually adopted is:

"Ordered, That the Sergeant at Arms take into custody and bring to the bar of the House such of its Members as are absent without leave."

The motion was agreed to, and subsequently Mr. Ollie M. James, of Kentucky, inquired:

Is it not the duty of the Sergeant at Arms, under this call, to report to the House as he arrests Members, and to present them at the bar of the House and call the attention of the Speaker to the fact?

The Speaker pro tempore said:

Under the practice of the House under its present rules, Members are not arrested and compelled to come to the bar of the House so as to be excused. They report to the Clerk of the House as they come in, and their presence is noted.

Later Mr. William Hughes, of New Jersey, submitted:

Mr. Speaker, I would like to suggest that the call of the House to-day has proceeded further than the call of the House has ever proceeded in recent times. An order has been made author-

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[1] First session Sixty-third Congress, Record, p. 5653.

[2] Champ Clark, of Missouri, Speaker.

[3] Second session Sixty-first Congress. Record. p. 3390.

[4] Joseph G. Cannon, of Illinois, Speaker.

izing the Sergeant at Arms to arrest absent Members and bring them before the bar of the House. The Sergeant at Arms is not presenting any Member before the bar of the House. The Clerk continues the call and allows Members when they come in to answer to the roll, and no further proceedings are taken under the call. I ask, What proceedings have been taken under the order? Five Members have come in, but no one has been presented before the bar of the House.

The Speaker pro tempore [1] said:

The Chair will say that the old practice of the House of bringing Members in and having them presented at the bar of the House and being excused was abolished by the adoption of the new rule, which allows Members to come in and vote or answer to their names without being formally excused. The Chair recollects that the old practice was to bring Members in and present them at the bar of the House, and they had to be excused, but under the new practice they are entitled to vote if there be a question pending, and if there be no question pending they are entitled to have their names recorded by the Clerk as they come in, and are not required to be formally excused. The Chair presumes that if a Member comes in under compulsion in custody of the Sergeant at Arms it would probably be necessary that he should be excused.

685. A proposition to arrest Members absent without leave is in order during proceedings to secure a quorum.

On February 17, 1911,[2] a quorum having failed to respond on a call of the House, ordered following a report by the Committee of the Whole House of lack of a quorum for the consideration of the omnibus claims bill, Mr. Oscar W. Underwood, of Alabama, moved that the Sergeant at Arms arrest absentees.

The Speaker pro tempore [3] said:

The gentleman from Alabama moves that the Sergeant at Arms arrest absentees and bring them to the bar of the House. The Chair thinks that motion is in order even in the absence of a quorum, as its manifest purpose is to secure the presence of a quorum. The question is on the notion.

The motion was agreed to, and the Speaker pro tempore announced:

The Sergeant at Arms will be directed to arrest absent Members, as directed by order of the House, and present them at the bar of the House.

Obstruction to consideration of the measure continued, and on February 19,[4] a quorum failed to respond on a call of the House, ordered after the Committee of the Whole in consideration of the same measure had again risen without a quorum. Thereupon, Mr. J. Thomas Heflin, of Alabama, offered the following resolution:

Ordered, That the Sergeant at Arms take into custody and bring to the bar of the House such of its Members as are absent without leave.

The Speaker pro tempore said:

The Chair thinks that motion is in order at this time. The question is on agreeing to the motion offered by the gentleman from Alabama.

The question was taken, and the motion was agreed to.

686. Instance wherein the House ordered the arrest of absentees during proceedings to secure a quorum.

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[1] John Dalzell, of Pennsylvania, Speaker pro tempore.

[2] Third session Sixty-first Congress, Record, p. 2805.

[3] Marlin E. Olmsted. of Pennsylvania. Speaker pro tempore.

[4] Record, p. 2896.

Form of resolution for the arrest of Members absent without leave.

A resolution authorizing the Sergeant at Arms to arrest absentees is not debatable.

A request for unanimous consent is not entertained in the absence of a quorum.

On September 30, 1918,[1] during a filibuster, a quorum failing to answer on a call of the House and later on a motion to adjourn, Mr. Thetus W. Sims, of Tennessee, offered the following resolution:

Resolved, That the Sergeant at Arms take into custody and bring to the bar of the House such of its Members as are now absent without leave of the House.

Mr. Joseph G. Cannon, of Illinois, asked to be recognized. The Speaker[2] held that the resolution was not debatable.

Mr. Frank C. Reavis, of Nebraska, asked unanimous consent to address the House for 3 minutes. The Speaker declined to entertain the request, and held that no business was in order except a motion to adjourn or in furtherance of an effort to secure the attendance of a quorum.

687. A motion to require the Sergeant at Arms to report at the bar of the House on progress in securing a quorum is in order during a call of the House.

Interrogation of an officer, required to answer at the bar of the House, must be authorized by motion and is limited to subjects specified in that motion.

Instance in which the Sergeant at Arms was summoned to the bar of the House and required to report progress in the discharge of the duties of his office.

On March 18, 1910,[3] during prolonged delay in securing a quorum under a call of the House, Mr. Ollie M. James, of Kentucky, offered the following motion:

Mr. Speaker, I move that the Sergeant at Arms be called before the bar of the House, that we may ascertain what progress and efforts he has made to obtain a quorum in this House to transact the public business, if any.

The Speaker pro tempore[4] said:

The Chair thinks it would be within the power of the parties present, although not a quorum to ascertain from the Sergeant at Arms what progress he has made. The gentleman from Kentucky moves that the Sergeant at Arms be required to come to the bar of the House and report what progress he has made, if any.

The motion was agreed to, and Mr. Albert S. Burleson, of Texas, moved:

That Mr. Bell, of Georgia, and Mr. Garner, of Texas, be requested to notify the Sergeant at Arms of the action of the House and ask the Sergeant at Arms to report to the House what progress he has made.

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[1] Second session Sixty-fifth Congress, Record, p. 10956.

[2] Champ Clark, of Missouri, Speaker.

[3] Second session Sixty-first Congress, Record, p. 3393.

[4] John Dalzell, of Pennsylvania, Speaker pro tempore.

The question on agreeing to the motion offered by Mr. Burleson was then taken and, being decided in the affirmative, Mr. Bell and Mr. Garner appeared with the Sergeant at Arms at the bar of the House.

Mr. Bell said:

Mr. Speaker, this is the Sergeant at Arms before the bar of the House.

The Speaker pro tempore directed:

The Chair will request the reading clerk of the House to inform the Sergeant at Arms of the action of the House.

The Clerk read:

The House has directed the Sergeant at Arms to report what progress he has made or what action he has taken, if any, to bring in absent Members.

The Sergeant at Arms reported in detail.

Mr. Gilbert N. Haugen, of Iowa, proposed to further question the Sergeant at Arms, when the Speaker pro tempore ruled:

The Chair thinks any question to be propounded to the Sergeant at Arms must be authorized by the House and not propounded by an individual Member.

Whereupon, Mr. William W. Rucker, of Missouri, moved that Mr. Haugen be permitted to interrogate the Sergeant at Arms.

The motion was agreed to, and Mr. Haugen submitted further interrogatories, which were answered by the Sergeant at Arms.

Mr. James expressed a wish to propound additional questions and, on motion of Mr. Haugen, the House authorized Mr. James to further inquire.

At the conclusion of Mr. James's examination the Sergeant at Arms retired without ceremony.

688. Motions incidental to a call of the House are not debatable.

Under a call of the House warrants for the arrest of Members may be issued by the Speaker pro tempore.

On October 7, 1913,[1] immediately upon the reading and approval of the Journal, Mr. James R. Mann, of Illinois, made the point of order that no quorum was present, and, on motion of Mr. Frank Clark, of Florida, a call of the House was ordered.

A quorum having failed to respond, Mr. Charles L. Bartlett, of Georgia, moved that the Speaker pro tempore issue a warrant for the arrest of Members.

Mr. Mann made the point of order that the Speaker pro tempore was without authority to sign such warrant.

The Speaker pro tempore[2] ruled:

In the opinion of the Chair the Speaker pro tempore has the same authority as the Speaker himself would have in securing a quorum. That matter was raised once in the Forty-fourth Congress, and upon a point of order being made the Speaker pro tempore, Mr. Sunset Cox, of New York, ruled that the Speaker pro tempore had such power.

Mr. Bartlett, as a parliamentary inquiry, asked if the motion was debatable.

The Speaker pro tempore held that it was not debatable.

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[1] First session Sixty-third Congress Record p. 5498.

[2] Swagar Sherley, of Kentucky, Speaker pro tempore.

689. A motion to dispense with further proceedings under a call of the House was not entertained in the absence of a quorum.

The lack of a quorum precludes the consideration of a request for unanimous consent.

On March 18, 1910,[1] a call of the House was ordered pending the Speaker's decision on a point of order against the privilege of a resolution amending the rules.

At the conclusion of the second roll call, the Speaker announced that 35 Members were needed to make a quorum.

Mr. Irvine L. Lenroot, of Wisconsin, moved to dispense with further proceedings under the call of the House.

The Speaker pro tempore [2] held:

Before the motion to dispense with further proceedings under the call can be entertained there must have been disclosed the presence of a quorum on the call of the House. In other words, you can not vacate your call until you have succeeded in getting a quorum. Then upon a motion the further proceedings under the call may be dispensed with without a quorum.

In response to a request by Mr. William A. Ashbrook, of Ohio, for permission to address the House, the Speaker pro tempore ruled:

The Chair would say to the gentleman that unanimous consent can no more be given than can a motion to proceed to any other business.

690. The rule whereby a quorum is obtained and the vote taken on the pending proposition by one roll call.

The process of arresting absent Members under a call of the House. Form and history of section 4 of Rule XV.

Section 4 of Rule XV provides:

Whenever a quorum fails to vote on any question, and a quorum is not present and objection is made for that cause, unless the House shall adjourn there shall be a call of the House, and the Sergeant-at-Arms shall forthwith proceed to bring in absent Members, and the yeas and nays on the pending question shall at the same time be considered as ordered. The Clerk shall call the roll, and each Member as he answers to his name may vote on the pending question, and, after the roll call is completed, each Member arrested shall be brought by the Sergeant-at-Arms before the House, whereupon he shall be noted as present, discharged from arrest, and given an opportunity to vote and his vote shall be recorded. If those voting on the question and those who are present decline to vote shall together make a majority of the House, the Speaker shall declare that a quorum is constituted, and the pending question shall be decided as the majority of those voting shall appear. And thereupon further proceedings under the call shall be considered as dispensed with. At any time after the roll call has been completed, the Speaker may entertain a motion to adjourn, if seconded by a majority of those present, to be ascertained by actual count by the Speaker; and if the House adjourns, all proceedings under this section shall be vacated.

This rule was adopted on January 23, 1896.[3] In its original form it included a provision that it should not apply to sessions on Friday nights.

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[1] Second session Sixty-first Congress, Record, p. 3394.

[2] John Dalzell, of Pennsylvania, Speaker pro tempore.

[3] First session Fifty-fourth Congress, Record, pp. 923–938; see section 3041 of this work.

This provision was rendered obsolete by the adoption March 8, 1900,[1] of the standing order modifying section 2 of Rule XXVI by making in order the consideration of private pension bills on the second and fourth Fridays in each month instead of on Friday evening sessions as formerly. This standing order was readopted by each succeeding Congress until superseded by the adoption of section 6 of Rule XXIV in the revision of 1911.

691. When lack of a quorum develops while the House is dividing, the call of the House is automatic under the rule and no motion is required.

On January 26, 1916,[2] Mr. James F. Byrnes, of South Carolina, moved that the House adjourn. On a division, the yeas were 29, nays 169, and Mr. Byrnes made a point of no quorum.

Mr. Edward Keating, of Colorado, moved a call of the House.

Mr. Charles R. Crisp, of Georgia, made the point of order that the House was dividing and under the rule no motion was necessary.

The Speaker[3] sustained the point of order and directed that the doors be closed, absentees brought in, and the roll called.

692. The rule providing for an automatic call of the House does not apply unless the House is dividing and, if the point of no quorum is made before the question is put, may not be invoked.

On June 28, 1913,[4] the House was considering the bill (H.R. 32) providing an additional circuit judge for the eastern district of Pennsylvania.

Mr. Henry D. Clayton, of Alabama, moved that the House concur in Senate amendment No. 1.

The Speaker[3] stated the motion but before he could put the question was interrupted by a discussion of preferential motions, during which Mr. Frank W. Mondell, of Wyoming, made the point of no quorum.

On motion of Mr. Clayton, a call of the House was ordered.

Mr. A. Mitchell Palmer, of Pennsylvania, made the point of order that, under the rule, the vote was on the pending motion to concur.

The Speaker said:

> No; the gentleman from Pennsylvania is mistaken as to his facts. What happened is this, that the Chair started to put the question, but never did put the question, because as soon as he rose and stated that the question was on the motion of the gentleman from Alabama, Mr. Clayton, to concur in this amendments he got no further, and then the gentleman from Alabama rose and asked something about unanimous consent that debate close. That is the condition it was in, and there is no question about what the call of the House is on. The call of the House is to ascertain whether we can muster a quorum.

693. On May 21, 1917,[5] Mr. Claude Kitchin, of North Carolina, moved that the House resolve itself into the Committee of the Whole House on the state of the Union for the consideration of the war revenue bill.

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[1] First session Fifty-sixth Congress, Journal, p. 329; see section 3281 of this work.

[2] First session Sixty-fourth Congress, Record, p. 1606.

[3] Champ Clark, of Missouri, Speaker.

[4] First session Sixty-third Congress, Record, p. 2288.

[5] First session Sixty-fifth Congress, Record, p. 2661.

The Speaker[1] announced the motion but had not put the question, when Mr. Simeon D. Fess, of Ohio, made a point of no quorum.

Mr. Kitchin moved a call of the House.

Mr. John N. Garner, of Texas, made the point of order that, under the rule, a call of the House was automatic.

The Speaker held that the House was not dividing, and put the question on ordering a call of the House.

694. A quorum has not failed to vote until both the yeas and nays have been taken, and a call of the House is not ordered until this stage is reached.

On January 30, 1920,[2] Mr. James W. Good, of Iowa, moved that the House resolve itself into the Committee of the Whole House on the state of the Union for the consideration of the deficiency appropriation bill.

The Speaker[3] said:

The gentleman from Iowa moves that the House resolve itself into the Committee of the Whole House on the state of the Union for the further consideration of the deficiency bill. As many as are in favor of the motion will say aye.

The ayes responded, but before the noes could be taken Mr. William S. Vare, of Pennsylvania, made the point of order that a quorum was not present.

A quorum not being present, the Speaker directed a call of the House, under the rule, when Mr. Joseph Walsh, of Massachusetts, submitted that the House was not dividing and the rule could not apply until both the yeas and nays had been taken.

The Speaker said:

The rule does not say anything about dividing, although that is the phrase used. The rule says whenever a quorum fails to vote on any question and a quorum is not present. The Chair thinks that under that, technically, he would have to decide that a vote had been taken and that a quorum did not vote. If the point of no quorum is made before the vote is taken, strictly the Chair could not decide that a quorum had not voted. The Chair therefore rules that this is not an automatic call.

695. In order to invoke the rule for an automatic call of the House, the absence of a quorum must be demonstrated.

On May 26, 1921,[4] following the approval of the Journal, the Speaker announced:

When the House adjourned last evening the previous question had been ordered on the deficiency bill, and a separate vote has been demanded on certain amendments. The Clerk will report the first amendment on which a separate vote is demanded.

Mr. Blanton submitted, as a parliamentary inquiry, that a division was had on the first pending amendment and the point of no quorum was made on that division prior to adjournment on the preceding day and, therefore, under the rule, an automatic call of the House was indicated.

The Speaker[3] said:

The reason why there would be an automatic call is that there is no quorum present. Because there was no quorum at the time it would not follow that there was no quorum now. The question is on agreeing to the amendment.

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[1] Champ Clark, of Missouri, Speaker.

[2] Second session Sixty-sixth Congress, Record, p. 2255.

[3] Frederick H. Gillett, of Massachusetts, Speaker.

[4] First session Sixty-seventh Congress, Record, p. 1796.

696. Lack of a quorum developing while a demand for the yeas and nays was pending, the demand for yeas and nays, is disregarded and the vote is taken under the rule.

On June 1, 1921,[1] Mr. Marvin Jones, of Texas, moved to recommit the bill (H. R. 6567) relating to the consolidation of telephone companies to the Committee on Interstate and Foreign Commerce, with instructions.

Mr. Paul B. Johnson, of Mississippi, demanded the yeas and nays and, pending that demand, made the point that a quorum was not present.

The Speaker pro tempore, having ascertained and announced that a quorum was not present, put the question on ordering the yeas and nays.

Mr. Otis Wingo, of Arkansas, made the point of order that the House was dividing and, under the rule, the vote recurred on the pending motion to recommit.

The Speaker pro tempore [2] said:

The Chair will state the parliamentary status. The House divided on the motion to recommit. The Chair announced that the vote showed that the motion was lost. The gentleman from Mississippi thereupon demanded that the vote be taken by the yeas and nays, and pending that made the point of no quorum. The Chair desires to follow the long line of practice of the House, realizing that it is in the interest of expedition in roll calls to vote automatically on the question on which the House was dividing at the time the point of no quorum was made. The Chair therefore reverses the decision which he made a moment ago and holds that the vote will be taken automatically on the motion to recommit. The Door-keeper will close the doors, the Sergeant at Arms will notify absentees, and the Clerk will call the roll. The question is on the motion to recommit.

697. A roll call recurs under the rule on failure of a quorum on a viva voce vote.

On March 8, 1922,[3] when the question was taken by viva voce vote on the final passage of the bill (H.R. 4382) to apply the reclamation law to drainage districts, Mr. James R. Mann, of Illinois, inquired if a point of no quorum, made before a division was demanded on the question, would precipitate an automatic roll call under the rule.

The Speaker [4] said:

That is a point which the Chair has never settled. The Chair thinks it would come.

Mr. Little, of Kansas, said:

Then, Mr. Speaker, I shall not ask for a division, but I make the point of order that there is no quorum present.

Thereupon the Speaker directed a call of the House under the rule.

698. A Member who had risen and was demanding recognition is not precluded from making the point of no quorum by the fact that the Speaker had in the meantime declared the result and recognized him for a parliamentary inquiry.

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[1] First session Sixty-seventh Congress, Record, p. 1994.

[2] William H. Stafford, of Wisconsin, Speaker pro tempore.

[3] Second session, Sixty-seventh Congress, Record, p. 3585.

[4] Frederick H. Gillett, of Massachusetts, Speaker.

On June 14, 1922,[1] Mr. Louis T. McFadden, of Pennsylvania, moved the previous question on the bill (H.R. 11939) relating to State taxation of national banks, and all amendments thereto, to final passage.

The previous question was ordered, whereupon Mr. Edward Voigt, of Wisconsin, who had been demanding recognition, inquired if the action of the House in ordering the previous question prevented debate on pending amendments. On being told that it did, Mr. Voigt made the point of no quorum on the vote ordering the previous question.

Mr. Joseph Walsh, of Massachusetts, made the point of order that after the result of the vote had been declared and a parliamentary inquiry had intervened the point of no quorum came too late and the rule for an automatic call of the House did not apply.

The Speaker[2] said:

> The gentleman from Wisconsin was on his feet. The Chair thinks that he would have a right to claim that the previous question had not been ordered; that he would have a right to demand a division. Very frequently the Chair states the result of a vote and then a gentleman rises, and the Chair never insists that the vote has been completed. It seems to the Chair to be fair play to the House to hold that the gentleman had a right to demand a division and a roll call on the question. It is clear that there is no quorum present. The Doorkeeper will close the doors, the Sergeant at Arms will bring in absentees, and the Clerk will call the roll. The question is on ordering the previous question.

699. The Speaker may, without suggestion from the floor, take note of the failure of a quorum to vote on the pending question, and on his own initiative direct a call of the House under the rule.

On April 7, 1908,[3] Mr. Washington Gardner, of Michigan, moved that the House resolve itself into the Committee of the Whole House on the state of the Union for the consideration of the District appropriation bill.

On division the yeas were 100 and the nays were 75.

Mr. Charles L. Bartlett, of Georgia, made a point of no quorum and immediately withdrew it before ascertainment by the Speaker.

Whereupon the Speaker[4] said:

> The Chair will make the point of order, and take notice that there is no quorum present. The doors will be closed, the Sergeant at Arms will notify absent Members, the yeas and nays are ordered under the rule. The Clerk will call the roll.

700. While a quorum is not required to adjourn, a point of no quorum on a negative vote on adjournment, if sustained, precipitates a call of the House under the rule.

On August 25, 1919,[5] on a motion to adjourn, the House voted in the negative, yeas 38, nays, 58.

Mr. Thomas L. Blanton, of Texas, made the point that a quorum had not voted.

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[1] Second session, Sixty-seventh Congress, Record, p. 8736.

[2] Frederick H. Gillett, of Massachusetts, Speaker.

[3] First session Sixtieth Congress, Record, p. 4482.

[4] Joseph G. Cannon, of Illinois, Speaker.

[5] First session Sixty-sixth Congress, Record, p. 4306.

Mr. Claude Kitchin, of North Carolina, made the point of order that a quorum was not required on the motion to adjourn.

The Speaker [1] held:

The Chair thinks that the sequence of events was this: The gentleman from Texas moved to adjourn. The House voted down the motion to adjourn, and the Chair so put it. Then the gentleman made a point of no quorum.

Now, the only question is whether that point of no quorum was made on the division or subsequent to that. The Chair is inclined to think it was made on the division, and that the vote would come on the motion to adjourn. Obviously no quorum is present, and it is an automatic call of the House. As many as are in favor of the motion to adjourn will, when their names are called, answer "yea"; those opposed will answer "nay." The Doorkeeper will close the doors, the Sergeant at Arms will notify the absentees, and the Clerk will call the roll.

701. If a quorum fails to vote on the pending question and objection is made, an automatic roll call is still required after a motion to adjourn has been offered and rejected by a quorum vote.

On June 3, 1926,[2] Mr. Louis C. Cramton, of Michigan, offered a motion to reconsider the vote by which the House had passed the bill (H.R. 11329) for relief of certain counties in the States of Oregon and Washington.

Mr. Nicholas J. Sinnott, of Oregon, moved to lay the motion on the table, and the question being taken, Mr. John C. Schafer, of Wisconsin, objected to the vote on the ground that a quorum was not present.

Pending the automatic roll call, under the rule, Mr. Martin B. Madden, of Illinois, made a motion to adjourn.

The vote being taken the Speaker announced that the motion was rejected by a vote of 45 yeas and 271 nays, and a quorum was present.

Mr. Cramton submitted that notwithstanding the development of a quorum on the motion to adjourn, the vote recurred under the rule on the original motion pending at the time the motion to adjourn was made.

The Speaker [3] acquiesced and said:

The question is on the motion of the gentleman from Oregon to lay the motion of the gentleman from Michigan to reconsider on the table, upon which there is an automatic call.

The Chair does not think that the development of a quorum on a subsequent vote would avoid a call of the House.

The question is on the motion of the gentleman from Oregon to lay the motion to reconsider on the table. A quorum not having developed at that time, the automatic call must be had.

702. Under the rule for a call of the House, the Speaker issues warrants for arrest of absentees without further authorization from the House.

On July 26, 1921, [4] during dilatory proceedings attending the consideration of the resolution (H. Res. 151) to pay expenses of the Committee on Reorganization from the contingent fund, a quorum failed to vote on ordering the previous question on the resolution.

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[1] Frederick H. Gillett, of Massachusetts, Speaker.

[2] First session Sixty-ninth Congress, Record, p. 10633.

[3] Nicholas Longworth, of Ohio, Speaker.

[4] First session Sixty-seventh Congress, Record, p. 4328.

The Speaker[1] announced that he had issued his warrant for the arrest of absent Members.

Mr. Finis J. Garrett, of Tennessee, made the point of order that the Speaker was not authorized to issue such warrant of his own initiative and the Speaker had never at any time issued his warrant for arrest of Members except by authority of a resolution passed by the House.

The Speaker overruled the point of order and held that under the rule the Speaker was empowered to issue his warrant on an automatic call of the House without further authorization and cited an opinion[2] to that effect rendered by Mr. Speaker Cannon in the Fifty-ninth Congress.

703. Interpretation and discussion of the rule providing for an automatic call of the House on the failure of a quorum to vote.

The rule providing an automatic roll call on the failure of a quorum to vote applies to votes by yeas and nays as well as to those taken by tellers, division, or viva voce, but not on motions incidental to lack of a quorum.

The Speaker orders the doors closed only when a call of the House is in progress.

On February 14, 1917,[3] the House finding itself without a quorum during the consideration of the joint resolution (H. J. Res. 335) for the appointment of a Board of Managers for the National Home for Disabled Volunteer Soldiers, Mr. Ashton C. Shallenberger, of Nebraska, moved a call of the House, and on that motion demanded the yeas and nays.

The yeas and nays, were ordered, and the Speaker, in putting the question, said:

The question is on ordering a call of the House. The Doorkeeper will look the doors, the Sergeant at Arms will notify the absentees, and the Clerk will call the roll.

Mr. James R. Mann, of Illinois, said:

I make the point of order that it is not in order to order the doors to be closed until a call of the House has been ordered. The rule is not applicable to the case. That is the new rule, that when objection is made that no quorum votes and no quorum is present there shall be a call of the House and so forth. That is not the rule under which we are operating at present. There is demanded a roll call, but not on the point of no quorum. I simply called attention to the fact that the Speaker ordered the doors closed. I do not think it is in order to order the doors closed until a call of the House has been ordered.

The Speaker[4] sustained the point of order that the doors should be closed only on a call of the House.

Mr. John N. Garner, of Texas, took issue with Mr. Mann's assumption that the rule providing for an automatic call of the House did not apply, and made the point of order that a quorum having failed to vote on the pending question it was the duty of the Speaker to direct a call of the House.

Mr. Garner said:

The Chair himself raised the objection that there was not a quorum present. The Chair himself has objected, and that comes within the rule and requires an automatic roll call.

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[1] Frederick H. Gillett, of Massachusetts, Speaker.

[2] Section 3043 of this work.

[3] Second session Sixty-fourth congress, Record, p. 3314.

[4] Champ Clark, of Missouri, Speaker.

In reply, Mr. Charles R. Crisp, of Georgia, said:

Mr. Speaker, I must agree that the gentleman from Illinois, Mr. Mann, is correct in the position which he takes in this matter. When I addressed the Chair a moment ago it was for the purpose of calling attention to the fact that when the yeas and nays disclosed the absence of a quorum the Speaker must take cognizance of it, and nothing could be done. Now, it seems to me this matter is very plain. Under the rules there are two provisions for a call of the House. Under the old rules there was only one provision for a call, and that was the provision that 15 Members in the absence of a quorum could send out and bring in a quorum. The House has since adopted a rule known as the automatic call, and, in my opinion, that means that when the House is dividing by a viva voce vote or by tellers or otherwise, except by yeas and nays, and the want of a quorum is disclosed, and the point is made, then the automatic call applies, and the Speaker should order the doors closed and direct the Sergeant at Arms to notify the absentees and order the yeas and nays on the question.

In response to an inquiry by Mr. Garner as to the distinction in the application of the rule on the failure of a quorum on a vote by tellers or viva voce and on a yea and nay vote, Mr. Crisp continued:

I think there is a difference. I think the yea and nay is the last method of taking a vote on any question that may come before the House, and it is the best way of ascertaining a quorum. I think the intent of the House when they adopted the rule was that if on viva voce, rising vote, or on tellers there was not a quorum, instead of having to order a call of the House, the automatic rule should apply and the yeas and nays be ordered on the pending question.

The Speaker rendered no formal decision, as the roll call was already in progress.

Subsequently, addressing the House by unanimous consent, Mr. Crisp said:

Mr. Speaker, earlier in the evening, when the parliamentary question arose as to whether an automatic call of the House obtained, I took the position that the automatic call did not apply and agreed with the position taken by the learned gentleman from Illinois. I want to say now that, so far as I had ever seen any precedent in this House on the subject, or any practical application of the rule, the position we then took was correct. But upon investigation I find that the gentleman from Texas was correct and that I was wrong—that the automatic call did apply—and when I am wrong and convinced I have no hesitancy in saying so. I desire to call the attention of the Speaker to two precedents on this question.

Mr. Crisp then cited precedents [1] sustaining this contention, and concluded:

Under these decisions, if they are followed, it is obvious when we take a vote by yeas and nays on a motion to order the previous question on the passage of a bill and amendments and a quorum failing to vote, then the automatic rule applies, and a call of the House follows, and Members brought in by the Sergeant at Arms or who come in voluntarily should be permitted to cast their vote on ordering the previous question on the bill and amendments to passage. I felt, Mr. Speaker, that it was due the Chair and due the House and due myself when I learned I was in error to frankly say so. I thank the House.

This revised opinion, however, seems to overlook the fact that the motion for a call of the House was pending incidental to lack of a quorum, and therefore the rule providing for an automatic roll call was not applicable.

704. On July 26, 1921,[2] a quorum failed to vote by yeas and nays on ordering the previous question on the resolution (H. Res. 151) to pay half the expense of the Committee on Reorganization from the contingent fund.

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[1] Sections 3045 and 3052 of this work; first session Fifty-fourth Congress, Record, p. 6330.

[2] First session Sixty-seventh Congress, Record, p. 4327.

The Speaker directed a call of the House under the rule, when Mr. Finis J. Garrett, of Tennessee, submitted a parliamentary inquiry as to the integrity of the proceedings.

The Speaker [1] said:

It is the same as a division. When a quorum fails to appear on a division an automatic roll call follows. Speaker Clark made this same ruling. The clerk will call the roll.

705. During a call of the House a motion to adjourn is seconded by a majority ascertained "by actual count by the Speaker," and tellers may not be demanded.

On July 26, 1921,[2] during a call of the House precipitated by the failure of a quorum to vote on ordering the previous question on a resolution for the payment of expenses of a joint committee from the contingent fund, Mr. Tom Connally, of Texas, moved to adjourn.

The Speaker [1] said:

The question is, Does a majority of those present second him? As many as desire to second the motion to adjourn will rise and be counted. [After counting.] Fifty-three gentlemen have risen in the affirmative. Those opposed will rise and be counted. [After counting.] One hundred and fourteen gentlemen have risen in the negative.

Mr. Finis J. Garrett, of Tennessee, demanded tellers.

The Speaker ruled:

The rule says the second is to be ascertained by actual count by the Speaker; therefore tellers can not be demanded.

706. On August 1, 1921 [3] a quorum failed to vote on a motion by Mr. Julius Kahn, of California, to suspend the rules and pass the bill (S. 1385) maintaining the corps of cadets at West Point at maximum strength.

Mr. Alben W. Barkley, of Kentucky, moved that the House adjourn.

The Speaker pro tempore [4] said:

That motion is in order, but in this case it must be seconded by a majority of the Members present, and that must be determined by a count by the Chair. Those in favor of seconding the motion to adjourn will rise and stand until counted.

707. On the failure of a quorum in a vote by tellers on seconding the old motion [5] to discharge a committee the Chair directed a call of the House under the rule.

On January 15, 1912,[6] a quorum failing to appear on a vote by tellers on seconding a motion to discharge the Committee on Invalid Pensions from the further consideration of the bill (H. R. 60) to increase the pensions of widows, minor children, etc., Mr. Oscar W. Underwood, of Alabama, moved a call of the House.

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[1] Frederick H. Gillett, of Massachusetts, Speaker.

[2] First session Sixty-seventh Congress, Record, p. 4328.

[3] First session Sixty-seventh Congress, Record, p. 4504.

[4] Horace M. Towner, of Iowa, Speaker pro tempore.

[5] This section has been superseded by section 4 of Rule XXVII.

[6] Second session Sixty-second Congress, Record, p. 954.

Mr. James R. Mann, of Illinois, made the point of order that a call of the House was automatic under the rule, and the motion was not in order.

The Speaker pro tempore [1] said:

The Chair had an idea that possibly this situation would arise, and consequently has been looking the matter up before the question of a point of no quorum was made, and of course availed itself of the assistance of the aid to the Chair on these parliamentary matters by consulting the Clerk at the Speaker's table. From all the Chair was able to gather before and since the point was made the Chair thinks that this is a vote within the meaning of the automatic rule and that section 4 applies. The Chair holds the automatic rule applies, and the doors will be closed.

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[1] Thetus W. Sims, of Tennessee, Speaker pro tempore.

Chapter CCX.[1]

THE ORDER OF BUSINESS.

708. The Speaker has requested that he be advised in advance of intention to submit unanimous consent requests for changes in order of business.

It is customary to notify the majority and minority leaders as well as the Speaker of proposed requests for deviations from the authorized order of business.

On June 11, 1919,[2] during consideration of a request for unanimous consent relating to a change of reference of certain bills, Mr. Frank W. Mondell, of Wyoming, the majority leader, said:

Mr. Speaker, in this connection may I again suggest to the gentlemen that when they have requests of this kind to make they refer the matter, before making the requests, to the gentleman from Missouri, Mr. Clark, who ought to be informed in regard to them before they are presented to the House. I was under the impression that the gentleman from Missouri had been informed with regard to this.

Mr. Champ Clark, of Missouri, minority leader, subjoined:

Mr. Speaker, if the House will bear with me a minute, I wish to say that I think the suggestion of the gentleman from Wyoming is correct. Somebody has to look after these matters, and unless the gentlemen who have bills inform those who are supposed to look after matters here it precipitates one of these talking fests every morning. While I was Speaker I asked everybody who wanted to make a motion to recommit, except just a flat motion to recommit, to bring me the motions in advance—and I have no doubt the present Speaker will find that to be of advantage—so you can find out what is in them. Gentlemen get up here with bills that I do not know anything about or anybody else knows anything about. They may be very meritorious, but we do not feel like letting them go through.

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[1] Supplementary to Chapter LXXXVII.

[2] First session Sixty-sixth Congress, Record, p. 972.

The Speaker [1] said:

The Chair would like to suggest that the Chair would be obliged if gentlemen who wish to ask unanimous consent would consult him in advance; and would suggest that in the future the Chair will probably not recognize anyone to ask unanimous consent unless he knows in advance the subject for which unanimous consent is asked.

709. Requests for unanimous consent should not be coupled and one should not be made contingent on the granting of another.

On April 21, 1926,[2] following the approval of the Journal, Mr. Benjamin L. Fairchild, of New York, asked unanimous consent to address the House for five minutes for the purpose of denying charges made against a resident of the District of Columbia on the previous Monday by Mr. Thomas L. Blanton, of Texas.

Mr. Blanton reserved the right to object and preferred as a substitute a request that Mr. Fairchild be granted five minutes at the conclusion of which he should be given five minutes in which to reply.

The Speaker [3] deprecated the request and said:

Let the Chair make this statement: The Chair is very much opposed to the practice of making the consent for one gentleman to address the House contingent on another consent. The Chair does not believe that to be a good practice.

The regular order is, Is there objection to the gentleman from New York proceeding for five minutes?

710. The Speaker has declined to entertain a request for unanimous consent contingent upon the granting of a similar request previously preferred.

On April 21, 1926,[4] Mr. Thomas L. Blanton, of Texas, submitted a request for unanimous consent to address the House for five minutes.

Mr. Benjamin L. Fairchild, of New York, reserved the right to object and announced that he would object unless granted five minutes in which to reply.

The Speaker [5] declined to entertain Mr. Fairchild's request and said:

The Chair announced this morning that he will not entertain a request contingent upon granting another request.

710a. A "gentlemen's agreement"—a term applied to unanimous consent orders of more than ordinary importance—is observed with scrupulous care and the Speaker has declined to recognize Members to submit requests which in his opinion infringed on its provisions.

A gentlemen's agreement once entered into is not subject to subsequent revision, even by unanimous consent.

On December 20, 1926,[6] Mr. John Q. Tilson, of Connecticut, preferred the following request for unanimous consent:

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[1] Frederick H. Gillett, of Massachusetts, Speaker.

[2] First session Sixty-ninth Congress, Record, p. 7915.

[3] Nicholas Longworth, of Ohio, Speaker.

[4] First session Sixty-ninth Congress, Record, p. 7941.

[5] Nicholas Longworth, of Ohio, Speaker.

[6] Second session Sixty-ninth Congress, Record, p. 788.

Mr. Speaker, I should like to have an understanding, a gentlemen's agreement, that in case the Department of Agriculture appropriation bill should be finished to-morrow the session on Wednesday will be merely a formal one. I shall take it as an agreement if no one objects.

There was no objection, and Mr. Finis J. Garrett, of Tennessee, asked how the agreement would be interpreted if in the meantime the river and harbor bill should be messaged over from the Senate.

Mr. Tilson replied:

With the understanding that we have just had, if that bill should come to the House later than to-morrow, I should not feel inclined to ask that any action be taken upon it until after the holidays, unless the action were of a merely formal character.

Subsequently, on the same day, Mr. Tilson, again addressing the House by consent, explained:

Mr. Speaker, before we went into Committee of the Whole, in a colloquy between the gentleman from Tennessee and myself, reference was made to what action might be taken in case the river and harbor bill were passed and messaged over at a late hour. As I recall, what I said to the gentleman from Tennessee was to the effect that if that bill came over later than to-morrow, owing to the agreement we had to take up nothing but routine or formal business on Wednesday, I should not feel inclined to call up for action a bill of that importance. What I meant by that statement was that I should not feel warranted in calling up a contested matter. If that bill or any other bill came over on Wednesday and proved to be only of formal matter, I see no reason why it might not be properly disposed of.

There was no objection, but on Wednesday, December 22,[1] when Mr. S. Wallace Dempsey, of New York, asked unanimous consent that the river and harbor bill be taken from the Speaker's table for the consideration of Senate amendments thereto, the Speaker declined recognition for the purpose and said:

The Chair does not think he ought to recognize the gentleman for that purpose. The Chair thinks there was a very definite understanding based on the remarks of the gentleman from Connecticut that no action would be taken with regard to the river and harbor bill specifically or any other bill except of a purely formal character. The Chair thinks such action as this would be far from a mere formal procedure, and whether or not there may be some Member present who desires to object, there are a number of Members who have gone away with this understanding in mind, and the Chair feels he ought not recognize the gentleman for the purpose he indicates.

The Chair thinks, regardless of whether the gentleman is going to object or not, it is his duty to carry out what, in his opinion, is the express understanding of the House.

Mr. Tilson, on whose motion the gentlemen's agreement had been entered into, called attention to the fact that his second proposal relative to the framing of the agreement modified the original understanding. However, the Speaker held that such agreements, once entered into, were not subject to modification, and said:

The Chair thinks not. The Chair thinks that the remarks made by the gentleman from Connecticut and the gentleman from Tennessee later in the afternoon do not change the spirit of the understanding, and, by the way, that was at a time just before adjournment when there were hardly any Members in the Chamber at all, whereas the original agreement was had when there was at least a quorum present. The Chair thinks that many gentlemen may have gone away with the understanding that no such action, so important as agreeing to the Senate amendments to the river and harbor bill, would be taken up to-day, and the Chair feels he must protect them.

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[1] Record, p. 950.

The Chair will state that he will not recognize any Member to-day to ask unanimous consent to take up a matter that is at all controversial, a matter which is in any degree controversial. He will recognize a request to send a bill to conference, for he thinks that is purely a formal matter.

711. Proceeding to vacate action by the House is not provided for under the rules, and a suspension of the order of business for that purpose is by unanimous consent only.

On February 13, 1914,[1] Mr. John A. Key, of Ohio, asked unanimous consent to reconsider the vote by which the bill (H. R. 12914), an omnibus pension bill, was passed in order to permit an amendment thereto.

The Speaker[2] said:

It can not be reconsidered. The proper method is to vacate the proceedings by which the pension bill was engrossed, read a third time, and passed. The gentleman asks unanimous consent to vacate the proceedings on that bill back to the place where the vote was taken on the motion to engross and read a third time. Is there objection? [After a pause.] The Chair hears none. It is now in order for the gentleman from Kentucky to offer his bill as an amendment.

The proposed amendment was offered and agreed to, and the bill as amended was again engrossed, read a third time, and passed.

712. On January 23, 1918,[3] Mr. Charles D. Carter, of Oklahoma, asked unanimous consent that the Clerk be authorized to correct certain totals which did not correspond to subtotals in the Indian appropriation bill, amended when the bill was passed on the preceding day.

Mr. Martin D. Foster, of Illinois, submitted that such correction could not be made after the passage of the bill even by unanimous consent.

Whereupon Mr. Carter asked unanimous consent that the proceedings by which the bill was engrossed, read a third time, and passed be vacated back to the stage of amendment. There was no objection.

On motion of Mr. Carter, by unanimous consent, the Clerk was authorized to make the desired corrections.

The bill was again ordered to be engrossed, read a third time, and passed.

713. On discovery of error in announcing the presence of a quorum on a call of the House, a motion to dispense with further proceedings under the call was vacated by unanimous consent and the call resumed.

On August 17, 1912,[4] Mr. J. Thomas Heflin, of Alabama, asked to call up from the Speaker's table the bill (S. 7343) authorizing a dam across the Coosa River.

Mr. Martin D. Foster, of Illinois, made the point of no quorum and, a quorum not being present, on motion of Mr. Oscar W. Underwood, of Alabama, a call of the House was ordered.

At the conclusion of the roll call the Speaker announced that 202 Members had answered to their names, a quorum, and a motion by Mr. Underwood to dispense with further proceedings under the call was agreed to.

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[1] Second session, Sixty-third Congress, Record, p. 3471.

[2] Champ Clark, of Missouri, Speaker.

[3] Second session Sixty-fifth Congress, Record, p. 1172.

[4] Second session Sixty-second Congress, Record, p. 11218.

Presently the Speaker [1] announced:

The tally clerk informs the Chair that he made a mistake in that count, and that instead of there being 202 Members present there are only 192.

Mr. Underwood asked unanimous consent to vacate the motion by which further proceedings under the call were dispensed with.

There was no objection, and the Speaker ordered that the doors be again closed and directed the Clerk to continue the call.

714. Suspension of the established order of business is by unanimous consent only, and a motion to that effect will not be entertained.

On October 2, 1917,[2] Mr. J. Thomas Heflin, of Alabama, submitted a request for unanimous consent to address the House for two hours immediately after the approval of the Journal on the succeeding day to discuss the conduct of Members he considered questionable.

Mr. John N. Garner, of Texas, objected.

Thereupon Mr. Heflin moved that he be permitted to address the House as indicated.

Mr. Garner made the point of order that the motion was not admissible.

The Speaker [1] sustained the point of order.

715. A gentlemen's agreement that there should be "no business whatever" at formal sessions of the House during a designated period was construed to exclude business of the highest privilege as well as business of a purely formal character, including the swearing in of Members and the extension of remarks in the Record.

Form of a standing order under which the House met on two days only of each week until a specified date unless sooner convened by the Speaker.

On June 19, 1929,[3] the House agreed to the following resolution:

Resolved, That after September 23, 1929, the House shall meet only on Mondays and Thursdays of each week until October 14, 1929: *Provided,* That if in the discretion of the Speaker legislative expediency shall warrant it, he may designate a date prior to October 14, 1929, on which the business of the House shall be resumed, in which case he shall cause the Clerk of the House to issue notice to Members of the House not later than one week prior to the date set by him.

Pending passage of the resolution an agreement was reached on the floor which was voiced by Mr. John Q. Tilson, of Connecticut, the majority leader, as follows:

It is agreed that there shall be nothing transacted except to convene and adjourn; no business whatever.

It is not expected that there will be a quorum present at any time.

On September 23,[4] while this agreement was still in force, Mr. Lindley H. Hadley, of Washington, rising to a parliamentary inquiry, asked:

Mr. Speaker, would it be a breach of the terms of the agreement to swear in Members whose credentials are found to be in due form and unquestioned?

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[1] Champ Clark, of Missouri, Speaker.

[2] First session, Sixty-fifth Congress, Journal, p. 427; Record, p. 7646.

[3] First session, Seventy-first Congress, Record, p. 3228.

[4] Record, p. 3883.

The Speaker pro tempore [1] replied:

The present occupant of the chair would prefer not to have that done at this time.

Again on September 30,[2] Mr. John J. McSwain, of South Carolina, preferred a request for unanimous consent to extend his remarks in the Record by printing therein the names of the soldiers from South Carolina who lie buried in the fields of France.

Mr. John N. Garner, of Texas, said:

Mr. Speaker, I hope the gentleman will not press his request. My impression is that if gentlemen will read the Record they will find it was understood when we adjourned that until the 14th of October there was to be absolutely nothing done in the House of Representatives, not even the granting of permission to extend remarks. I think gentlemen will find that in the Record, and I am just putting this in the Record for future consideration. My impression is that the exact statement was made that nothing would be done in the House of Representatives except a motion to adjourn. That meant that there would be no extensions of remarks and no swearing in of Members. We have a Member here now who is ready to be sworn in, and there is no reason why he should not be sworn in; but we have not asked that that be done because we want to keep the exact letter as well as the spirit of that understanding.

The Speaker pro tempore [3] approved:

The Chair will state that the gentleman from Texas has stated exactly the position of the present occupant of the chair, and the present occupant of the chair will so hold.

716. The motion to resolve into the Committee of the Whole is not debatable.

The motion to go into the Committee of the Whole to consider general appropriation bills is in order on a Monday set apart for the consideration of bills reported by the Committee on the District of Columbia.

On Monday, May 23, 1910,[4] a day designated for the consideration of business reported by the Committee on the District of Columbia, Mr. James A. Tawney, of Minnesota, from the Committee on Appropriations, by direction of that committee, moved that the House resolve itself into the Committee of the Whole House on the state of the Union for the consideration of the sundry civil appropriation bill.

Mr. Samuel W. Smith, of Michigan, made the point of order that the motion was not in order on a day set apart for the consideration of business relating to the District of Columbia.

The Speaker [5] said:

The Chair overrules the point of order. The Chair calls the attention of the gentleman from Michigan to the Manual, at page 393, where this motion is expressly authorized by the rules on any day except calendar Wednesday.

"At any time after the reading of the Journal it shall be in order, by direction of the appropriate committees, to move that the House resolve itself into the Committee of the Whole House

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[1] Robert G. Simmons, of Nebraska, Speaker pro tempore.

[2] Record, p. 4088.

[3] Earl C. Michener, of Michigan, Speaker pro tempore.

[4] Second session, Sixty-first Congress, Record, p. 6742.

[5] Joseph G. Cannon, of Illinois, Speaker.

on the state of the Union for the purpose of considering bills raising revenue, or general appropriation bills."

The rule is express, and the decisions under it are uniform.

Mr. Smith asked to be heard on the motion, and Mr. Tawney having made a point of order that the motion was not debatable, the Speaker ruled:

The motion is not debatable. The question is on the motion of the gentleman from Minnesota that the House resolve itself into the Committee of the Whole House on the state of the Union for the further consideration of the sundry civil appropriation bill. The question was taken; and on a division (demanded by Mr. Smith, of Michigan) there were—ayes 101, noes 16.

717. The motion to go into Committee of the Whole to consider general appropriation bills has precedence on Monday of a motion to go into Committee of the Whole to consider a bill reported by the Committee on the District of Columbia.

On June 12, 1916,[1] a District of Columbia day, Mr. Ben Johnson, of Kentucky, from the Committee on the District of Columbia, moved that the House resolve itself into the Committee of the Whole House on the state of the Union to consider the joint resolution (H. J. Res. 91) authorizing an inquiry into the cost of living in the District of Columbia.

Mr. Swagar Sherley, of Kentucky, from the Committee on Appropriations, moved that the House resolve itself into the Committee of the Whole House on the state of the Union for the consideration of the fortifications appropriation bill.

The Speaker[2] recognized Mr. Sherley and submitted his motion as preferential.

718. The motion to go into the Committee of the Whole to consider revenue bills has precedence on Monday of a motion to go into the Committee of the Whole to consider a bill reported by the Committee on the District of Columbia.

On Monday, February 13, 1911[3] a day devoted to business reported by the District of Columbia Committee, Mr. Samuel W. McCall, of Massachusetts, from the Committee on Ways and Means, moved that the House resolve itself into the Committee of the Whole House on the state of the Union for the consideration of the bill (H. R. 32216) to promote reciprocal trade relations with Canada.

Mr. J. Van Vechten Olcott, of New York, from the Committee on the District of Columbia, made the point of order that it was Monday, a day set apart for the consideration of business relating to the District of Columbia, and he was entitled to recognition to move to resolve into the Committee of the Whole for the consideration of bills reported by that committee.

The Speaker[4] ruled:

This is the day under the rules for the consideration of District business, but the gentleman from Massachusetts makes a motion that the House do resolve itself into Committee of the Whole House on the state of the Union for the consideration of a revenue bill. This is a matter of privilege, and the motion of the gentleman from New York for the preservation of the day set apart

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[1] First session, Sixty-fourth Congress, Record, p. 9451.

[2] Champ Clark, of Missouri, Speaker.

[3] Third session, Sixty-first Congress, Record, p. 2429.

[4] Joseph G. Cannon, of Illinois, Speaker.

for the transaction of District business is also a matter of privilege. A majority can determine which business the House will proceed to by voting down the motion of the gentleman from Massachusetts, if a majority sees proper so to do, in which event the Chair would recognize the gentleman from New York. According to the parliamentary theory, at least, a general appropriation bill or a revenue bill, one proposing to raise money in theory and the other to spend money in theory, takes precedence, under the uniform practice of the House, of District day. Under the uniform practice a revenue bill has taken precedence in priority of recognition, and the Chair follows at least the theory, if not the substance, of the parliamentary rule.

719. The motion to go into Committee of the Whole to consider general appropriation bills has precedence on Friday of a motion to go into Committee of the Whole to consider the Private Calendar.

On Friday, April 5, 1912,[1] Mr. John H. Stephens, of Texas, offered a motion that the House resolve itself into the Committee of the Whole House on the state of the Union for the consideration of the Indian appropriation bill.

Mr. Edward Pou, of North Carolina, thereupon moved that the House resolve itself into the Committee of the Whole House to consider bills on the Private Calendar:

The Speaker[2] said:

The motion of the gentleman from Texas [Mr. Stephens] is a preferential motion. If the House desires to go into the consideration of the Indian appropriation bill, it will vote for the motion of the gentleman from Texas. If it prefers to consider private claim, it will vote down the motion of the gentleman from Texas.

720. On March 6, 1914,[3] this being Friday, immediately after the approval of the Journal, Mr. Edward W. Pou, of North Carolina, and Mr. Asbury F. Lever, of South Carolina, rose and addressed the Chair simultaneously.

Mr. Pou moved that the House resolve itself into the Committee of the Whole House to consider bills on the Private Calendar, and Mr. Lever submitted a motion to resolve into the Committee of the Whole House on the state of the Union for the further consideration of the agricultural appropriation bill.

The Speaker[2] ruled:

There is not a more vigilant Member of the House than the gentleman from North Carolina. He attends to his business, and he is always on hand when the time is propitious, and sometimes when it is not propitious, to get up his bills. But this is the parliamentary situation: In the first place, some of these rules need recasting to make them harmonious with each other. For instance, one rule provides that a report from the Committee on Rules is always in order, while the rule which the gentleman from Illinois [Mr. Mann] quoted, section 9 of Rule XVI, provides that at any time after the reading of the Journal it shall be in order, by direction of the appropriate committees, to move that the House resolve itself into the Committee of the Whole House on the state of the Union for the purpose of considering bills raising revenue or general appropriation bills. At first blush it would seem that those rules were in direct conflict with each other, and in one sense they are.

Suppose the Chairman of the Committee on Rules were here demanding recognition to bring in a rule, and the gentleman from South Carolina were insisting on going into the Committee of the Whole House on the state of the Union to discuss the agricultural appropriation bill, what would happen? All of these rules must be considered together, to make, if possible, a consistent

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[1] Second session, Sixty-second Congress, Record, p. 4338.

[2] Champ Clark, of Missouri, Speaker.

[3] Second session, Sixty-third Congress, Record, p. 4430.

whole, and they must be considered in the light of common sense. In addition to that the Speaker is under moral obligation to construe them so as to expedite the business of the House. Three are fourteen general appropriation bills. The Government can not exist unless the Committees on Appropriations in Congress, under its leaders, perform their functions, and it is the business of the Speaker to expedite the passage of these bills where he can under the rules so that we may be able to get away from here before the frost comes.

Originally private claims did not have any more standing than any other bills, but had to come up under the usual procedure. Finally, the House determined to set aside certain Fridays in order that preference might be given to consideration of claims bills over the ordinary run of business; but that was not to give consideration of those matters preference over a motion of an Appropriation Committee that the House resolve itself into the Committee of the Whole House on the state of the Union for the purpose of considering an appropriation bill, which is of the highest importance.

It has been ruled on—and the Chair wants to settle this thing for all time to come if he can—by three different Speakers; that is, by two Speakers and one Speaker pro tempore—Speaker Reed, Speaker Henderson, and the Hon. John Dalzell, Speaker pṕro tempore. Now, here is Mr. Speaker Reed's ruling: [1]

"The motion to go into the Committee of the Whole to consider general appropriation bills has precedence on a Friday of a motion to go into the Committee of the Whole to consider the Private Calendar."

Now, that is the crux of the whole thing. Continuing, Speaker Reed said:

"If the House did not desire to consider appropriation bills, it could vote down the motion, and then the motion to go into the Committee of the Whole to consider the Private Calendar would be next in order."

The other two decisions are to the same effect.

The Chair recognizes the gentleman from South Carolina, to go into the Committee of the Whole House on the state of the Union to consider a general appropriation bill.

Now, the House has its remedy. It can do as it pleases.

721. The motion to go into the Committee of the Whole to consider general appropriation bills on Friday takes precedence of a motion to go into the Committee of the Whole to consider the Private Calendar only when authorized by the committee having jurisdiction.

On Friday, May 13, 1910,[2] Mr. George W. Prince, of Illinois, moved that the House resolve itself into the Committee of the Whole House for the consideration of bills on the Private Calendar.

Mr. Dorsey W. Shackleford, of Missouri, offered, as preferential under the rule, a motion to go into the Committee of the Whole House on the state of the Union to consider the sundry civil appropriation bill.

The Speaker pro tempore [3] ruled:

The Chair calls attention to section 9 of Rule XVI:

"At any time after the reading of the Journal it shall be in order, by direction of the appropriate committees, to move that the House resolve itself into the Committee of the Whole House on the state of the Union for the purpose of considering bills raising revenue, or general appropriation bills."

Under that rule it must be by the direction of the committee to give the motion higher privilege. Therefore the Chair thinks that the motion of the gentleman from Illinois must first

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[1] Vol. IV, sec. 3082, of this work.

[2] Second session Sixty-first Congress, Record, p. 6232.

[3] Charles E. Fuller, of Illinois, Speaker pro tempore.

be disposed of. The rule provides that it must be by direction of the Appropriations Committee. The question is on the motion of the gentleman from Illinois to go into Committee of the Whole House for the consideration of bills in order under the rule.

722. Motions to go into Committee of the Whole to consider the various general appropriation bills are of equal privilege, and will be put in the order in which recognition is secured.

The date on which bills are referred to the calendar is immaterial in determining their relative privilege.

On February 27, 1912,[1] Mr. William Sulzer, of New York, from the Committee on Foreign Affairs, and Mr. Lamb, of Virginia, from the Committee on Agriculture, rising at the same time, moved that the House resolve itself into the Committee of the Whole House on the state of the Union for the consideration of the diplomatic and consular appropriation bill and the agricultural appropriation bill, respectively.[2]

Mr. Lamb argued that the agricultural appropriation bill, having been reported and placed on the calendar prior to the bill reported by the Committee on Foreign Affairs, was entitled to preference in determining priority of consideration.

The Speaker[3] held:

These two motions are of equal dignity, and the gentleman from New York had the floor first and is recognized. Now, if the House wants to take up the agricultural bill first, it can do it by voting down the motion of the gentleman from New York. The Chair has no jurisdiction about it, except to recognize the gentleman who first rises. The question is on the motion of the gentleman from New York that the House resolve itself into the Committee of the Whole House on the state of the Union to consider the bill H. R. 19212, the diplomatic appropriation bill.

723. The motion to go into the Committee of the Whole to consider a general appropriation bill may not be amended by a nonprivileged proposition.[4]

The legislative day and not the calendar day governs in determining the order of business.

On Friday, February 19, 1909[5] (legislative day of Monday, February 15), Mr. Walter I. Smith, of Iowa, moved to resolve into the Committee of the Whole House on the state of the Union for the consideration of the fortifications appropriation bill.

Mr. Thetus W. Sims, of Tennessee, called attention to the fact that it was Friday, a day set apart under the rules for the consideration of bills reported by the Committee on War Claims, and offered an amendment providing that the House go into the Committee of the Whole for the consideration of bills on the Private Calendar.

Mr. James R. Mann, of Illinois, made the point of order that the amendment was not in order.

The Speaker[6] held that while it was the calendar day of Friday it was the legislative day of Monday, and as bills on the Private Calendar are not privileged on

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[1] Second session Sixty-second Congress, Record, p. 2522.

[2] Such conflicts are now obviated by the extension of jurisdiction of the Committee on Appropriations over all general appropriation bills.

[3] Champ Clark, of Missouri, Speaker.

[4] See Vol. IV, sec. 3077, of this work.

[5] Second session, Sixtieth Congress, Record, p. 2705.

[6] Joseph C. Cannon, of Illinois, Speaker.

Monday, and a privileged motion may not be amended by a nonprivileged proposition, the amendment was not in order.

724. The motion to resolve into the Committee of the Whole to consider a privileged bill is not subject to amendment.[1]

On February 9, 1911,[2] Mr. Edgar D. Crumpacker, of Indiana, offered, as privileged, a motion that the House resolve itself into the Committee of the Whole House on the state of the Union to consider the bill (H. R. 30566) for the reapportionment of Representatives under the Thirteenth Decennial Census.

Mr. Charles F. Scott, of Kansas, as a parliamentary inquiry, asked if it would be in order to offer an amendment providing for the consideration of the agricultural appropriation bill in lieu of the bill specified.

The Speaker[3] said:

Those motions under the rule in the practice of the House have not been considered as amendable, since no time would be saved and no purpose would be effected.

725. The motion to resolve into Committee of the Whole is not subject to amendment.

On May 13, 1910,[4] Mr. George W. Prince, of Illinois, moved that the House resolve itself into the Committee of the Whole House for the consideration of bills on the Private Calendar.

Mr. Dorsey W. Shackleford, of Missouri, offered an amendment

The Speaker pro tempore[5] said:

The Chair understands that the motion to go into the Committee of the Whole House is not subject to amendment.

726. The motion to go into the Committee of the Whole may not be laid on the table or indefinitely postponed.

On February 19, 1921,[6] the Committee of the Whole House rose and the Chairman reported that the committee having had under consideration the bill (S. 2867) to place Major General Crowder on the retired list as a lieutenant general had come to no resolution thereon.

Mr. Frank L. Greene, of Vermont, moved that the House again resolve into the Committee of the Whole for the consideration of this bill and, pending that motion, moved that general debate be closed.

The motion to close debate having been agreed to, Mr. Louis C. Cramton, of Michigan, moved that the motion to resolve into the Committee of the Whole be laid on the table.

The Speaker[7] held the motion was not in order.

Mr. Alben W. Barkley, of Kentucky, moved that the question be indefinitely postponed.

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[1] See Vol. IV, see. 3078, of this work.

[2] Third session Sixty-first Congress, Record, p. 2205.

[3] Joseph G. Cannon, of Illinois, Speaker.

[4] Second session Sixty-first Congress, Record, p. 6231.

[5] Charles E. Fuller, of Illinois, Speaker pro tempore.

[6] Third session Sixty-sixth Congress, Record, 3436.

[7] Frederick H. Gillett, of Massachusetts, Speaker.

The Speaker said:

The motion of the gentleman from Kentucky is not in order. The Chair presumes the gentleman relies upon Rule XVI, clause 4. Reading:

"When a question is under debate no motion shall be received but to adjourn, to lay on the table, for the previous question."

Now, the motion to go into the committee is not a question of debate.

727. Bills received from the Senate go to the Speaker's table, from which they are referred to appropriate committees by the Speaker unless sooner called up for consideration under the rules.

While it is the practice to refer promptly bills messaged over from the Senate, it has been held that the rule requiring reference is merely directory and not mandatory and that the length of time such bills may remain on the Speaker's table before being referred is within the Speaker's discretion.

An exceptional instance wherein a bill messaged from the Senate was retained on the Speaker's table for a period of 10 months.

A bill messaged from the Senate to the House having been retained on the Speaker's table indefinitely without reference to a committee of the House, the Senate declined to act on a resolution proposing investigation of the delay.

A Senate bill received in the House after a House bill substantially the same has been reported and placed on the House Calendar is privileged and may be called up from the Speaker's table for consideration by the committee having jurisdiction of the House bill.

In order to acquire privilege under the rule a Senate bill must have been messaged to the House after the House bill of similar tenor has been reported and it is not sufficient that the Senate bill was referred from the Speaker's table after the House bill was reported.

On April 17, 1930,[1] the Speaker,[2] addressing the House by consent, said:

The Chair desires to make an announcement touching the reference of a joint resolution. The Chair has retained on the Speaker's table for some time Senate Joint Resolution No. 3, providing for an amendment to the Constitution. The Chair did this in the hope and expectation that a rule now pending, and pending for some time, in the Committee on Rules, providing that all joint resolutions with reference to amendments to the Constitution should be referred to the Committee on the Judiciary, would be reported by that committee. However, in view of the fact that the Chair is convinced that that rule will not be adopted at this session of Congress, and in view of the further fact that an almost precisely similar joint resolution has been reported by the Committee on the Election of President, Vice President, and Representatives in Congress and is now on the calendar, the Chair thinks it proper to now refer Senate Joint Resolution No. 3 to the Committee on the Election of President, Vice President, and Representatives in Congress.

Mr. John N. Garner, of Texas, inquired if it would have been in order at any time since the filing of the report on the similar joint resolution (H. J. Res. 292) referred to by the Speaker to call up the Senate joint resolution of similar tenor.

[1] Second session Seventy-first Congress, Record, p. 7236.

[2] Nicholas Longworth, of Ohio, Speaker.

The Speaker replied:

The Chair thinks that at any time after House Joint Resolution 292 had been reported and placed on the Calendar it would have been in order, provided such report antedated the messaging over of the Senate joint resolution. The rule on the subject—clause 2, Rule XXIV—is that where a Senate bill or resolution is messaged over to the House after a similar House bill or resolution has been reported from a committee and is on the House Calendar, then the Senate bill may be called up as privileged by the committee having jurisdiction of the House bill.

The Chair stated the general rule, as applied to these cases, but in this case the Senate resolution was messaged over before the House resolution was reported. The privilege therefore would not apply in this particular case, but if it would apply in this particular case, the only complaint the Chair has heard from any source is that it has been retained on the Speaker's table.

In order to give the matter privilege it would have been necessary that the House bill should have been on the calendar before the Senate bill was messaged over.

Mr. Garner further inquired:

Mr. Speaker, in order that the record may be clear, may I ask the Speaker a question? Is it not customary when bills are sent from the other House to this body for the Speaker to refer them to the respective committees unless some Member of the House asks him to hold them on his desk with a view to taking some action upon them? If it were necessary in each instance for some Member of the House to request the Speaker to send a bill to the respective committees, then every Member would have to take note of every bill sent over here and make a special request of the Speaker of the House of Representatives. The custom in this House, since I have been a Member of it, has been that when a bill is passed by the Senate and sent to the House of Representatives, it is sent to the proper committee unless there is some special reason why it should be held on the Speaker's desk. The rule requires this.

Mr. Charles R. Crisp, of Georgia, added:

Mr. Speaker, may I be permitted to say that for a number of years anyone desiring to introduce bills had to introduce them from the floor of the House and they had to be referred to the proper committee. Some years ago in the interest of conserving time and doing away with the necessity of bills having to be introduced from the floor and referred to committee, this rule was adopted which provides that the Speaker may refer bills originally introduced and Senate bills to the proper committees. I know the word "may" instead of "shall" is used in the rule, but the courts in considering the context of such matters have frequently construed "may" to mean "shall," and I think when we take into consideration the whole history of this rule, as well as the object and the purpose of the rule, it is fair to say that it is the duty of the Speaker, unless extraordinary reason exists in a particular case, to refer the bills.

The Speaker held:

The Chair will call attention to the fact that the rule requiring reference by the Speaker to a committee is not mandatory. The word "may" is used. The Chair has the rule before him. It is as follows (clause 2, Rule XXIV):

"Business on the Speaker's table shall be disposed of as follows:

"Messages from the President shall be referred to the appropriate committees without debate. Reports and communications from heads of departments, and other communications addressed to the House, and bills, resolutions, and messages from the Senate may be referred to the appropriate committees in the same manner and with the same right of correction as public bills presented by Members; but House bills with Senate amendments which do not require consideration in a Committee of the Whole may be at once disposed of as the House may determine, as may also Senate bills substantially the same as House bills already favorably reported by a committee of the House, and not required to be considered in Committee of the Whole, be disposed of in the same manner on motion directed to be made by such committee."

The Chair thinks it is in the discretion of the Chair, under the rule. The Chair will say it is very rare, indeed, that the Speaker does not make immediate reference, but there may be very good and valid reasons why a bill should lie on the Speaker's table for some time. This may very frequently speed the passage of legislation or it may be for such a reason as alleged by the Chair in this instance. This interpretation by the Chair is in complete accord with the decision laid down by Speaker Henderson in Volume IV, section 3111, of Hinds' Precedents.

On April 21,[1] on request of Mr. George W. Norris, of Nebraska, the Vice President laid before the Senate the following resolution (S. Res. 245):

Whereas on the 7th day of June, 1929, the Senate passed Senate Joint Resolution 3, a joint resolution proposing an amendment to the Constitution of the United States fixing the commencement of the terms of President, Vice President, and Members of Congress and fixing the time of the assembling of Congress; and

Whereas on the 8th day of June, 1929, by an official message from the Senate, the House of Representatives was duly notified thereof and said resolution so passed was properly certified and delivered to the House of Representatives by the duly authorized agent of the Senate; and

Whereas the Speaker of the House of Representatives has retained possession of said joint resolution, has not referred the same to any committee of the House of Representatives, and no action whatever has been taken thereon by the House of Representatives or by the Speaker, and the said resolution is still upon the Speaker's desk of the House of Representatives; and

Whereas the retention of said joint resolution by the Speaker for 10 months without referring the same to a committee of the House of Representatives and without taking any other action thereon is a discourtesy to the Senate and establishes a precedent which, if carried to its logical conclusion, will bring misunderstanding between the coordinate branches of the Congress and will result not only in a failure to act upon important matters of national legislation but will destroy the harmony, confidence, and respect which should exist between the two coordinate branches of our National Legislature: Therefore be it

Resolved, That the Vice President is hereby directed to appoint a committee of five Senators to look into the matter above referred to and to report to the Senate what action, if any, should be taken in the premises.

The resolution was not acted on by the Senate.

728. House bills with Senate amendments which do not require consideration in a Committee of the Whole are privileged and may be called up from the Speaker's table for immediate consideration.

On May 10, 1917,[2] Mr. Carter Glass, of Virginia, submitted a unanimous consent request to take from the Speaker's table the bill (H. R. 3673) amending the Federal reserve act, and that the House disagree to the Senate amendment thereto and agree to the conference asked by the Senate.

Mr. Willard J. Ragsdale, of South Carolina, objected.

Mr. James R. Mann, of Illinois, made the point of order that the Senate amendment did not require consideration in the Committee of the Whole, and unanimous consent was not necessary.

The Speaker[3] sustained the point of order and recognized Mr. Glass to move to disagree to the Senate amendment and agree to conference.

729. On February 28, 1919,[4] Mr. Joseph W. Byrns, of Tennessee, called up the fortifications appropriation bill from the Speaker's table and moved to agree to Senate amendments thereto.

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[1] Record, p. 7310.

[2] First session Sixty-fifth Congress, Record, p. 2074.

[3] Champ Clark, of Missouri, Speaker.

[4] Third session Sixty-fifth Congress, Record, p. 4642.

Mr. William H. Stafford, of Wisconsin, made the point of order that unanimous consent was required.

The Speaker[1] held that as the amendments did not require consideration in the Committee of the Whole, the bill was privileged under the rule for immediate consideration, and put the question on agreeing to the amendments.

730. A House bill with Senate amendments requiring consideration in the Committee of the Whole, in the absence of disposition by the House on its receipt from the Senate, was referred by the Speaker under clause 2 of Rule XXIV to the appropriate committee.

On December 15, 1926,[2] Mr. Meyer Jacobstein, of New York, rising to a parliamentary inquiry, asked what disposition had been made of the bill (H. R. 6238) to amend the immigration act of 1924, recently returned by the Senate with amendments.

The Speaker[3] replied:

On the request of the chairman and ranking minority member of the Committee on Immigration, the House not having taken any action or suggested any action, the Chair referred the bill to the Committee on Immigration.

731. A House bill returned with Senate amendment requiring consideration in the Committee of the Whole may not be called up for consideration but is referred directly from the Speaker's table to the standing committee having jurisdiction.

On June 3, 1913,[4] Charles C. Carlin, of Virginia, moved to take from the Speaker's table the bill (H. R. 32) creating an additional judge, and consider Senate amendments thereto in the House as in Committee of the Whole.

Mr. Thomas W. Hardwick, of Georgia, made the point of order that the Senate amendments required consideration in Committee of the Whole, and the bill should be referred to the Committee on the Judiciary.

The Speaker pro tempore[5] ruled that the amendment involved a charge upon the Treasury and required consideration in the Committee of the Whole, and, under the rule, the bill should be referred directly to the standing committee having jurisdiction.

732. While the rule requires the reference to the appropriate standing committee of House bills returned with Senate amendments requiring consideration in the Committee of the Whole, the usual practice is to take such bills from the Speaker's table and send them to conference by unanimous consent.

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[1] Champ Clark, of Missouri, Speaker.

[2] Second session Sixty-ninth Congress, Record, p. 549.

[3] Nicholas Longworth, of Ohio, Speaker.

[4] First session Sixty-third Congress, Record, p. 1878.

[5] James Hay, of Virginia, Speaker pro tempore.

Upon objection to a request for unanimous consent to take from the Speaker's table for consideration a bill with Senate amendments, the Speaker refers the bill to the standing committee having jurisdiction.

On December 20, 1913,[1] Mr. Carter Glass, of Virginia, asked unanimous consent that the currency bill be taken from the Speaker's table and that the House disagree to the amendment of the Senate and agree to the conference asked by the Senate.

Mr. Martin B. Madden, of Illinois, submitted a parliamentary inquiry as to the effect an objection to the request would have on the disposition of the bill.

The Speaker[2] replied that, under the rule, the regular order was to refer the bill to the appropriate committee, and in event unanimous consent was not given to take it from the Speaker's table for present consideration, it would be referred to the Committee on Banking and Currency.

Mr. James R. Mann, of Illinois, suggested that unless the Senate amendment required consideration in Committee of the Whole, the bill was privileged for immediate consideration.

The Speaker held it would require a Senate amendment involving a charge upon the people to require the reference of the bill under the rule.

733. A motion to suspend the rules and take from the Speaker's tale for consideration a House bill with Senate amendments being rejected, the bill is referred directly from the Speaker's table to the standing committee having jurisdiction.

On February 27, 1915,[3] Mr. Asbury F. Lever, of South Carolina, offered the following motion:

> Mr. Lever moves to suspend the rules and take from the Speaker's table H. R. 20415, an act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1916, disagree to all Senate amendments thereto, and ask a free conference.

A second being demanded, the House divided, and a second was refused.

Mr. Lever inquired what disposition would now be made of the bill.

The Speaker[4] replied that the bill would be referred, under the rule, to the Committee on Agriculture.

734. The three conditions needed in order that a Senate bill on the Speaker's table may be taken up for direct action by the House.

Interpretation of the words "substantially the same" as used in the rule providing for calling a Senate bill from the Speaker's table for immediate consideration.

In determining the degree of similarity of a Senate bill on the Speaker's table to a House bill already reported, the Chair considers the House bill as reported by the committee and not as originally introduced.

The fact that a House bill substantially the same as a Senate bill on the Speaker's table has passed the House and gone to the Senate does not detract from the privilege of the Senate bill under the rule.

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[1] Second session Sixty-third Congress, Record, p. 1295.

[2] Champ Clark, of Missouri, Speaker.

[3] Third session Sixty-third Congress, Record, p. 4868.

On February 11, 1913,[1] Mr. Henry D. Clayton, of Alabama, by direction of the Committee on the Judiciary, moved to take from the Speaker's table for present consideration the bill (S. 4043) divesting intoxicating liquors of interstate character, a House bill, (H. R. 17593) of similar tenor having been favorably reported by a committee of the House.

Mr. John J. Fitzgerald, of New York, made the point of order that the motion was not privileged, as the bills were not substantially the same, and demanded the regular order.

Mr. James R. Mann, of Illinois, supported Mr. Fitzgerald's contention and quoted a paragraph in the bill as originally introduced which had been stricken out before reported by the committee and which was not included in the Senate bill.

Mr. William A. Cullop, of Indiana, also supported the point of order, and argued that to come within the provisions of the rule the House bill of similar tenor must be pending in the House at the time, and as the House bill in question had been passed and messaged to the Senate, the Speaker had lost jurisdiction over it and could not take official notice of its provisions.

The Speaker[2] ruled:

This question divides itself into two parts. First, whether the status of this bill brings it within the rule. The rule, which has been read three or four times, provides:

"But House bills with Senate amendments which do not require consideration in a Committee of the Whole may be at once disposed of as the House may determine"—

Of course that is not this case—

"as may also Senate bills substantially the same as House bills already favorably reported by a committee of the House, and not required to be considered in the Committee of the Whole, be disposed of in the same manner on motion directed to be made by such committee."

The second division of this question is whether or not these two bills are substantially the same. The rules of the House are intended to expedite the transaction of business instead of being intended for the purpose of retarding the transaction of business. These two bills are not only substantially the same but they are almost identical.

The gentleman from Illinois, Mr. Mann, for whose mental acumen, industry, and intelligence the Chair has a great deal of respect, contends to-day that the Senate bill must be substantially identical with the bill as originally introduced.

The Chair will ask the gentleman from Illinois if this Senate bill is not verbatim, with the small difference in the title which the Chair pointed out, the very bill that was debated here on last Saturday for three mortal hours and no debate hinged on those amendments. Neither the gentleman from Illinois [Mr. Mann] nor the Chair has to quit exercising the faculty of memory to consider one of these points of order.

On the second division on this question let us see if this bill is in a status justified by this rule:

"As may also Senate bills substantially the same as House bills already reported by the committee of the House"—

Was that bill favorably reported by a committee of the House or not? Of course, everybody knows that it was—

"would not be required to be considered in the Committee of the Whole."

Of course, that does not apply.

Now, there are three things there. One is that the bills must be substantially alike. There must not be anything in them to refer to the Committee of the Whole; and there is not. It must

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[1] Third session Sixty-second Congress, Record, p. 3013.

[2] Champ Clark. of Missouri, Speaker.

be called up by the authority of the committee; and it is. Hence all the conditions precedent are complied with.

The contention of the gentleman from Indiana that the Chair has no way of finding out what was in the bill last Saturday is untenable. In the first place, the Chair can remember what was in the House bill. We have the Congressional Record to see what that bill was. In addition to that, if the Chair had any cause to believe that the Congressional Record had been tampered with, he could send out and get the original bill. That is still within the jurisdiction of the House and the Speaker.

The rule may now not be what the rule ought to be. If a majority of Members believe that the rule ought to read, "Bills already reported by a committee of the House and on the calendar," then I submit the Committee on Rules ought to put that amendment in when the rules are revised. It is the duty of the Chair to construe the rules as he finds them.

So the points of order are overruled. The gentleman from Alabama, Mr. Clayton, is recognized.

735. On February 15, 1928,[1] Mr. Edward E. Denison, of Illinois, under authorization from the Committee on Interstate and Foreign Commerce, proposed to call up from the Speaker's table the bill (S. 2348) granting consent of Congress to the construction and operation of bridges across certain rivers, a similar House bill having been reported favorably. In giving notice of his intention, Mr. Denison inquired if the privilege of the Senate bill would be affected by the fact that the House bill had not only been reported but had also passed the House.

The Speaker[2] held that the passage of the House bill did not affect the privilege of such Senate bills, and said:

The Chair has read the debate on that question, not being present yesterday. The Chair remembers that a short time ago the present occupant of the chair was about to make a ruling on the subject sustaining the right to call up a bill under these circumstances. However, at that time the gentleman calling up the bill changed his request to one of unanimous consent, so it was not necessary for the Chair to pass directly upon the question. The Chair, however, has before him a precisely similar situation which developed in the third session of the Sixty-second Congress, where a question arose as to whether a Senate bill could be called up as a matter of right when a similar House bill had been passed. Speaker Clark, in ruling on that question, decided, in substance, that the situation, in so far as the House bill was concerned, was the same whether it had been merely reported or had actually passed. Speaker Clark held that the same rule applied, and the present occupant of the chair, having been of that opinion hitherto and being reinforced by this ruling of Speaker Clark, has no hesitation in ruling that such a bill may be called up as a matter of right.

Following the passage of the Senate bill by the House the Speaker added:

The Chair thinks it would be proper, under the circumstances, to request the Senate to return the House bill. That was done in this previous case.

736. In determining whether a House bill is substantially the same as a Senate bill, on the Speaker's table, amendments recommended by the committee of the House are considered.

In order for a Senate bill to be brought up directly from the Speaker's table, the House bill to which it is similar must be on the House Calendar.

A bill providing pay for retired officers involves a charge upon the Treasury and is properly referred to the Union Calendar.

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[1] First session Seventieth Congress, Journal, p. 1014; Record, p. 3072.

[2] Nicholas Longworth, of Ohio, Speaker.

On August 9, 1912,[1] Mr. A. W. Gregg, of Texas, proposed to call up from the Speaker's table the bill (S. 6453), relating to the efficiency of personnel of the Navy, a similar bill (H. R. 24225) having been favorably reported by a committee of the House.

Mr. James R. Mann, of Illinois, made the point of order that the Senate bill was not privileged, first, because not substantially the same as the bill reported by the House committee, and second, because it had been improperly referred to the House Calendar and should be on the Union Calendar.

Mr. Mann said:

Mr. Speaker, this bill coming from the Senate is similar to a bill which was introduced in the House and which was reported to the House with a number of amendments. But this bill does not contain the amendments recommended by the Naval Committee on the House bill. I contend that, under the rule, if a bill is introduced in the House and the committee recommends a lot of amendments which change to a large extent the bill, and that then the Senate passes a bill like the original bill, without the amendment, it is not a bill similar to the bill on the House Calendar.

As to the question of reference, Mr. Mann further said:

I thought, possibly, that the gentleman might ask that it be put upon the proper calendar. It says this—

"That any officer retired under the provisions of this section shall be retired with the rank and three-fourths the pay of the grade from which he was retired."

It certainly involves a charge upon the Treasury.

The Speaker[2] sustained both points of order, and said:

The Chair thinks that the point of order is well taken, that that amendment is the essential part of the bill. The rule has two conditions. In the first place, the bill must be substantially the same; and, in the second place, it must be a bill that does not necessarily go to the Committee of the Whole House on the state of the Union.

737. In ascertaining whether a Senate bill proposed to be taken from the Speaker's table was sufficiently similar to a House bill already on the calendar, a bill limiting certain banks to loans of $15,000 was deemed not substantially the same as a bill limiting such banks to loans of $25,000.

On February 27, 1929,[3] Mr. Louis T. McFadden, of Pennsylvania, by direction of the Committee on Banking and Currency, proposed to take from the Speaker's table the bill (S. 5302) to amend the Federal farm loan act by increasing the loan limit of Federal farm loans in Alaska and Porto Rico from $10,000 to $25,000, a similar House bill providing for the increase of such loans from $10,000 to $15,000 having been favorably reported.

Mr. Eugene Black, of Texas, made the point of order that the Senate bill was not eligible to be called up under the rule, for the reason that it was substantially different from the House bill.

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[1] Second session Sixty-second Congress, Record, p. 10605.

[2] Champ Clark, of Missouri, Speaker.

[3] Second session Seventieth Congress, Journal, p. 404; Record, p. 4635.

After debate the Speaker [1] held:

The question is whether those bills are substantially the same. It occurs to the Chair, although he is not familiar with the circumstances, that the limit of the loan is quite fundamental, and as there is the difference between $25,000 as the limit in one bill and $15,000 in another, the Chair feels that the bills are not substantially the same. The Chair sustains the point of order.

738. A Senate bill in order to be brought up directly from the Speaker's table must have come to the House after and not before a House bill substantially the same has been placed on the House Calendar.

A bill is on the calendar as soon as referred, although it may not yet appear on the printed form.

Procedure in the consideration of Senate bills called up from the Speaker's table under the rule.

On July 22, 1919,[2] Mr. George S. Graham, of Pennsylvania, asked the Speaker to lay before the House the bill (S. 180) for Near East relief, a bill of similar tenor being on the House Calendar.

Mr. Louis C. Cramton, of Michigan, made the point of order that the House bill upon which it was relied to give the Senate bill privilege had not been placed on the calendar before the Senate bill was received in the House, and the motion was therefore out of order.

Mr. Cramton submitted the printed calendar showing that the House bill was referred on July 15, and called attention to the fact that the Senate bill was received on the same day.

The Speaker,[3] after inquiry, said that he was informed that the House bill was actually referred to the calendar before the Senate bill came over, and hold that the bill was on the calendar as soon as referred although not yet appearing on the printed calendar, and overruled the point of order.

In response to an inquiry from Mr. Cramton as to procedure in the consideration of the bill, the Speaker said:

Section 2 of Rule XXIV gives the bill that privilege. It will be considered under the regular rules of the House. The gentleman from Pennsylvania, Mr. Graham, having charge of the bill, will have an hour, and unless he moves the previous question within the hour the bill would be before the House as any other bill.

739. In order to render them privileged, action in calling up Senate bills from the Speaker's table for direct action by the House must be authorized by the standing committee having jurisdiction.

On August 17, 1912 [4] Mr. J. Thomas Heflin, of Alabama, asked that the bill (S. 7343) authorizing a dam across the Coosa River be taken from the Speaker's table, a bill of similar tenor being on the House Calendar.

Mr. Martin D. Foster, of Illinois, made the point of order that the motion was not privileged for the reason that Mr. Heflin was not authorized by the committee to call up the bill.

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[1] Nicholas Longworth, of Ohio, Speaker.

[2] First session, Sixty-sixth Congress, Record, p. 3007.

[3] Frederick H. Gillett, of Massachusetts, Speaker.

[4] Second session Sixty-second Congress, Record, p. 11218.

The Speaker[1] sustained the point of order and held that while written authority from the committee was not necessary to empower a Member to call up such bills the minutes of the committee should show that authority was given.

740. The House having adjourned after yeas and nays were ordered and before the vote was taken, the pending question remain as unfinished business when the same class of business is again in order.

An order for the yeas and nays coming over as unfinished business from a previous day may be vacated by unanimous consent.

On February 21, 1919,[2] after the approval of the Journal, the Speaker announced that when adjournment was taken the previous day the yeas and nays had been ordered on the passage of the deficiency appropriation bill, and the order was pending as the unfinished business.

Mr. James R. Mann, of Illinois, asked if the order for yeas and nays could be vacated.

The Speaker[1] held that it could be vacated by unanimous consent.

Mr. Swagar Sherley, of Kentucky, objected, and the Speaker put the question on the passage of the bill and directed the Clerk to call the roll.

741. A bill called up out of order by unanimous consent and undisposed of at adjournment remain as unfinished business to be resumed when that class of business is again in order.[3]

On December 22, 1916,[4] on motion of Mr. Henry D. Flood, of Virginia, by unanimous consent, the joint resolution (S. J. Res. 186), authorizing diversion of the waters of Niagara River, was taken from the Speaker's table and considered.

After extended debate, Mr. Flood asked unanimous consent to withdraw the resolution from consideration.

In response to a parliamentary inquiry by Mr. James R. Mann, of Illinois, the Speaker[1] held that unanimous consent having been given for its consideration, the bill was now before the House in regular order and if undisposed of at adjournment was the unfinished business whenever the class of business to which it belonged was again in order under the rules, until displaced by some parliamentary action; that if withdrawn before adjournment it resumed its former status and could not again be called up except by unanimous consent.

Thereupon Mr. Mann objected to the withdrawal of the bill, and consideration was resumed and continued until, on motion of Mr. Flood, postponed to January 4, 1917.

742. Bills reported from committees are distributed to three calendars, there to await action by the House.

Form and history of section 1 of Rule XIII.

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[1] Champ Clark, of Missouri, Speaker.

[2] Third session Sixty-fifth Congress, Record, p. 3937.

[3] Second session Sixty-fourth Congress, Record, p. 703.

[4] See section 7946 of this work.

In the revision of 1911[1] a slight amendment was made in the first paragraph of section 1 of Rule XIII.[2] This amendment was confined to a change in phraseology and made no material alteration in the purport of the section. The sentence which originally provided, "There shall be three calendars of business reported from committees, viz;" was amended to read "There shall be three calendars to which all business reported from committees shall be referred, viz." Otherwise the rule retains the form in which it was adopted in 1880.[3]

743. The calendars are printed daily.

Form and history of section 5 of Rule XIII

Section 5 of Rule XIII provides:

> Calendars shall be printed daily.

This section was adopted in the revision of 1911.[4] Prior to that time no provision for the printing of the calendars had been carried in the rules.

Formerly the calendars were printed biweekly, being issued on each Monday and Friday.

Beginning with the Sixty-second Congress, calendars were printed daily, with complete indexes, but since the Sixty-second Congress the index has been included on Monday only.

744. Bills on the wrong calendar may be transferred to the proper calendar, as of date of original reference, by direction of the Speaker.

On January 26, 1910,[5] following the reading and approval of the Journal, the Speaker[6] announced:

> The Chair will call the attention of the House to the fact that on the Private Calendar there appears Senate Joint Resolution No. 59, of date of January 25, providing for the filling of vacancies to occur in the Board of Regents of the Smithsonian Institution of the class other than Members of Congress. This is a public bill, and undoubtedly should be upon the House Calendar. The Chair therefore directs the transfer to the House Calendar.

745. On February 12, 1914,[7] Mr. Ben Johnson, of Kentucky, asked that the bill (S. 1294), relative to the employment of women in the District of Columbia, which he said was improperly upon the House Calendar, be transferred to the Union Calendar as of date when reported to the House.

The Speaker put the question:

> The gentleman from Kentucky moves that the bill S. 1294 be transferred from the House Calendar to the Union Calendar.

Mr. James R. Mann, of Illinois, made the point of order that a motion was not required, and the transfer could be made by the Speaker as a matter of right.

The Speaker[8] said:

> The Speaker will transfer it, then. Mr. Speaker Carlisle decided that all required in such a case was the request that the bill be transferred to its proper place.

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[1] First session Sixty-second Congress, Record, pp. 14, 80.

[2] Section 3115 of this work.

[3] Second session Forty-sixth Congress, Record, p. 205.

[4] First session Sixty-second Congress, Record, pp. 14, 58, 80.

[5] Second session Sixty-second Congress, Record, p. 1029.

[6] Joseph G. Cannon, of Illinois, Speaker.

[7] Second session Sixty-third Congress, Record, p. 3937.

[8] Champ Clark, of Missouri, Speaker.

Thereupon, on motion of Mr. Johnson, the House resolved into the Committee of the Whole House on the state of the Union for the consideration of the bill as rereferred.

746. A bill erroneously referred to the House Calendar was transferred to the Union Calendar as of date of original reference by direction of the Speaker.

A bill releasing a lien of the Government while increasing the security of the Government's claim requires consideration in Committee of the Whole and is properly referred to the Union Calendar.

On January 23, 1918,[1] which was Calendar Wednesday, when the Committee on Irrigation of Arid Lands was reached in the call of committees, Mr. Edward T. Taylor, of Colorado, called up the bill (H. R. 4954) on the House Calendar.

Mr. William H. Stafford, of Wisconsin, made the point of order that the bill provided for the waiver of a lien of $100,000,000 held by the Government on certain irrigated land, and should therefore be on the Union Calendar.

Mr. John E. Raker, of California, argued in opposition to the point of order, that while the bill proposed to release the particular lien referred to, it, by other provisions, increased the security of the Government's claim against the land, and was therefore properly on the House Calendar.

Mr. John N. Garner, of Texas, inquired:

I want to propound a parliamentary inquiry to the Speaker. If the Speaker should hold that this bill ought to be on the Union Calendar, can he order it placed on the Union Calendar as of to-day, and can the bill be called up immediately?

The Speaker[2] said:

The Chair decides that this particular bill ought to be on the Union Calendar; and he further decides that the House automatically resolves itself into the Committee of the Whole House on the state of the Union to consider the bill, with the gentleman from Indiana 'Mr. Cox' in the chair.

747. On June 23, 1919,[3] Mr. William R. Wood, of Indiana, called up the joint resolution (H. J. Res. 104), providing for the appointment of secretaries by Members of the House of Representatives, which had been referred to the House Calendar.

Mr. Eugene Black, of Texas, made the point of order that the resolution should be on the Union Calendar, as it involved an additional payment of $240 a year to clerks appointed by Members, and was to that extent an additional charge upon the Treasury.

The Speaker[4] ruled:

If that is true, then it should be on the Union Calendar, and unless there is some evidence contradictory to that the Chair will order it upon the Union Calendar. The joint resolution is on the Union Calendar.

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[1] Second session Sixty-fifth Congress, Record, p. 1174.

[2] Champ Clark, of Missouri, Speaker.

[3] First session Sixty-sixth Congress, Record, p. 1606.

[4] Frederick H. Gillett, of Massachusetts, Speaker.

Whereupon, on motion of Mr. Clifford Ireland, of Illinois, the House resolved itself into the Committee of the Whole House on the state of the Union for the consideration of the joint resolution.

748. The Speaker may correct the reference of a bill to the calendars at any time before consideration begins and while the question of consideration is pending.

On Calendar Wednesday the House resolves into the Committee of the Whole automatically for the consideration of bills called up by committees, and the question of consideration is properly raised in the committee and not in the House.

On October 1, 1919,[1] it being Calendar Wednesday, when the Committee on Interstate and Foreign Commerce was reached, Mr. John J. Esch, of Wisconsin, in calling up the bill (H. R. 7015) governing Panama Canal tolls, on the House Calendar, suggested that it affected the revenue, and should be on the Union Calendar.

Mr. Willis C. Hawley, of Oregon, raised the question of consideration.

The Speaker[2] said:

The Chair will transfer it from the House Calendar to the Union Calendar, and then automatically the House resolves itself into Committee of the Whole House on the state of the Union. The gentleman from Oregon can raise the question of consideration in committee.

Mr. Joseph Walsh, of Massachusetts, submitted that it was in order to raise the question of consideration at any time before consideration began, and a Member, claiming the floor for that purpose, should be recognized before the House resolved into the committee.

The Speaker said:

The Chair would say at first blush that the gentleman's right to recognition was not of such privilege as to prevent the Chair from correcting an error of reference. The Chair is disposed to think that the first duty of the Chair before recognizing anybody, if there was a reference to the wrong calendar, was to change the reference, and of course that does not destroy anybody's rights. The question of consideration can be raised in committee as it has been raised here by the gentleman from Oregon. Of course the committee had its right to give hearings or not as it pleased, and the fact that the committee did or did not give hearings does not seem to the Chair to affect the validity of the committee's report. The ruling has been—and it was a very carefully considered ruling by the last Speaker of the House when this question came up—that the question of consideration should be raised in the committee and not in the House; and although to raise the question of consideration in the committee is an anomaly, the Chair would not feel disposed to overrule that without a very thorough study and consideration of the question. The Chair rules that the House now automatically resolves itself into the Committee of the Whole House on the state of the Union for the consideration of this bill.

Accordingly the House resolved itself into the Committee of the Whole House on the state of the Union for the consideration of the bill, and Mr. Hawley, having raised the question of consideration, the committee determined to consider it, yeas 129, noes 15.

749. The right of the Speaker, to correct the erroneous reference of bills to the calendars does not apply to references made by the House.

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[1] First session Sixty-sixth Congress, Record, p. 6212.

[2] Frederick H. Gillett, of Massachusetts, Speaker.

On January 20, 1919,[1] during the call of the Calendar for Unanimous Consent, Mr. William H. Stafford, of Wisconsin, made the point of order that the bill (H. R. 11368) to issue a land patent to the National Lincoln-Douglas Sanatorium, was improperly on the Union Calendar and should be transferred to the Private Calendar.

Mr. James R. Mann, of Illinois, explained that the bill was originally referred to the Private Calendar but had been subsequently transferred to the Union Calendar by unanimous consent.

The Speaker[2] held that the reference to the calendar by order of the House removed the reference from the jurisdiction of the Speaker, and a further change in reference could be made only by order of the House.

750. Adverse reports do not go to the calendars except by direction of a committee or request of a Member.

Unless request for other disposition is made within three days a bill reported adversely is automatically tabled and may be taken from the table and recommitted or placed on the calendar by unanimous consent only.

On May 7, 1930,[3] Mr. James G. Strong, of Kansas, asked unanimous consent that the proceedings by which the bill (H. R. 8461) had been laid on the table be vacated and the bill be recommitted to the Committee on War Claims.

In response to an inquiry by Mr. Fiorello H. LaGuardia, of New York, as to the nature of the proceedings, the Speaker[4] explained:

A bill reported adversely under the rules shall lie on the table unless a request is made within three days that it be referred to the calendar. That request not having been made, the bill automatically went to the table. Is there objection to the request of the gentleman from Kansas?

751. On a call of committees under section 4 or section 7 of Rule XXIV, committees are called seriatim in the order in which they appear in Rule X and not alphabetically.

On August 9, 1911,[5] calendar Wednesday, while the Clerk was calling the committees under the rule, Mr. John H. Stephens, of Texas, inquired in what order the committees were being called.

The Speaker[6] replied that on a call of committees the committees were called in the order in which they appeared in the rules and not alphabetically.

752. Proceedings under the two rules providing for calling the committees are unrelated and unfinished business under one is not considered under the other.

On December 6, 1916,[7] the Speaker announced:

This is Calendar Wednesday. The unfinished business is H. R. 563, the Rayburn bill.

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[1] Third session Sixty-fifth Congress, Record, p. 1769.

[2] Champ Clark, of Missouri, Speaker.

[3] Second session Seventy-first Congress, Record, p. 8859.

[4] Nicholas Longworth, of Ohio, Speaker.

[5] First session Sixty-second Congress, Record, p. 3770.

[6] Champ Clark, of Missouri, Speaker.

[7] Second session, Sixty-fourth Congress, Record, p. 52.

Mr. James R. Mann, of Illinois, made the point of order that the bill referred to had been called up on the preceding day, Tuesday, on the ordinary call of committees under section 4 of Rule XXIV, and could not be called up as unfinished business on the Calendar Wednesday call under section 7 of the rule.

The Speaker [1] sustained the point of order, holding that under the rules there were two distinct calls of committees, and that business undisposed of under one could not be called up as unfinished business under the other.[2]

753. A bill on the Union Calendar may not be brought up on call of committees.

On Tuesday, August 15, 1911,[3] when the Committee on Indian Affairs was reached during a call of the committees under section 4 of Rule XXIV, Mr. John H. Stephens, of Texas, proposed to call up the bill (H. R. 13002) to authorize the withdrawal from the Treasury of funds belonging to certain Indian tribes.

The Speaker [4] called attention to the fact that the bill was on the Union Calendar and therefore not within the rule, and could not be brought up under a call of committees.

754. When a committee is called during a call of committees, it is not in order to rise for any purpose other than to call up a bill for consideration.

On January 13, 1910,[5] when the Committee on Expenditures in the Interior Department was reached, during a call of the committees under section 4 of Rule XXIV, Mr. Rufus Hardy, of Texas, of that committee, rose and proceeded to explain the failure of the committee to call up a bill.

The Speaker pro tempore [6] interposed, holding that it was not in order to offer any explanation, and directed the Clerk to call the next committee.

755. Interpretation of the term "without prejudice" with reference to bills passed over on a call of the calendar.

A bill passed over "without prejudice" on call of committees retains its status on the calendar and is in order for consideration when the committee reporting it is again called.

On December 12, 1908,[7] during a call of the committees under section 4 of Rule XXIV, the bill (H. R. 21898) providing for the establishment of judicial districts in the district of Indiana was called up by the Committee on the Judiciary.

After consideration, Mr. John C. Chaney, of Indiana, asked that the bill go over without prejudice.

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[1] Champ Clark, of Missouri, Speaker.

[2] Formerly it was held (second session Sixty-first Congress, Record, p. 553; first session Sixty-second Congress, Record, p. 3819) that the call of committees rested where discontinued on the preceding call under either rule.

[3] First session Sixty-second Congress, Journal, p. 419.

[4] Champ Clark, of Missouri, Speaker.

[5] Second session Sixty-first Congress, Record, p. 614.

[6] George R. Malby, of New York, Speaker pro tempore.

[7] Second session Sixtieth Congress, Record, p. 165.

Mr. James R. Mann, of Illinois, inquired:

May I ask what is "going over without prejudice?" What does "going over without prejudice" mean?

The Speaker [1] replied:

That it can be called up any time the Committee on the Judiciary has the call.

756. A bill with amendments of the other House is privileged after the stage of disagreement has been reached.

The stage of disagreement between the two Houses is reached when one informs the other of disagreement.

On March 13, 1922 [2] Mr. Gilbert N. Haugen, of Iowa, asked unanimous consent to take from the Speaker's table the bill (S. 2897) for the purchase of seed grain to be supplied to farmers, to insist on the amendments of the House, and to agree to a conference asked by the Senate.

Mr. James R. Mann, of Illinois, made the point of order that the stage of disagreement having been reached the bill had a privileged status, and unanimous consent was not required.

The Speaker pro tempore [3] sustained the point of order and recognized Mr. Haugen to offer, as privileged, a motion for disposition of the bill.

757. On March 3, 1923,[4] Mr. Marion E. Rhodes, of Missouri, moved to take from the Speaker's table the joint resolution (S. J. Res. 287) creating the joint commission of gold and silver inquiry, and agree to the conference asked by the Senate.

Mr. Finis J. Garrett of Tennessee, made a point of order that the motion was not privileged and could be made only by unanimous consent.

The Speaker [5] pro tempore said:

In this case the Senate passed a resolution. The House amended it and sent the resolution to the Senate with a House amendment. The Senate has disagreed to the amendment of the House and sends the resolution back to the House with its disagreement and asks for a conference. There is therefore a disagreement and it is well settled that when the stage of disagreement has been reached between the two Houses the matter becomes a matter of privilege. The Chair overrules the point of order. The question is on the motion of the gentleman from Missouri to insist upon the amendments of the House and agree to the conference asked for by the Senate.

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[1] Joseph G. Cannon, of Illinois, Speaker.

[2] Second session Sixty-seventh Congress, Record, p. 3804.

[3] Joseph Walsh, of Massachusetts, Speaker pro tempore.

[4] Fourth session Sixty-seventh Congress, Journal, p. 344; Record, p. 5540.

[5] Philip P. Campbell, of Kansas, Speaker pro tempore.